

NO. A06-0178

State of Minnesota
 In Court of Appeals

Gary J. Milner, Toni Bjerke, and Annette Barrett,
 individually on behalf of themselves and all others similarly
 situated,

Respondents,

v.

Farmers Insurance Exchange,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

1. On December 26, 2004, the United States District Court for the District of Oregon entered final judgment under Rule 54 (b), Federal Rules of Civil Procedure, as to the Minn. Stat. §§ 177.21-.27 claims of a Minnesota state law class substantially identical to plaintiffs' class and which includes the named plaintiffs. Even so, the district court held that the respondents' class claims here were not barred by res judicata. **Did the district court err in refusing to apply res judicata?**

The district court denied Farmers' motion to dismiss.

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501 (2001)
Rennie v. Freeway Transport, 656 P.2d 919, 921 (Or. 1982).
Sondel v. Northwest Airlines, Inc. 56 F.3d 934, 939-40 (8th Cir. 1995)

2. The jury found that plaintiffs failed to prove that Farmers violated Minn. Stat. §177.25, subd. 1 (overtime compensation). Despite the jury's finding, the district court ordered injunctive relief and the payment of civil penalties to certain members of the class pursuant to Minn. Stat. §177.27, subd. 8. **Did the district court have statutory authority to order injunctive relief and the payment of civil penalties?**

The district court ordered injunctive relief and the payment of penalties to certain class members.

Minn. Stat. §177.27 et seq.

3. Despite the jury's finding that plaintiffs failed to prove that the class worked uncompensated overtime hours, the district court awarded respondents' counsel almost \$2 million in attorney's fees and costs, using a multiplier of 1.5 times the lodestar fee based on "results obtained." **Did the district court err by awarding attorneys' fees and costs, by failing to adequately scrutinize the claimed attorneys fees and cost request to ascertain that the fees and expenses were properly charged and by awarding a multiplier based upon results obtained?**

The district court awarded \$1,887,268.32 in attorney's fees and \$105,399.72 in costs.

Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 630 (Minn. 1988)
Blum v. Stenson, 465 U.S. 886, 897 (1984)
Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 541 (Minn. 1986)

STATEMENT OF THE CASE

Plaintiffs' claim for unpaid overtime under the Minnesota FLSA resulted in a jury verdict finding that Farmers had not failed to pay any overtime required by that statute. Despite this finding, the trial court ordered that Farmers be permanently enjoined from "misclassifying" its claim representatives and imposed punishment in the form of a civil penalty of \$376,000 to be paid to 25 class members found by the jury to have suffered no harm. Further, these orders were entered after a final federal court judgment had awarded a class of Farmers' Minnesota claims representatives \$4,000,000 for identical claims under the same statute. The federal judgment should have barred the claims in this case. Because the trial court erred in not applying established principles of res judicata, and in interpreting the Minnesota FLSA, the judgment below must be reversed.

* * *

The named plaintiffs brought a multi-count class action complaint against Farmers Insurance Exchange ["Farmers"] alleging that Farmers failed to pay them and a class of similarly situated employees overtime compensation. The complaint alleged that Farmers violated Minn. Stat. §177.25 by not paying overtime for hours worked in excess of 48 hours in a work week; that Farmers violated Minn. Stat. §177.24 by failing to pay them for hours worked in each work week in excess of 38-3/4 hours, up to 48 hours, at their regular rate of pay; and that Farmers was unjustly enriched by requiring Plaintiffs to work in excess of 38-3/4 hours per week up to 48 hours per week without paying them compensation at their regular rate of pay. (A.16-30). The complaint sought recovery of unpaid compensation, liquidated damages, an accounting, declaratory relief and an

injunction. (A.23-30).

Farmers answered, denying liability for additional compensation on the grounds that plaintiffs were administrative employees employed on a fixed salary and were exempt from the requirements of Minn. Stat. §177.24-.25 because Minn. Stat. §177.23, subd. 7(6), excludes persons employed in a bona fide executive, administrative, or professional capacity from the definition of “employee” under the statute. (A.31-35).

On December 16, 2002, the trial court certified the named plaintiffs as representatives of a class of personal lines claims representatives employed by Farmers after October 3, 1998. (Order and Memorandum, filed December 18, 2002). Prior to trial, the court granted summary judgment in favor of Farmers on plaintiffs’ claim for a violation of Minn. Stat. §177.24 (failure to pay straight time compensation for hours in excess of 38-3/4 up to 48 hours). (See Order and Memorandum, filed September 27, 2004).

The case was tried to a jury from October 6 to 22, 2004. (A.45). At the conclusion of evidence and before the case was submitted, plaintiffs dismissed their unjust enrichment claim. (A.47). The jury returned a special verdict generally finding that Farmers had failed to establish the factual predicate for the Minn. Stat. §177.23, subd. 7 (6) exemption, but found that plaintiffs did not prove they were entitled to compensation for unpaid overtime hours worked.. (A.36-38).

After the jury’s verdict, but prior to entry of final judgment, the following events occurred:

1. A federal judge, sitting in Portland, Oregon, entered a final

judgment under Rule 54(b), Federal Rules of Civil Procedure, as to the Minn. Stat. §§ 177.21-.27 claims of a Minnesota state law class substantially identical to the class in this case. (*In re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation*, MDL Docket No. 33-1439, U.S. District Court, D. Oregon, Judgment dated December 17, 2004, filed in Hennepin County on January 11, 2005, as Exhibit to Finch Aff.). The named plaintiffs in this case are members of the class bound by the Oregon federal judgment. (*Id.*);

2. Farmers moved to enter judgment of dismissal in its favor on the basis of the jury's finding that plaintiffs were not entitled to any damages (A.39-40);
3. Plaintiffs moved under Minn. Stat. § 177.27 for an injunction to compel Farmers to reclassify its claims representatives as nonexempt and for an order imposing civil penalties for "misclassifying" them (A.41-42); and
4. Farmers moved to dismiss the remaining claims on the grounds that plaintiffs' claims were barred by res judicata in light of the Oregon federal court judgment (A.43-44).

Without taking any evidence on the factual basis for an injunction, the trial court denied Farmers' motions and issued an order dated April 5, 2005, ordering Farmers to reclassify all of its Minnesota claims representatives as nonexempt employees, ordering Farmers to pay to each class member a civil penalty of \$500.00 per pay period during the time that the class member was classified as exempt,¹ determining that plaintiffs were the prevailing party in the litigation--notwithstanding the jury's findings to the contrary--and inviting plaintiffs' counsel to submit an application for attorneys' fees (A.45-64).

Pursuant to the trial court's April 5, 2005 order, plaintiffs submitted an application

¹ The order for payment of a civil penalty was limited to class members who were not also class members in the Oregon federal lawsuit. (A.55). The Amended Judgment awarded \$376,000 in civil penalties to 25 named individuals. (A.85-86).

for attorneys' fees and expenses. (A.65-66). Farmers objected on the grounds that the fees and expenses requested were excessive and unwarranted by law or the results obtained and that plaintiffs had failed to comply with the requirements of Rule 119, Minn. General Rules of Practice. (See Defendant's Briefs, filed April 26, 2005; May 23, 2005; June 10, 2005; and June 22, 2005). On September 13, 2005, the trial court issued an order awarding attorneys' fees to plaintiffs' counsel in the aggregate amount of \$1,887,268.32, including a 150% upward enhancement for results obtained. The court also awarded plaintiffs expenses of \$105,339.72 (A.67-83).

The parties stipulated to the entry of an amended judgment which resolved all of the remaining claims and dismissed certain of the parties not included in the prior orders for judgment and a final judgment was entered on December 29, 2005. (A.84-90). Farmers now appeals from that judgment. (A.91-92).

STATEMENT OF FACTS

Farmers is a California interinsurance exchange licensed to write insurance in Minnesota. (A.32; Tr. 138-39). Farmers handles Minnesota claims for itself and other members of the Farmers Group of Insurance Companies. (*Id.*). The Farmers' claims representatives ("CRs") who are plaintiffs in this lawsuit are classified in six different job classifications depending on experience and type of claim handled. (A.46). Claims representatives are classified as Claims Representatives, Senior Claims Representatives and Special Claims Representatives, but CRs handling automobile physical damage ("APD") claims are classified as APD Claims Representatives, Senior APD Claims Representatives or Special APD Claims Representatives. (*Id.*). Claims Representatives

are promoted into the Senior Claim Representative and then Special Claims Representative classifications, based on their experience and performance. (A.48). The job duties of the Claims Representatives, Senior Claims Representatives and Special Claims Representatives are substantially the same. (*Id.*).

At all times material to this lawsuit, Farmers' CRs neither punched a time clock nor reported hours to their supervisors. (Liegakos Aff. at p. 12, ¶34, filed February 13, 2004). They were expected to efficiently manage their time and to put in as much time as necessary to carry out their duties. (*Id.*).

