

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.

RESPONDENTS' BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF LEGAL ISSUES

1. The trial court entered its Amended Final Judgment on December 29, 2005, noting that it only applied to those persons who were not subject to a Rule 54(b) judgment entered by the United States District Court for the District of Oregon. **Can Farmers establish that the claims 25 persons who were never subject to the jurisdiction of the federal court and never part of the federal class action are precluded by that federal court's judgment?**
2. Together, Minn. Stat. §§ 177.27, subd. 7-8 strengthen the enforcement of the Minnesota Fair Labor Standards Act (MFLSA). Because the district court properly concluded that Farmers violated MFLSA, it ordered that Farmers pay civil penalties to those persons not bound by the federal court's order, and similarly ordered injunctive relief going forward. **Is Farmers entitled to strip MFLSA of its significant remedial and enforcement provisions?**
3. The trial court, having found that Plaintiffs were the prevailing party in the litigation and that the fee-shifting statute applied, properly awarded attorneys fees pursuant to Minn. Stat. § 177.27, subd. 10. **Under the abuse of discretion standard, can Farmers require this Court to make evidentiary findings concerning the reasonableness of the trial court's award?**

STATEMENT OF THE CASE

Farmers Insurance Exchange (Farmers) failed to establish at trial that its claims representatives were exempt from the protections of the Minnesota Fair Labor Standards Act (MFLSA). As a result, the trial court concluded that Farmers violated multiple provisions of MFLSA, and subsequently ordered that the Class of claims representatives was owed substantial relief available under that remedial statute, in the form of civil penalties and injunctive relief.

Despite the fact that the case had sustained itself through trial and a jury verdict, Farmers was able to soften the blow of that result by successfully petitioning a federal district court, sitting in Oregon, to enjoin the trial court under the “relitigation exception” to the All Writs Act, 28 U.S.C. § 1651 (MDL Court). The January 2005 injunction prohibited the trial court from taking any action in *Milner* that would “contravene” the federal court’s Rule 54(b) judgment, entered in December 2004 in the litigation styled as *In re Farmers Insurance Exchange Claims Representatives Multidistrict Litigation*. (MDL or MDL Class). That injunction acted to stay the case in the trial court as to those members of the *Milner* Class who were also members of a subclass of claims representatives in the MDL Class. Consequently, it is telling that nowhere in its principal brief does Farmers explain to this Court that the judgment it seeks to overturn on appeal applies only to 25 of the original 194-member *Milner* class. These 25 claims representatives were **never part of the MDL Class**. These claims representatives litigated solely in state court, litigated solely state law claims, and never were subject to

the jurisdiction of the federal court. These claims representatives never were party or privy to the judgment awarding damages to persons who were also members of the MDL state law class.

The district court did not err in applying *res judicata*, nor did it err in applying MFLSA. Its judgment should be affirmed, and Farmers' appeal denied.

STATEMENT OF FACTS

On October 3, 2001, a group of Minnesota Farmers Insurance Exchange claims representatives filed a class action complaint in Minnesota state court, alleging in part that Farmers violated the Minnesota Fair Labor Standards Act (MFLSA), Minn. Stat. §§ 177.21-35. The named plaintiffs also asked for an accounting, declaratory relief, and civil penalties. (Compl. Oct. 3, 2001).

On March 12, 2002, the Judicial Panel on Multidistrict Litigation transferred *Milner* to the District of Oregon (the MDL Court), Judge Robert Jones presiding, for coordinated or consolidated pretrial proceedings. (Notice of Removal (Nov. 7, 2001, filed June 25, 2002). On April 9, 2002, the *Milner* plaintiffs and Farmers' stipulated motion to remand *Milner* back to Minnesota state court was granted. (Order (Jones) (Apr. 9, 2002), filed June 26, 2002).

Once back in Minnesota, Plaintiffs successfully moved to certify their Minnesota state law Rule 23 class. The trial court certified that class on December 16, 2002, defining the class 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 consent[[]in writing to join the federal action is withdrawn by May 1, 2003.