The interrelationship of this case with the Farmers Insurance Multidistrict Litigation.

On October 3, 2001, this matter ("*Milner*") was commenced in Hennepin County District Court. (*See* Class Action Complaint, filed October 3, 2001). Meanwhile, CRs employed by Farmers in six other states had commenced virtually identical class action lawsuits alleging failure to pay overtime compensation in violation of the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. [the "FLSA"] and comparable state laws. (*See* Brief in Support of Motion to Transfer of Actions to Single District, attached as Exhibit #4 to Wagner Aff., at p. 2, filed August 5, 2004).

Farmers removed *Milner* to federal court, and the federal Judicial Panel on Multidistrict Litigation transferred it and six other federal cases involving overtime pay claims against Farmers to the United States District Court for the District of Oregon pursuant to 28 U.S.C. § 1407 ("*MDL*"). (Notice of Removal (November 7, 2001), filed June 26, 2002). While the case was pending in the United States District Court for the

District of Minnesota, plaintiffs moved to remand. (Notice of Motion (November 30, 2001), filed June 26, 2002). Magistrate Judge Arthur Boylan and District Judge Donovan Frank each ruled that the case should be remanded, but the case had already been transferred before the entry of the remand order. (Report and Recommendation (Boylan)(January 11, 2002); Order (Frank)(March 15, 2002), both filed June 26, 2002). In April 2002, the parties stipulated that this case should be transferred back to Minnesota and the Honorable Robert E. Jones of the United States District Court for the District of Oregon, remanded *Milner* to Minnesota state court. (Order (Jones)(April 9, 2002), filed June 26, 2002).

The final “Amended Class Action Complaint” in this case contained five “claims for relief” seeking: 1) damages and attorneys’ fees for failure to pay overtime compensation for hours worked in excess of 48 hours per week; 2) a declaratory judgment with respect to the plaintiff’s entitlement to overtime pay; 3) an accounting by the defendants for overtime pay, interest and penalties due to the plaintiffs; 4) injunctive relief; and 5) damages for unjust enrichment of defendant by failing to compensate plaintiffs for hours worked over 38 $\frac{3}{4}$ hours per week. (A.23-30).

After the remand of this case, the plaintiffs in the consolidated *MDL* action filed a Fourth Amended Class Action Complaint which alleged that Farmers violated the federal Fair Labor Standards Act and similar acts of seven states, including Minnesota, by failing to pay overtime compensation for hours worked. (*MDL* Order and Findings Certifying State Law Classes at pp. 1-2, EX. to Finch Aff., filed January 11, 2005). The plaintiffs in the *MDL* action sought certification of the case as a collective action under 29 U.S.C. §

216 and as a class action under F.R.Civ. P. 23(c) as to the state law claims under Colorado, Illinois, Michigan, Minnesota, New Mexico, Oregon and Washington law. (*Id.*). All of the classes alleged that Farmers wrongfully failed to pay them overtime compensation by classifying them as “exempt” from the federal and state overtime laws. (*Id.*).

In September 2002, the *MDL* Court conditionally certified the FLSA claims to proceed as a collective action under 29 U.S.C. § 216(b) and approved a notice to be sent to all potential collective action members nationwide informing them of their right to join or “opt-in” to the case to assert federal FLSA claims. (*MDL* Order and Findings Certifying State Law Classes at pp. 1-2, Exhibit to Finch Aff., filed January 11, 2005). From the approximately 6100 notices sent to current and former CRs nationwide, approximately 1170 CRs timely opted-in. (*Id.* at p. 2). As a result, the collective action included approximately 1170 CRs who asserted federal FLSA claims. (*Id.*).

Back in Minnesota, the plaintiffs in this action moved for certification of the case as a class action under Minn. R. Civ. P. 23.02(c). (*See* Motion for Class Certification, filed October 24, 2002). Class certification was granted in this action on December 16, 2002. (Order and Memorandum, filed December 18, 2002). The trial court defined the class to exclude individuals who had opted-in to the FLSA collective action portion of the *MDL* action. (Order for Notice to Class Members, filed March 7, 2003). The class was ultimately defined as:

Current and former employees of Farmers Insurance Exchange [“FIE”] who (a) are or have been at any time since October 3, 1998, employed as personal lines Claims Representatives, APD Claims Representatives,

Senior Claims Representatives, Senior APD Claims Representatives, Special Claims Representatives, or Special APD Claims Representatives by a FIE office in Minnesota; (b) worked more than 38-3/4 hours in a workweek during this time period; (c) were classified by FIE as exempt from overtime pay requirements during this period and (d) have not commenced a separate lawsuit to recover unpaid wages or consented in writing to join the federal multidistrict litigation, unless the consent to join the federal action is formally withdrawn by May 1, 2003.

(*Id.*; *see also* A.46). Notice to the Rule 23.02 (c) class was mailed in March 2003. (*See* Order for Notice to Class Members, filed March 7, 2003). No one to whom notice was mailed requested exclusion from the class. (*See* Finch Aff., at p. 3, ¶4, filed July 28, 2004).

On May 19, 2003, the *MDL* court certified seven state law classes, including the Minnesota Fair Labor Standards Act (MnFLSA) state law claim under Fed. R. Civ. P. 23(b)(3). (*MDL* Order and Findings Certifying State Law Classes at pp. 1-2, EX. to Finch Aff., filed January 11, 2005). The class definition of the Minnesota state law class in the *MDL* action is virtually identical to the class definition in this case. The Minnesota class in the *MDL* action consists of:

All personal lines Claims Representatives, Senior Claims Representatives, and/or Special Claims Representatives (job codes CL52, CL03, CL65, CLA5, CLA6 and CLA7) employed by FIE in the state of Minnesota at any time since October 3, 1998 whom FIE did not compensate for work performed in excess of 48 hours per week.

(*Id.* at p. 14). The job codes are the codes for the same six job classifications included in the Milner case class definition. (*See Id.* at EX. 1, p. 4). Notice approved by the *MDL* Court was mailed to class members in each of the seven states in accordance with Federal Rule 23(c). (*Id.* at p. 18). CRs who did not want to participate were required to return a

form to opt-out. (*Id.* at EX. 1, p. 6). Fourteen (14) persons opted-out of the MnFLSA class in the *MDL* action. (Finch Aff. at pp. 3-4, ¶10, filed July 28, 2004). All of the opt-outs were class members in the *Milner* case. (*Id.*) All other *Milner* class members were also class members in the MDL action, *including the named plaintiffs*. (See *MDL Final Judgment Re Minnesota Class, EX. to Finch Aff.*, filed January 11, 2005).

In September and October 2003, the *MDL* court tried the bifurcated issue of whether Farmers' CRs were exempt from the overtime pay requirements of federal and state laws. (See *MDL Findings* at p. 3, EX. 3 to Wagner Aff., filed July 2, 2004). The *MDL* court issued an order on November 6, 2003, and an amended order on February 26, 2004, finding that under both federal and Minnesota law, automobile physical damage CRs were nonexempt; liability CRs, who handle bodily injury claims, were exempt; and that some property CRs were exempt and some were nonexempt. (*Id.* at pp. 61-64).

After the determination on the exemption issue, the *MDL* court ordered the implementation of a damage claim procedure and appointed a special master to oversee the damages phase of the case. (*MDL Findings* at p. 64, EX. 3 to Wagner Aff., filed July 2, 2004).

On December 17, 2004, after the claims of Minnesota *MDL* class members had been received and processed, the *MDL* court issued an Order for Judgment regarding the Minnesota class. (See *MDL Final Judgment Re Minnesota Class, EX. to Finch Aff.*, filed January 11, 2005). The court directed entry of judgment forthwith under Fed.R.Civ.P.

54(b). (*Id.* at p. 7). Judgment was entered on December 22, 2004.² (*Id.*). The Judgment in favor of the Minnesota Class awarded damages close to \$4.0 million, and resolved “all claims for all relief asserted of all members of the Minnesota Class in this action.” (*Id.*). It provides no civil penalty or equitable relief. (*Id.*). On January 12, 2005, the MDL court issued an injunction, specifically enjoining the *Milner* court from “entering any order or taking any action that would be contrary” to its Final Judgment re: Minnesota Class, entered December 17, 2004. (*MDL Injunction, EX. to Finch Aff., filed January 18, 2005*).

The outcome below.

This case proceeded to trial in the Hennepin County District Court in October of 2004. (A.45). Prior to the close of evidence, the trial court directed a verdict in favor of those individuals who were classified during the class period as “PIP CRs” (CRs who evaluate claims for no-fault benefits). (A.51-52). During trial there was minimal testimony about the job duties of PIP CRs, no testimony concerning their hours of work, and un rebutted evidence that they had been reclassified by Farmers as nonexempt employees on June 1, 2001, and were thereafter paid overtime for work hours exceeding 40 hours in a week. (*Id., see also Tr.111*).

On October 22, 2004, the jury returned a special verdict. (A.36-37). The jury found that the plaintiff class members did not have primary duties directly related to management policies or general business operations and did not regularly exercise discretion or independent judgment in the performance of their primary duties. (*Id.*). In

² An amended and corrected judgment was entered on January 27, 2005.

response to the verdict question, “What amount of money will adequately and fairly compensate [plaintiffs] for unpaid overtime hours worked over 48 hours per week ...,” the jury answered “0” (zero). (*Id.*)

After the jury verdict, Farmers moved for judgment in its favor on the basis of the jury’s finding that plaintiffs were not entitled to compensation for unpaid overtime hours worked, and separately moved to dismiss Plaintiffs’ claims because the claims were barred by res judicata in light of the judgment in the *MDL Action*. (A.39-40, 43-44). Plaintiffs moved for an injunction to compel Farmers to reclassify its CRs as nonexempt and for an order imposing civil penalties for “misclassifying” them. (A.41-42).

On April 5, 2005, the trial court filed its Findings of Fact, Conclusions of Law, Order and Memorandum. (A.45-64). Even though the jury found that the *Milner* class had not shown that they were entitled to any damages for unpaid overtime hours, the trial court held that Farmers “violated” Minn. Stat. §177.23, subd. 7 (6), Minn. Stat. §177.28, and Minn. R. 5200.0200 by “misclassifying” the plaintiff class as “administrative” employees who were exempt from overtime. (A.53-54). It also held that Farmers violated Minn. Stat. §177.30 and Minn. R. 5200.0100 by failing to keep adequate time records. (A.54).

Based on these holdings, the trial court enjoined Farmers from “continuing to violate” the cited portions of the MnFLSA and required it to “comply” with the Act. (A.54, 56). The trial court further ordered Farmers to pay a civil penalty of \$500 per person, per pay period for class members who had been classified as “exempt” CRs, payable directly to the person for whom it was being assessed. (A.55-56). The trial court

limited the injunctive relief and civil penalties to “those plaintiffs and members of the class that are not also members of the MDL Federal Court litigation.” (A.55). The trial court denied Farmers’ motion to dismiss on res judicata grounds, holding that res judicata did not apply because “the two actions are based on similar but different statutes (one federal and one state), the relief sought is different, the results and effects of each suit are different, and finally the parties are different.” (*See* A.63). The trial court then invited Plaintiffs’ counsel to file a motion for attorneys’ fees. (A.57).

Plaintiffs’ filed their motion for attorneys’ fees on April 16, 2005. (A.65-66). Farmers objected to the fee request on the grounds that the supporting documentation failed to comply with Rule 119, Minn. General Rules of Practice, that the rates were excessive, that the billing included excessive, duplicative, and unnecessary time, and that the fees should be reduced because the plaintiffs had been completely unsuccessful on their claim for damages. (*See* Defendants’ Memoranda filed on April 27, 2005, May 23, 2005, and June 22, 2005). After briefing and argument, the court awarded plaintiffs’ attorneys \$1,887,268.32 in attorneys’ fees. (A.75). The trial court accepted the plaintiffs’ hourly rates, did not substantially reduce the hours claimed notwithstanding the inadequate documentation, unnecessary or duplicative time, and, in fact, awarded plaintiffs’ counsel a 1.5x multiplier of their “lodestar fee” based on the results obtained. (A.67-83).

After its attorneys’ fee decision, the court entered an amended judgment, awarding a total of \$376,000.00 to the class members in civil penalties and awarding their counsel \$1,887,268.32 in attorneys’ fees and \$105,399.72 in costs. (A.85-86).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT RES JUDICATA DOES NOT BAR PLAINTIFFS' CLAIMS.

A. Standard of review – de novo review of a question of law

Whether res judicata bars Plaintiffs' claims is a question of law which this Court reviews *de novo*. *Care Inst., Inc.--Roseville v. County of Ramsey*, 612 N.W.2d 443, 445 (Minn. 2000).

B. Federal law determines the choice of law on res judicata.

The trial court held that Minnesota law controls whether res judicata bars the plaintiffs' claims because res judicata is a procedural rule. (A.60). That was error. The United States Supreme Court has clearly announced that *federal* law prescribes the res judicata effect to be given the judgment of a federal court. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501 (2001) (“states cannot give those judgments merely whatever effect they would give their own judgment, but must accord them the effect” required by federal law.); *see also Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 118 (Minn. App. 2001) (federal law governs preclusive effect of federal court judgment).

In *Semtek*, the Court analyzed the preclusive effect a Maryland state court must give to the dismissal of state-law-based claims by a federal court sitting in California. The Court held that federal common law governs the claim-preclusive effect of judgments by a federal court sitting in diversity. *Id.* at 508. The Court observed that, “since state, rather than federal, substantive law is at issue there is no need for a uniform

federal rule.... This is, it seems to us, a classic case for adopting, *as the federally prescribed rule of decision*, the law that would be applied by state courts in the state in which the federal diversity court sits.” *Id.* (emphasis added). Thus the Court held that the res judicata rule to be applied was that of California, not Maryland. *Id.*

This Court addressed the same issue in *Marshall v. Inn on Madeline Island*, 631 N.W. 2d at 118. There the Court analyzed the preclusive effect a Minnesota court must give a judgment rendered by a Wisconsin federal court in a diversity action based on claims under Wisconsin law. Discussing *Semtek*, the Court acknowledged that for diversity actions, “federal law on claim preclusion incorporates the law of the state in which the federal court rendered the judgment.” *Id.* at 118. The court then applied Wisconsin claim preclusion law to determine whether the judgment by the federal court in Wisconsin precluded the claims at issue. *Id.* at 119.

Applying the *Semtek* rule to this case, this Court must apply Oregon’s res judicata law, since the federal court which rendered the decision at issue sits in Oregon.

Oregon law provides that “a plaintiff who has prosecuted one action against a defendant through to final judgment binding on the parties is barred on res judicata grounds from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.” *Rennie v. Freeway Transport*, 656 P.2d 919, 921 (Or: 1982). The prior judgment is deemed to have effected a merger or bar of all claims against the defendant available to the plaintiff arising from

the occurrence or transaction that was at issue irrespective of whether plaintiff had actually asserted them in that action. *Id.* 921-22. Both federal law and Minnesota law are in accord. See 18A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, 2nd ed., § 4432 (citing *Shamley v. ITT Corp.* 869 F.2d 167, 170-71 (2nd Cir. 1989); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519 (9th Cir. 1987); and *J. Aron & Co. v. Service Transp. Co.*, 515 F. Supp. 428, 431-34 (D.C.Md. 1981); *Ascher v. Commissioner of Public Safety*, 527 N.W.2d 122 (Minn. Ct. App. 1995).

Under Oregon law, the fact that the first judgment is under appeal does not affect the application of the rule. The judgment has preclusive effect even if it is under appeal. *Scherzinger v. Portland Custodians Civil Service Board*, 103 P.3d 1122, 1128 (Or. Ct. App. 2004); *Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc.*, 611 P.2d 658, 662 (Or. Ct. App.), *petition for review denied*, 289 Or. 373 (1980). Thus, the MDL judgment is final for purposes of res judicata under Oregon law. Again, both federal law and Minnesota law would give the same result. See 18A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, 2nd ed., § 4433, *Deposit Bank v. Frankfort*, 24 S.Ct. 154, 191 U.S. 499 (1903); *State ex rel. Spratt v. Spratt*, 184 N.W.31, 32 (Minn. 1921) (“an appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed”); *See also Schoonmaker v. St. Paul T. & T. Co.*, 188 N.W. 223, 224 (Minn. 1922); and *American Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 572 (Minn. Ct. App. 1984).

C. The trial court erred in denying Farmers' motion to dismiss based on *res judicata*.

The trial court refused to apply *res judicata* here for four reasons:

In summary, the two actions are based on similar but different statutes (one Federal and one State), the relief sought is different, the results and effects of each suit are different, and finally the parties are different.

(A.63). These reasons were either palpably wrong or were not relevant to a *res judicata* analysis.

1. Both the *MDL* case and this case involved claims and relief under the MnFLSA.

The trial court first misstated the causes of action brought in the *MDL Action* and in this case. The claims litigated by the MDL Minnesota class were claims by a class of Minnesota personal lines claims representatives -- virtually identical to the class in this case -- for compensation for overtime hours worked under the Minnesota Fair Labor Standards Act -- the exact same claims brought by the plaintiffs in this case. Like the Plaintiffs in this case, the plaintiffs in the MDL Action alleged that Farmers misclassified them as exempt employees to avoid paying overtime. Both the *cause of action* and the *claims* were the same in the two lawsuits.

2. The fact that certain specific relief was sought by the class in this case, but not the *MDL* class, does not justify a refusal to apply *res judicata*.