(Order & Mem., Dec. 18, 2002). The class definition explicitly excluded those employees who had opted into the MDL collective action opt-in mechanism.¹ Thereafter, the respective plaintiff groups—the MDL Collective Action Plaintiffs (MDL Plaintiffs) and the *Milner* Class—proceeded to press their separate causes of action against Farmers. Farmers continued to defend those claims, in the respective jurisdictions and venues.

But five months after the trial court certified the Minnesota state law class, the MDL Plaintiffs and Farmers **stipulated** to certification of the state law claims that had previously been remanded back to state court. The MDL court certified seven state law opt-out classes in the MDL, including a Minnesota class defined as:

All personal lines Claims Representatives, Senior Claims Representatives, and/or Special Claims Representatives (job codes CL52, CL03, CL65, 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.

(MDL Minnesota Class). (SR000156-157).

The MDL stipulation created an overlapping, but not identical, class of Minnesota claims representatives. Some *Milner* Class members never consented to join the FLSA

¹ In contrast to Minnesota Rule of Civil Procedure 23.02(b), the Fair Labor Standards Act, 29 U.S.C. § 216(b) permits certification of claims of multiple plaintiffs only by an opt-in, as opposed to opt-out, procedure.

opt-in collective action, but neither did they opt out of the MDL Minnesota Class once it was certified by the MDL court. (SR00157; A.85-86; App. Br. at p. 10). Further, the *Milner* Class included claims representatives, known as “PIP” claims representatives, who were not part of the MDL class definition. (See SR00194, No. 1776, Order Amending & Clarifying Judgment re: Minnesota MED/PIP Claims Representatives (Jones), (D. Or. Aug. 4, 2005)). The MDL and Minnesota court thus exercised concurrent jurisdiction over some of the claims of the Minnesota claims representatives who were both part of the *Milner* Class and the MDL Minnesota Class. (SR00169-170). However, the current appeal does not include a single person who was both a member of the *Milner* Class **and** the MDL Class.

I. FARMERS LAUNCHES A MULTI-JURISDICTIONAL DEFENSE.

In September 2003, the MDL court conducted a bench trial of three weeks’ duration on the FLSA claims of the MDL Plaintiffs. (MDL Findings at p. 3, Ex. 3 to Wagner Aff., filed July 2, 2004). On November 6, 2003, the district court issued its findings of fact and conclusions of law, finding Farmers liable for failing to pay certain types of claims representatives overtime compensation as defined by FLSA: APD, lower level property, and certain Foremost and Multi-Line CRs. *Id.* at 61-64. As to the other types of claims representatives, including liability claims representatives, the district court found that Farmers had not misclassified them as exempt from FLSA protections. *Id.* The district court also found, without undertaking any analysis, that MFLSA and FLSA were identical, and therefore Farmers had violated MFLSA. *Id.* at 22. Because

the MDL Plaintiffs and Farmers stipulated to bifurcated trial on liability and damages, the district court referred its liability findings to a special master. *Id.* at 64.

Displeased with this result, Farmers moved for summary judgment in *Milner* in February 2004, seeking a ruling from the trial court that **all** of its Minnesota claims representatives were exempt from MFLSA. (Def. Mot. for Summ. J., Feb. 2, 2004). At no time did Farmers attempt to raise a res judicata or collateral estoppel defense; in fact, it entirely omitted mentioning the existence, much less the liability findings, of the district court to the *Milner* court. (Def. Mem. in Support of Motion for Summ. J., Feb. 13, 2004).

A. The MDL Plaintiffs Request a Stay and Injunction of the *Milner* Proceedings

In May 2004, the MDL Plaintiffs sought to intervene in the *Milner* action. (Notice of Mot. And Mot. To Intervene, May 10, 2004). The MDL Plaintiffs' motion was incited by their discovery that in February 2004, Farmers had asked the trial court to rule, contrary to the MDL court's November 6, 2003 liability holdings, that all Minnesota claims representatives were exempt from the protections of MFLSA. (Wagner Aff. at ¶¶ 2-4). At the same time, the MDL Plaintiffs moved the federal court to enjoin the Minnesota litigation under the "necessary in aid of jurisdiction" prong of the All Writs Act, 28 U.S.C. § 1651. *Id.*