Res judicata applies to all alternative theories of recovery that a party (or the party's privities) could assert in the initial action, whether or not they were actually litigated. *Dean v. Exotic Veneers, Inc.* 531 P.2d 266, 269 (Or. 1975). ("Having once litigated his claim against defendant, [plaintiff] should be foreclosed from further

litigation on all grounds or theories of recovery which could have been litigated in the first instance. The public policy to be served by the doctrine of res judicata prevents him from having two bites at the apple”). *Accord, Brown v. Felsen*, 442 U.S. 137, 131 (1979); *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 773-74 (Minn. 1992). Res judicata bars claims based on a *cause of action* litigated in a prior case even if the new *claims* were not raised in the previous lawsuit. *Id.* A plaintiff may not split a cause of action and bring successive suits involving the same set of factual circumstances. *Rennie*, 656 P.2d at 924. (“It may have been plaintiff’s preference to split his claim into the state and federal law components and to try them each separately, but his unilateral claim-splitting and the consequent multiplicity of lawsuits the defendants were obligated to defend is precisely the evil sought to be avoided by the *res judicata* doctrine”).

For *res judicata* purposes, a cause of action is “...all or any part of the transaction, or series of connected transactions, out of which the action or proceeding arose,” *Rennie*, quoted in *Drews v. EBI Companies*, 795 P.2d 531, 535 (Or. 1990). The focus of *res judicata* is not whether a new form of relief was sought in the second case, but instead whether the second claim could have been brought in the first action. *Id. Accord, Poe v. John Deere Co.*, 695 F.2d 1103, 1105-1106 (8th Cir. 1982); *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002).

The fact that the present class asked for a form of relief under the Minnesota wage and hour statute which was not requested or granted in the MDL action makes no difference for the purposes of a *res judicata* analysis. The two cases involved the

identical cause of action.

3. **The fact that the MDL court and the trial court reached different results on the exact same claims is not relevant to deciding whether to apply *res judicata*.**

Res judicata is a finality doctrine that mandates that there be an end to litigation:

The policies upon which court-made claim preclusion law is based include (1) achieving finality to a conclusion of a dispute, and (2) preventing splitting of that dispute into separate controversies. Both policies protect limited dispute-resolution resources from repeated expenditure upon the same overall dispute. Thus, "[a] valid and final personal judgment is conclusive between the parties, except on appeal or other direct review."

Drews v. EBI Companies, 795 P.2d at 535 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982)). *Accord, Montana v. United States*, 440 U.S. 147, 154 (1979); *Dorso Trailer Sales, Inc.*, 482 N.W.2d at 773-74. The inconsistent adjudication of the same claims in the MDL court and the Milner court is a reason for applying the res judicata bar, not ignoring it. Cf. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 396 (1981) (applying res judicata where first decision was palpably wrong). Under the MDL court's order, all of Farmers' Minnesota liability claims representatives are exempt employees under the MnFLSA; under the trial court's order, on the other hand, Farmers is permanently enjoined from classifying any liability claims representatives as exempt employees. The fact that the two courts reached entirely inconsistent conclusions on the exact same issue applied to exactly the same employees cries out for the application of *res judicata*. It certainly cannot be a justification for failing to apply the doctrine.

4. The classes in MDL and in this case are in privity because the class representatives in this case were class members in the MDL Action and are bound by its judgment.

The trial court also attempted to justify its order by carving out the *MDL* class members from some of its ordered remedies. But the MDL judgment applies to *all* the class members in this action, not just those who participated in the MDL action. Res judicata does not require that the parties be identical, only that they be privies. Parties in privity are "(1) those who control an action though not a party to it; (2) those whose interests are represented by a party to the action; and (3) successors in interest to those having derivative claims." *Secor Investments, LLC v. Anderegg*, 188 Or. App. 154, 167, 71 P.3d 538 (2003) (quoting *Stevens v. Horton*, 161 Or. App. 454, 462, 984 P.2d 868 (1999), *rev. den.*, 331 Or. 692, 26 P.3d 149 (2001)). *Accord, Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996); *Margo-Kraft Distributors, Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47-48 (Minn. 1972). And parties to a class action are in privity with their class representatives. See *Sondel v. Northwest Airlines, Inc.* 56 F.3d 934, 939-40 (8th Cir. 1995) Res judicata applies not only to class members in this case who were class members in the MDL case, but to all class members in this action because they are in privity with their class representatives who were parties, as class members, to the MDL action.

In *Sondel*, the Eighth Circuit considered a district court decision barring a class action lawsuit raising claims previously litigated as individuals by the class representatives in state court. The class representatives (as individuals) had brought a separate state court lawsuit on the same cause of action alleged in the federal class action.

The federal district court entered judgment in favor of the defendant. The Eighth Circuit affirmed, ruling that the state court judgment precluded the claims of the entire federal class, not just the individual class representatives. The court reasoned that the class representatives represent the interests of the class members and were thus in privity with them. *Id.* at 940.

Sondel relied on the holding in *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731 (9th Cir.1984), where the Ninth Circuit found that a federal class action lawsuit was precluded by an earlier state class action lawsuit raising the same claims. *Id.* at 736. In determining that the class members of the federal class were in privity with the state class, the court asked whether the federal class members were “so far represented by others [in the state class action] that [their] interests received actual and efficient protection.” *Id.* at 741. In determining that this test was met, the Ninth Circuit noted that (1) there was no showing that the plaintiffs in the state class action were inadequately represented; (2) there was no showing that the interests of the state and federal class members were different; (3) although different remedies were available, the substantive right remained the same; and (4) the relief granted the state court plaintiffs would not have changed character if the members of the federal class had been members of the state class action. *Id.* at 741.

All four of these factors are unquestionably satisfied here. There has been no claim that the Minnesota class in the *MDL* Action was inadequately represented. There has been no showing that the interests of the class members in this action and federal *MDL* class members are different. Although the plaintiffs in this case may have

requested different remedies, both courts applied the same statute, offering the same remedies. And the relief the MDL court granted to the Minnesota class in MDL would not have changed character if all the members of the state class had been members of the federal class. Under the standards of *Los Angeles Branch NAACP, Sondel*, and *Tyus v. Schoemehl*, the claims of the class members in this case are barred by their privity with their class representatives, whether or not they were also class members in the MDL Action.

II. THE TRIAL COURT ERRED IN IMPOSING CIVIL PENALTIES AND AN INJUNCTION UNDER MINN. STAT. § 177.28.

A. Standard of review – De novo review of statutory interpretation

This Court reviews questions of statutory interpretation de novo. *Meyer v. Best Western Seville Plaza Hotel*, 562 N.W.2d 690, 692 (Minn. App. 1997).

B. Because Minn. Stat. §177.27, subd. 8 only allows additional “damages and other appropriate relief” when an employee establishes he or she is entitled to lost wages, the trial court as a matter of law had no authority to order additional statutory relief.

On page 9 of its Order (A.53), the trial court impliedly held that it had authority to order injunctive relief and civil penalties, pursuant to Minn. Stat. §177.27, subd. 8, which provides, in pertinent part:

An employer who pays an employee less than the wages and overtime compensation to which the employee is entitled under sections 177.21 to 177.35 is liable to the employee for the full amount of the wages, gratuities, and overtime compensation, less any amount the employer is able to establish was actually paid to the employee and for an additional equal amount as liquidated damages. In addition, in an action under this subdivision the employee may seek damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.

(A.53). The trial court interpreted this language to provide it with statutory authority to order relief that is specifically reserved for the Commissioner of the Department of Labor and Industry in subdivision 7. (*Id.*). This was error for several reasons.

Minn. Stat. §177.27, subd. 8 requires two determinations: first (a) when an employee can seek relief under subd. 7, and then (b) what “damages and other appropriate relief” is provided by subd. 7 and “otherwise provided by law.”

The critical sentence of subd. 8 starts out with the words, “[i]n addition.” (“In addition, in an action under this subdivision the employee may seek damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.”) That clearly refers back to the preceding sentence, which applies to an employer who is liable to an employee for unpaid compensation and an equal amount of liquidated damages. But what if a jury determines that the employee is *not* entitled to recover unpaid compensation? The only logical construction is that if the employer is not liable to the employee for unpaid compensation and damages, then the employee is likewise not entitled to the other remedies of subd. 7.

Second, Minn. Stat. § 177.27, subd. 7 provides a menu of remedies that the Commissioner of the Department of Labor and Industry can order if the Commissioner finds that an employer has violated a MnFLSA section identified in subdivision 4. The *sine qua non* for imposing any of these remedies, however, is a finding of a violation of a statute or rule. In particular, the imposition of a civil penalty by the Commissioner is permissible only where the Commissioner has found that the employer has “repeatedly or willfully violated” the statute at issue.

The Commissioner is not a party to this case. The Commissioner has found no violation, isolated or repeated, of any statute. At trial, plaintiffs abandoned any claim that the Defendant's conduct was "willful." (See Tr.93). Moreover a jury, duly empaneled, sworn, and properly instructed, has returned a verdict finding that Defendant did *not* fail to pay overtime compensation due. That factual determination without more precludes the imposition of any of the remedies provided by Minn. Stat. § 177.27, subd. 7. While there were numerous other hurdles plaintiffs had to overcome in order to establish an entitlement to relief under Subd. 7, the first one alone is insurmountable in light of the verdict.

Moreover, Minn. Stat. § 177.27, subd. 8 does not grant employees *carte blanche* to obtain all of the remedies provided by subdivision 7. Such employees are entitled only to "damages and other appropriate relief provided by subdivision 7 *and otherwise provided by law.*" When private plaintiffs seek overtime compensation, civil penalties and injunctions are *not* "otherwise provided by law." In construing a statute, the legislature intends the entire statute to be effective and certain, Minn. Stat. § 645.17(2). To avoid reading this phrase out of the statute, this language must be construed to bar private plaintiffs from recovering remedies, including civil penalties and injunctions, which are not otherwise provided by law.

C. No “violation” of the enumerated statutes was proven that would entitle plaintiffs to an injunction or civil penalties under Minn. Stat. §177.27 for a failure to properly “classify” plaintiffs or for claims that were never pleaded.

Despite expressly recognizing that the jury found that plaintiffs failed to prove their statutory claim for unpaid overtime compensation under Minn. Stat. §177.24 (Order ¶32 (A.52)), the trial court nonetheless found that Farmers had “violated” Minn. Stat. §§177.23, subd. 7(6), §177.28, and Minn. R. 5200.0200 by “misclassifying” Plaintiffs as “administrative” employees who were exempt from overtime pay requirements. (Order ¶7 (A.53-54)). But none of those allegedly “violated” provisions constitute causes of action.

Minn. Stat. §177.23, subd. 7(6) is simply a definition of the term “employee.” Minn. Stat. §177.28 and Minn. R. 5200.0200 are the administrative rules explaining the “administrative test” under which “administrative” employees are exempt from overtime pay requirements. These definitions are to be used in interpreting the provisions of the MnFLSA. They are not substantive provisions that may be “violated” - - they are simply definitions. The violation at issue, as pleaded by plaintiffs, is a claimed violation of Minn. Stat. §177.25, subd. 1 -- failure to pay overtime compensation for hours worked in excess of 48 in a work week -- which statute the jury specifically found was *not* violated. Because there has been no jury finding of a “violation” of Minn. Stat. 177. 25, subd. 1, the trial court had no authority to order civil penalties or injunctive relief in any event.

The only other basis the trial court articulated to support its decision awarding injunctive relief and civil penalties (Order ¶¶7, 9 (A.53-54)) is a claimed violation of

Minn. Stat. §177.30, which requires an employer to keep time records for its nonexempt employees. But plaintiffs never pleaded a claim for a violation of Minn. Stat. §177.30. (*See* A.16-30). They first raised the issue in a November 3, 2004 letter to the *MDL* trial court. At no point did they ever allege that Minn. Stat. § 177.30 was violated in this case. Using this allegation as a basis to order the payment of civil penalties was error.

The “primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Even the most liberal reading of the plaintiffs’ Amended Complaint does not give defendant notice of the claim that a violation of Minn. Stat. §177.30 was being alleged or that plaintiffs sought civil penalties for claimed violations of Minn. Stat. §177.30 in this matter. They are therefore not entitled to recover on such claims and the trial court was without authority to order such relief.³

D. The trial court did not have the statutory authority to order injunctive relief under Minn. Stat. §177.27, subs. 7 and 8.

Contrary to the trial court’s holding (Order ¶6 (A.53)), Minn. Stat. §177.27, subd. 7 does *not* empower a court to issue a permanent injunction for claimed violations of the MnFLSA. The statute allows the Commissioner of the Minnesota Department of Labor and Industry to issue an order to an employer to cease and desist from engaging in certain practices as a part of a compliance order the Commissioner has the discretion to issue

³ Moreover, Plaintiffs did not join the Commissioner of the Minnesota Department of Labor and Industry as a party to this case. Only the Commissioner may fine employers for failure to maintain such records. Minn. Stat. §177.30.

pursuant to Minn. Stat. §177.27, subd. 4.⁴ *Id.* The power to issue a compliance order for a violation of statutory provisions is entirely in the discretion of the Commissioner. Minn. Stat. §177.27, subd. 4 (“The commissioner *may* issue an order requiring an employer to comply with sections 177.21 to 177.35 . . . or with any rule promulgated under section 177.28”) (emphasis added); *See also* Minn. Stat. §645.44, subd. 15 (“may” is permissive). There is no evidence in this case that the Commissioner has ever ordered Farmers to comply with any of the enumerated sections. *See also* Minn. Stat. §177.27, subd. 7 (if the Commissioner, in his or her discretion, issues an compliance order under subd. 4, the order of compliance must direct the employer to cease and desist from engaging from the violative practice). Minn. Stat. §177.27, subd. 8, provides private litigants with the ability to seek “other appropriate relief provided by *subdivision 7.*” But it does not allow a private litigant to seek the remedies provided in *subdivision 4*, the subdivision that grants the Commissioner the exclusive power to issue an order to comply. Since no such order has issued from the Commissioner -- even if a violation had occurred -- plaintiffs would not be entitled to an injunction.

E. The trial court did not otherwise have the authority to order injunctive relief.

A permanent injunction is an extraordinary remedy and “will issue only after a right to such relief has been established at a trial.” *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. App. 1987). Before permanent injunctive relief may be awarded, the

⁴ If the Commissioner, in his or her discretion, decides to issue a compliance order, the employer may contest the order and have the matter determined in a contested case proceeding. Minn. Stat. §177.27, subd. 4.

merits of the dispute must be determined. *Id.* But the jury *has* determined the merits of the case, finding that Farmers *has not* failed to pay for overtime hours worked by class members. Plaintiffs have not established any right to relief in this case. Consideration of this issue by the trial court was foreclosed by the jury's verdict. The jury found that plaintiffs and the class were not entitled to recover damages, including compensation for unpaid hours worked in excess of 48 hours in a work week during the class period.

Second, when a comprehensive statute provides a remedy, such a remedy is exclusive and will preclude a resort to equity. *Adelman v. Onischuk*, 135 N.W.2d 670, 678 (Minn. 1965) (denying injunctive relief when statutorily created remedies were available). In this case, Minn. Stat. §177.27 provides for specific remedies for the plaintiffs' claims that the jury rejected. Injunctions are not among the specific remedies allowed under the statute. Even with the liberal interpretation given to consumer protection statutes, when a statute provides for specific remedies, only those remedies are available. *See Dennis Simmons, D.D.S., P.A., v. Modern Aero, Inc.*, 603 N.W.2d 336, 339 (Minn. App. 1999) ("Aggressive prosecution does not mean that we are permitted to misconstrue or expand those remedies provided by the legislature."). The exclusive remedies available to a private plaintiff in Minn. Stat. §177.27 simply do not include equitable relief in the form of a permanent injunction.

Finally, even if the jury's verdict did not foreclose the consideration of the issue and even if the plaintiffs were allowed to expand the specific remedies provided in the statute, plaintiffs would still not be entitled to a permanent injunction. The party seeking a permanent injunction must establish that his legal remedy is not adequate and that the

injunction is necessary to prevent great and irreparable injury. *Cherne Industrial, Inc. v. Grounds & Associates*, 278 N.W.2d 81, 92 (Minn. 1979)(citations omitted). Plaintiffs are unable to establish that their legal remedy in this case is not adequate. The fact that the jury found that Farmers did not violate the overtime statute does not mean that their remedies were inadequate. The jury explicitly rejected the plaintiffs' contention that they were entitled to damages for overtime hours allegedly worked. This does not make their remedy "inadequate;" it simply means plaintiffs do not have an actionable claim. Second, plaintiffs cannot show that an injunction is necessary to prevent great and irreparable injury for the entirely sufficient reason that the jury has determined that *there was no injury*. Therefore, no great and irreparable injury has been shown.⁵

F. The trial court did not have statutory authority to order Farmers to pay civil penalties.

On pages 9-10 (¶¶8-9) of its Order (A.53-54), the trial court ordered Farmers to pay civil penalties pursuant to Minn. Stat. §177.27, subd. 7. This was error.

Minn. Stat. § 177.27, subd. 7 grants *the Commissioner* authority to determine that the imposition of civil penalties is warranted in particular circumstances when specific provisions of the MnFLSA have been *violated*:

An employer who is found by *the Commissioner* to have repeatedly or willfully violated a section or sections identified in subdivision 4 shall be subject to a civil penalty of up to \$1,000 for each violation for each employee. In determining the amount of a civil penalty under this subdivision the appropriateness of such penalty to the size of the employer's business and the gravity of the violation must be considered.

⁵ In any event, the proper procedure for prospective relief is *not* an injunction, but rather a cease and desist order from the Commissioner of the Department of Labor and Industry pursuant to Minn. Stat. §177.27, subd. 7.

Minn. Stat. §177.27, subd. 7 (emphasis added).

Subdivision 7 empowers only the Commissioner of Labor and Industry to subject a repeated or willful violator of the enumerated provisions to a civil penalty. This authority to impose civil penalties is one of the enforcement tools expressly granted to the Commissioner. The Commissioner has the exclusive responsibility to determine when employer has “repeatedly” or “willfully” violated the provisions of the MnFLSA for purposes of imposing civil penalties and determining the appropriate amount of penalty. Minn. Stat. §177.27, subd. 8 permits employees to seek “damages and other appropriate relief provided by subdivision 7 *and* otherwise provided by law.” Because the right to seek civil penalties is not “otherwise provided by law,” Plaintiffs cannot make a claim for the statutory civil penalties and the trial court did not have statutory authority to order them. Reversal is required as a matter of law.

G. Any assessed civil penalties cannot be paid to plaintiffs.

The trial court ordered that the civil penalties it claimed it had authority to assess under Minn. Stat. §177.27 be paid directly to members of the plaintiff class. (A. 54-55). This too was error.

Minnesota courts have long recognized that statutory civil penalties do not inure to the benefit of plaintiffs in lawsuits; they are instead tools of public enforcement. *See Hoffman D.D.S. v. Delta Dental Plan of Minnesota*, 517 F.Supp. 564, 573 (D. Minn. 1981)(holding that an individual plaintiff does not have standing to recover the civil penalty provided for in Minn. Stat. §325D.56 because it is a tool for public enforcement

only); *State by Humphrey v. Alpine Air Products*, 500 N.W.2d 788, 792 (Minn. 1993)(“The civil penalty also furthers a legitimate purpose other than punishment: it lowers the incentive to engage in consumer fraud and thus aids the state in enforcement of the statute.”). Individual plaintiffs simply do not have standing to seek civil penalties in civil lawsuits. *See also* Minn. Stat. §8.31 (providing that a person may act as a “private attorney general” for specific violations of specific consumer protection statutes, but does *not* allow them to recover civil penalties as damages).

Even if the trial court had the authority to order Farmers to pay civil penalties – which it does not -- such penalties cannot be recovered by a private plaintiff. Ordering that they be paid to the individual plaintiffs was error.

III. THE TRIAL COURT FAILED TO ADEQUATELY SCRUTINIZE PLAINTIFFS’ COUNSEL’S FEE APPLICATION AND AWARDED FEES AND EXPENSES WHICH ARE EXCESSIVE, INADEQUATELY DOCUMENTED, INAPPROPRIATE AND NOT JUSTIFIED BY THE RELIEF OBTAINED FOR THE CLASS.

As a threshold matter, if the Court agrees with either of our arguments on issues I or II, above, then it immediately follows that plaintiffs did not prevail at all and therefore were as a matter of law not entitled to any fee award whatsoever. The rest of this brief would therefore be moot. However, even if the Court were to reject the foregoing arguments, it remains true that the trial court committed reversible error in its fee award, for the following reasons.

A. Standard of Review -- The trial court's discretion to award attorneys fees is constrained by statute and by controlling decisions of the Minnesota Supreme Court.

Typically the determination of attorney's fees is a discretionary matter for the trial court. Thus, appellate review is ordinarily based on an abuse of discretion standard. However, where the trial court's determination is expressly based on the interpretation of case law, the standard of review is de novo. *Frost-Benco Elec. Association v. Minnesota Public Utilities Commission*. 358 N.W.2d 639, 642 (Minn.1984). This Court need not give deference to the district court's interpretation of case law and prior legal determinations. *Id.* Thus, review here is de novo.

In *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 630 (Minn. 1988), the Minnesota Supreme Court addressed how Minnesota courts should assess a request for "reasonable attorneys fees" under a statute providing for the award of attorneys' fees as part of the relief granted. The court endorsed and adopted the "lodestar" methodology articulated by the U. S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See Anderson*, 417 N.W.2d at 630. Under the lodestar method of calculating attorneys fees, counsel's reasonable hourly billing rates are multiplied by the number of hours they have reasonably expended to reach the result obtained. *Anderson*, 417 N.W.2d at 628-29. In *limited, exceptional* circumstances, an upward adjustment to a lodestar figure may be appropriate. *See Blum v. Stenson*, 465 U.S. 886, 897 (1984) (citing *Hensley*).

Here, the district court first erred by concluding that it had *any* statutory authority to order attorneys fees. But even if the trial court had the statutory authority to order

attorneys fees, it both abused its discretion in determining the “lodestar” amount and misapplied controlling law in awarding plaintiffs a 1.5 multiplier of their “lodestar” fees.

B. The trial court did not have a statutory basis to award attorneys fees and costs.

Recovery of attorney fees must be based on either statute or contract. *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). The trial court held that plaintiffs were entitled to recover their reasonable costs, disbursements, witness fees, and attorney’s fees, pursuant to Minn. Stat. §177.27, subd. 10 (A.55). That statute, however, allows an award of attorneys’ fees and costs *only* when the provisions of Minn. Stat. §§177.21 to 177.35 have been *violated*. Because plaintiffs did not prove that any of those sections were violated, (*see* §II C, *supra* at pp. 25-27), the trial court simply did not have any authority to award attorneys fees and costs here in the first instance and should not have invited plaintiffs’ counsel to file a motion for fees and costs.

C. Even if the trial court had statutory authority to award attorneys fees, it misinterpreted case law and erred by using a multiplier to award attorneys fees unwarranted by the results obtained.

On page 2 (¶¶3-4) of its September 15, 2005 Findings of Fact, Conclusions of Law, Order and Memorandum re: Application for Attorney’s Fees (“Fees Order”) (A.68), the trial court multiplied the lodestar fee by 1.5 to arrive at the total award. It applied the 1.5 multiplier based expressly on the erroneous assumption that multipliers of 1.0 to 4.0 are “typical”. *See* Fees Order at p. 7 (A.73) (“[I]odestar multipliers typically range from 1.0 to 4.0.”)(citing *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133 (W.D. La. 1997).

Contrary to the trial court's assertion, multipliers above 1.0 in adjudicated class action lawsuits are extraordinary, not typical. The *Combustion* case dealt with a *common fund* attorney fee award, starkly different than an adjudicated matter. The common fund doctrine allows courts to distribute attorney's fees from a "common fund" created when a class action reaches a *settlement*. The lawyers creating the fund for the benefit of plaintiffs are compensated out of the fund itself. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2nd Cir. 2000). Thus rather than receiving a straight percentage of the benefit, plaintiffs' attorneys receive the lodestar amount plus a "bonus" multiplier for taking the risk and creating a fund for the benefit of the class.⁶

Contrary to the trial court's assertion that multipliers are "typical," there is in fact a strong presumption that the *unenhanced* lodestar amount is the reasonable statutory fee. By statute, prevailing plaintiffs' counsel are only entitled to their "reasonable . . . attorney fees." (Minn. Stat. §177.27)). Only exceptional circumstances warrant an upward adjustment to a lodestar figure. The United States Supreme Court strictly limited the use of upward adjustments in class actions with statutory attorney's fee awards. *Blum v.*

⁶ The use of a lodestar risk-multiplier in common fund cases grew out of a concern that a percentage approach resulted in *overcompensation* for attorneys. *Combustion*, 968 F.Supp. at 1133. In many cases, attorneys were grossly overcompensated for their time and effort in class actions involving little or no risk in obtaining a relatively quick and substantial settlement. *Id.* Class counsel were taking a substantial percentage of a large "common fund" created for their clients, without relation to the work they performed. Therefore, courts started using the lodestar multiplier approach, significantly decreasing the attorney's fees taken from the common fund. Even when regularly applying multipliers of 1.0 to 4.0 attorney's fees were reduced in common fund situations. Thus, multipliers were "frequently" used in common fund cases. *Id.* This allowed the attorneys to continue to receive a bonus for taking on class actions, but prevented enormous windfalls at the expense of the class.

Stenson, 465 U.S. 886, 897 (1984) (citing *Hensley*).

The *Blum* case is remarkably similar to ours. In *Blum*, plaintiffs' counsel sued under a statute allowing for reasonable fees for prevailing plaintiffs. 465 U.S. at 897. The lower court determined a lodestar amount for the reasonable fees generated by plaintiffs' counsel, and then applied a 1.5 multiplier. *Id.* at 898. The United States Supreme Court reversed the award, eliminating the multiplier. *Id.* at 901-02. In doing so, the Court stated:

[W]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of *exceptional success* an enhancement award may be justified.

Id. at 901 (citing *Hensley*)(emphasis added).

An "exceptional case" requires more than simply prevailing on some claims. Whatever complexity and novelty inhered in the issues presented here, as in *Blum*, were already fully reflected in the hours presented by plaintiff's counsel:

The "quality of representation," however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional."

Id. at 899. Plaintiffs here offered no evidence whatsoever that the quality of service rendered was superior to what should reasonably be expected in light of the rates charged, nor that their success was "exceptional."

On page 3 (¶14) of its Fee Order (A.69), the trial court posited that a multiplier was appropriate here because counsel's efforts conferred a benefit upon "not only the

Class, but also for all future FIE claims representatives in the State of Minnesota.”⁷

There is nothing in the record or the trial court’s Memorandum which suggests that the benefit warrants a windfall for plaintiffs’ counsel. In *Blum*, the Supreme Court rejected the lower court’s mere assertion that the outcome was of “great benefit to a large class of needy people.” *Id.* That mere assertion is not enough to warrant an upward adjustment. And merely being deemed the “prevailing party,” does not impede a downward departure. *Id.* (citing *Hensley* at 461 U.S. 434-36).

The “results obtained” do not provide an independent basis for an upward multiplier. *Id.* Instead, the outcome of the litigation is one factor in the reasonableness determination of the original lodestar amount. (*before* a multiplier is considered). *Id.* In *Hensley*, the Court noted that in cases where one party is entitled to fees because it is a “prevailing” party, the “results obtained” factor becomes important for an upward *or* downward departure. 461 U.S. at 434. Thus, even if a party is deemed “prevailing,” a downward adjustment is warranted where a plaintiff achieves only partial success, even if some limited benefit has been conferred upon the class. As set forth below, a deflator or downward departure is more appropriate under the circumstances of this case.

The district court applied the law incorrectly in its attorney’s fee determination. This is not a discretionary standard, it is a de novo standard. The district court relied on

⁷ The trial court was wrong. Most Minnesota claims representatives were already reclassified as nonexempt before the trial court ruled. Farmers reclassified PIP claims representatives as nonexempt and began paying overtime in June 2001. (Tr. 111). It reclassified APD claims representatives as nonexempt in July 2004 and property claims representatives as nonexempt on a nationwide basis in February, 2005, all before the trial court ordered reclassification in April 2005. (*See* Tr. 22-24; Humerickhouse Aff. ¶2, filed May 27, 2005).

the legal determination of a multiplier for "common fund" cases, which simply does not apply to adjudicated claims with statutory fee provisions. Applying the proper standard to these facts, using a multiplier was legal error and must be reversed.

Instead of applying a multiplier, a reduction in attorneys' fees is necessary here to reflect plaintiffs' failure to secure any back pay and liquidated damages and to partially compensate for the overzealous strategy and loose billing practices engaged in by class counsel. *See* Aff. of Gerald Knapton, filed May 23, 2005, pp. 13-18 (A.91) (providing detailed analyses of the deficiencies in plaintiffs' attorneys fees submission). The Supreme Court addressed this very issue in *Hensley*:

There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.

461 U.S. at 434. The important inquiry here is whether plaintiffs achieved, "a level of success that makes the hours *reasonably* expended a satisfactory basis for making a fee award." *Id.* (Emphasis added).

A multiplier of, for example, .50 (deflator of 50%) of class counsel's *reasonable* fees would be appropriate here. Plaintiffs' case rested in large part on the hope of a sixteen million dollar compensatory damages award, together with an equal amount of liquidated damages under Minn. Stat. § 177.27, subd. 8. Plaintiffs utterly failed to succeed on this claim.

Plaintiffs recovered nothing on their wage claims. The jury completely rejected their claim for damages. Their only recovery is the \$376,000 in civil penalties the trial court improperly ordered Farmers to pay to 25 class members. (See A.85-86). For this level of “success” a downward adjustment is appropriate.

D. The Trial Court Abused its Discretion in Using a Lodestar of \$1,258,179.48.

On pages 10-12 of its Fee Order (A.76-78), the trial court determined the lodestar (reasonable hourly rates times the number of hours reasonably expended on the litigation) was \$1,258,179.48. As explained by the trial court on page 2 (¶3) of its Fee Order (A.68), the lodestar amount was calculated by taking class counsel’s claimed hours (decreased by 10%) and multiplied by class counsels’ claimed rates. This number represents the lodestar which is the supposedly “reasonable” amount.

In general, a reviewing court will not reverse a trial court's award or denial of attorney fees absent an abuse of discretion. See *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn.1987) (citation omitted). Here, the district court abused its discretion in determining the lodestar amount.

Plaintiffs had the burden to establish that the fees incurred were reasonable. See *Hensley*, 461 U.S. at 437 (“The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended.”). Reasonable fees are calculated by determining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* However, “[i]t does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended.” *Robinson v. City of Edmond*, 160 F.3d 1275, 1290 (10th Cir. 1998). The court must also take into

account the results obtained in determining the reasonableness of the fees. *Hensley*, 461 U.S. at 436. Above all, the time spent must be adequately documented. *Id.*; *Beard v. Teska*, 31 F.3d 942, 955 (10th Cir. 1994).

Where the hours expended are not reasonable or adequately documented, the amount of a party's claim for fees must be reduced. *Hensley*, 461 U.S. at 436. Similarly, entries which are "vague" or "imprecise" *by definition* do not meet the applicant's burden of proving that the fees are related to the successful claims. *Baufield v. Safelite Glass, Corp.*, 831 F.Supp. 713, 721 (D. Minn. 1993) (under the Minnesota Human Rights Act, the Court reduced lodestar figure for inadequate and imprecise documentation of time).

When the Minnesota Supreme Court reviewed (and approved) the *Hensley* procedural requirements in *Anderson v. Hunter Keith*, it placed special emphasis on the importance of the trial court's obligation to conduct a careful analysis and scrutiny of the applicant's representation of the hours reasonably expended:

Although the initial step in the *Hensley* analysis requires the court to determine the number of hours "reasonably expended" on the litigation, our review of the trial court's findings of fact and attached memorandum leaves us with the clear impression that in its analysis the trial court merely accepted at face value the "hours expended" representation of Anderson's attorneys, without further analysis as to the reasonableness of the submission, and then after doing so, multiplied those hours by a rate deemed to be reasonable to arrive at the ultimate award. One might assume that by accepting the attorneys' claimed "hours expended" figure at face value without further analysis or comment that the trial court implicitly found those claimed hours to be "reasonable." However, nothing in the findings, nor anything in the court's memorandum attached to them, exists to support any conclusion that the trial court had specifically *scrutinized* the "hours expended" claim to determine the reasonableness of that item, notwithstanding that throughout the history of this matter appellant's contention has been, and still is, not that the hourly rates claimed by Anderson's attorneys were unreasonable, but rather that the number and

type of hours expended were "excessive, redundant and unnecessary." *The Hensley analysis requires that the trial court exclude from the initial "lodestar" calculation hours that were not "reasonably expended."*

Anderson, 417 N.W.2d at 628-629 (emphasis added). The factors a trial court must consider when determining the reasonableness include (1) the time and labor required, (2) the nature and difficulty of the responsibility assumed, (3) the amount involved and the results obtained, (4) fees customarily charged for similar legal services, and (4) the fee arrangement between counsel and the client. *Anderson, Hensley and State by Head v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971).

While the trial court recited the necessary factors on page 7 of its Fee Order (A.73), it provided scant analysis of the factors. Instead of addressing the factors, the trial court concluded that plaintiffs' attorneys "did a good job" and awarded them all of their requested fees (less 10%), without regard to the required factors. (See Fees Order at pp. 8-9 (A.74-75)). With all due respect, the trial court abused its discretion by failing to analyze the fee request under the required factors (instead simply marking it down by 10%). A review of those factors shows why the court abused its discretion by accepting all of plaintiffs' counsel stated hours, discounting them by a mere 10%:

- 1. The time and labor related to plaintiffs' successful claims are minimal.**

To be sure, as the trial court noted (A.75) the "size" of this litigation was substantial. But the "size" of the litigation is not the appropriate test. It is the "time and labor required." The time and labor expended here were substantial, but not because of the size of the class or issues in the case. The time and labor required were vast due to

overreaching and unproven damage claims asserted by plaintiffs. Plaintiffs asked for back pay and liquidated damages in excess of \$32 million dollars. They utterly failed to prove that claim.

Moreover, the case law is clear that plaintiffs are not entitled to recover fees for claims on which they lost. *Hensley*, 461 U.S. at 435; *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 541 (Minn. 1986) (adopting *Hensley* as a “sensible and fair approach” to determining reasonableness of attorneys’ fees); *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 863-64 (Minn. App. 1998) (findings fees reasonable only because plaintiff’s counsel “reduced the amount of fees requested to reflect time spent on unsuccessful claims”); *Minneapolis Star & Tribune Co. v. U.S.*, 713 F. Supp. 1308, 1313-14 (D. Minn. 1989). Indeed, as the Supreme Court noted, “unrelated claims [must] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claims.” *Hensley*, 461 U.S. at 435; *see also Specialized Tours*, 392 N.W.2d at 542 (quoting same).⁸

⁸ A defendant certainly cannot be required to pay the plaintiff’s fees or costs with respect to a claim on which the defendant prevailed. No reasonable view of equity or fee shifting would condone that approach. Therefore, while the cases address attorneys’ fees awarded by statute to the “prevailing party,” they provide a basic framework for determining whether fees are “reasonable”. This framework is followed by Minnesota courts as a guide for determining reasonableness in a variety of fee actions. *E.g.*, *Anderson*, 417 N.W.2d at 628 (Minnesota discrimination statute); *Specialized Tours*, 392 N.W.2d at 542 (Minnesota Securities Act); *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 534, 535 (Minn. Ct. App. 1994) (Minnesota Environmental Response and Recovery Act). *See also Minneapolis Star & Tribune v. U.S.*, 713 F. Supp. at 1310-11 (applying *Hensley* factors in determining fee award pursuant to “Privacy Protection Act,” which allows a recovery of “reasonable attorneys’ fees”).

Here, plaintiffs failed to present an itemized list of legal work performed in a way which permitted defendant or the trial court to identify which work was done on which claims. (See Aff. Of Gerald Knapton filed May 23, 2005) (A.91). Thus, it is difficult to assess the number of hours claimed for work on claims which did not prevail. The size of the fee request, and some of the disbursements for which reimbursement is claimed, suggest that most of the work was done on the unsuccessful claims. The only monetary relief awarded to the class is \$376,000 in civil penalties, to be awarded to 25 individual class members--and that relief is not justified under the law. In fact, plaintiffs' counsel created very little, if any, value for the class. By contrast, the Minnesota class plaintiffs in the MDL Action – a group nearly identical to the class in this case – recovered almost \$4 million dollars in unpaid overtime compensation and liquidated damages. (*See MDL Final Judgment Re Minnesota Class, Ex. A to Finch Aff.*, filed January 11, 2005). Counsel for the MDL Minnesota class did create value for their clients and were therefore entitled to seek a significant fee recovery. With all due respect, counsel for this plaintiff class did not, and are not.

At the very most, if sustained on appeal, plaintiffs may recover only reasonable attorneys' fees related to their claims for civil penalties in the amount of \$376,000 and for the injunctive relief provided. Plaintiffs brought a claim for straight time pay for hours worked in excess of a standard workweek of 38-3/4 hours under Minn. Stat. § 177.24 and under a theory of unjust enrichment. Those claims failed to survive. They made a claim for unpaid wages in excess of \$16,000,000. That claim failed to survive. They made a claim for liquidated damages in an amount equal to the unpaid overtime.

That claim failed to survive. Time incurred for each of these matters should never have been included in the fee request nor in the computation of the lodestar fee. Because the trial court failed to appropriately analyze the issues it abused its discretion.

2. The nature and difficulty of the responsibility assumed was not significant.

Class action lawsuits involving overtime exemption claims are hardly novel. Farmers alone has defended more than 13 class action lawsuits occurring throughout the country involving the issue of overtime pay for its claims representatives. The plaintiffs borrowed heavily from evidence and legal arguments made by other counsel in the *MDL* action and in *Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805 (Cal. Ct. App. 2001). Nor are the claims in this case unique or complicated. Although the Minnesota exemption statute has not been extensively litigated in other cases, its concepts are based on established Federal models. The case called for presenting evidence of the job duties and responsibilities of the employees to a jury to determine if the job classification is “exempt” or “non-exempt” – not an arduous task. Moreover on the issue of whether the exemption applied, Farmers, not the plaintiffs, had the burden of proof. The trial court simply did not undertake the necessary analysis related to the nature of the difficulty of the responsibility assumed. Its decision on the lodestar amount was an abuse of discretion.

3. The trial court did not analyze the amount involved and the results obtained.

The damage amount obtained by plaintiffs was inexorably zero. While on page 8 of the Fee Order (A.74), the trial court states that he assessed a “large civil penalty,” the \$376,000 civil penalty pales in comparison to the \$16 million in overtime pay plaintiffs sought in the lawsuit. The jury determined that plaintiffs were not entitled to *any* past overtime pay. Indeed, it was only because of the trial court’s *post hoc* analysis of the civil penalty issue that plaintiffs recovered *anything* in this case.

Here, class counsel claimed they had obtained an “excellent” result in the case. This is exactly the type of dressing up of a case by “artful counsel” which is prohibited by law and public policy. *Ly v. Nystrom*, 615 N.W.2d 302, 312 (Minn. 2000). Plaintiffs’ counsel cannot spin a disappointingly small victory to make it appear that they rid the world of another Osama bin Laden. The risk/reward system of our civil justice system allows plaintiffs’ counsel to benefit from large awards when they do well and forces them to weather losses when they do not. What the trial court had before it is was an effort by unsuccessful counsel to avoid financial responsibility for their inability to prove any damages.

Class counsel made affirmative, strategic decisions in this case which inflated the fees incurred and duplicated efforts. The class was asserted and advanced with full knowledge that there was a similar and largely duplicative class in an action pending in federal court. Rather than joining that action, plaintiffs and their counsel chose to go it alone. They were aware from at least May 2004 that there was a risk that their claims

might be barred by a judgment in the *MDL* action. It is clear that the *MDL* action was financially much more beneficial to Minnesota claims representatives than anything that resulted from this case.

The trial court did not undertake the necessary analysis related to the amount involved. The results obtained in its decision on the lodestar amount was an abuse of discretion.

4. The trial court did not explain its analysis of fees customarily charged for similar legal services.

On page 9 of its Fee Order (A.75), the trial court provided the sum total of its analysis of the rates charged by plaintiffs' counsel, stating that it had "reviewed all of the documents submitted by both parties and has determined that the total number of hours worked submitted by Plaintiff (reduced by 10%), as well as the rates charged by Plaintiffs' attorneys are reasonable." It provided no further analysis. This is legally insufficient. When the reasonableness of the charges is challenged, "the trial court must not only make a decision on the claim, but must provide a 'concise but clear explanation of its reasons for the fee award.'" *Anderson*, 417 N.W.2d at 629-30 (quoting *Hensley*, 461 U.S. at 437).

As a part of its challenge to plaintiffs' counsels' submission of attorney's fees, Farmers filed the detailed affidavit of Gerald G. Knapton, an expert on litigation attorneys' fees, to assist the Court in the formidable task of deciphering and analyzing plaintiffs requests for attorneys' fees in this matter. (*See Knapton Aff.*, filed May 23, 2005)(A.91). Mr. Knapton's analysis focused on the reasonableness and generally

insufficient record of attorney time records submitted by plaintiffs. (*Id.*). The trial court did not address the issues raised by Mr. Knapton's affidavit. Its failure to analyze the fees customarily paid for legal services was an abuse of discretion.

5. The trial court did not analyze the fee arrangement between counsel and client.

Plaintiffs' counsel never disclosed the nature of their fee agreement with the class. Presumably, it is in the nature of a contingency fee agreement and the respective law firms were to be paid a percentage of any recovery. This would explain class counsel's eagerness to incur fees well in excess of \$1,000,000 for the opportunity to recover a percentage of the \$16,000,000 in overtime pay its expert claimed was due. Regardless, the factor was never even considered by the trial court. Its failure to do so is an abuse of discretion.

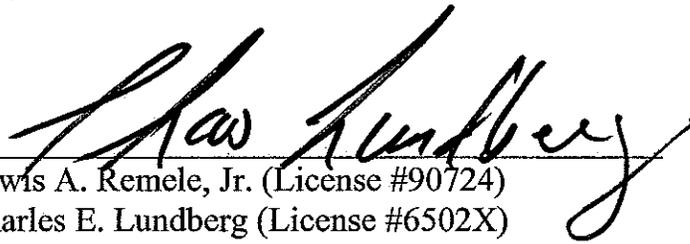
CONCLUSION

For the reasons advanced in this brief, the judgment of the trial court should be reversed and the case remanded to the trial court with instructions to enter a judgment of dismissal. If any part of the judgment is affirmed, the case should be remanded with instructions to reduce the award of attorneys' fees to an amount which reflects a reasonable hourly rate, a reasonable number of hours and a reasonable downward adjustment to reflect the limited results obtained.

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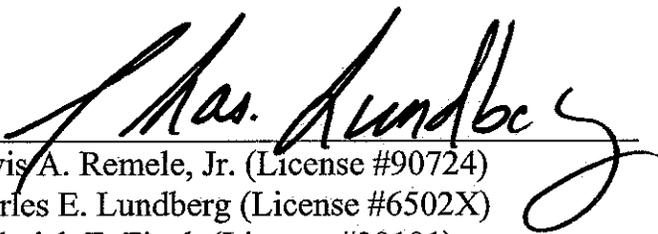
CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.1, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,729 words. This brief was prepared using Word 2003 word processing software.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).