To protect the interests of those Class members who were not successful in the MDL, the *Milner* Class opposed the MDL Plaintiffs' motion to intervene, and also successfully intervened in the MDL for the limited purpose of opposing the effort to

enjoin the Minnesota litigation. (Pl. Mem. in Opposition to Applicant-for-Intervention Miller's Mot. to Intervene, Jul. 28, 2004, at pp. 1, 5-6; Regan Aff., Ex. A, Jul. 28, 2004). Farmers vigorously opposed the MDL Plaintiffs' motion to intervene, (SR0002-02; *see also* Def. Mem. in Opposition to Dave Miller's Mot. to Intervene, Jul. 28, 2004), and similarly opposed the effort in the federal district court to enjoin the litigation.

B. The Trial Court Denies Farmers' Summary Judgment Motion and the Parties Prepare for Trial.

The trial court subsequently denied Farmers' motion for summary judgment, and, consistent with the trial court's Scheduling Order, the *Milner* Plaintiffs prepared for trial. (SR00003). Between October 6, 2004 through October 22, 2004, a jury of eight persons heard testimony, and then returned a unanimous special verdict stating that Farmers had violated MFLSA by wrongfully classifying the Plaintiffs and the Class as exempt from MFLSA's overtime pay requirements. (A.51). The jury found that Farmers had misclassified claims adjusters as exempt "administrative" employees under MFLSA, because they did not 1) perform work directly related to management policies or general business operations, and 2) routinely exercise discretion or independent judgment. *See* A.36-A.38. The jury made no finding regarding the number of hours the Plaintiffs worked, nor whether the Plaintiffs were entitled in the future to pay at overtime rates. (A.52). The jury assessed no recovery for back pay. Beginning in November 2004, the trial court, under the stipulation of the parties, began to evaluate Plaintiffs' remaining claims (including civil penalties and injunctive relief).

II. AT FARMERS' BEHEST, THE MDL COURT ENJOINS THE TRIAL COURT.

After the Minnesota verdict was returned, but before the entry of a final judgment in Minnesota and any decision as to the post-trial motions before the trial court, the following events occurred:

1. Farmers moved for entry on the judgment on the jury verdict. (A.39-.40)
2. 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 Farmers' multiple violations of MFLSA.
3. The MDL court sitting in Oregon, entered a partial judgment under Rule 54(b) of the Federal Rules of Civil Procedure. (SR00147-155).
4. Farmers moved to dismiss the state court action, claiming res judicata barred further litigation of the *Milner* plaintiffs' claims, despite the fact that it never amended its Answer or attempted to raise the defense previously. (A.43-.44).
5. At the same time, Farmers moved the MDL Court to enjoin the trial court pursuant to the All Writs Act, 28 U.S.C. § 1651, to prevent the trial court from considering the res judicata effects of the MDL Rule 54(b) judgment. (SR00186-00192).

A. The January 2005 All Writs Act Injunction and Stay

Abandoning its prior arguments made to the MDL court that an injunction should not issue because the federal and state courts should separately consider the res judicata effects of a judgment rendered in the parallel proceeding, Farmers sought an order staying *Milner* and enjoining the Minnesota state court from "proceeding any further as to the claims of Minnesota class members in [the] MDL who also are members of the *Milner* class." (SR00192). This time, the MDL court granted Farmers' motion and

enjoined the Minnesota trial court. Specifically, it ruled that the Minnesota court could proceed no further as to the claims of Minnesota class members who were also participants in the MDL action, ruling that the Minnesota court could not “enter [an order or tak[e] any action that would be contrary to” the district court’s Final Judgment, entered on December 17, 2004. *Id.* The effect of that order was to permanently stay the claims of nearly 170 claims representatives pending in Minnesota.

Plaintiffs have appealed the MDL Court’s continued injunction of the trial court in the Ninth Circuit. That appeal is still pending. *See Milner Class v. Farmers Ins. Exchange*, No. 05-35812 (9th Cir. Dec. 2005).

B. The April 2005 Findings of Fact and Conclusions of Law

In April 2005, still bound by the All Writs Act Injunction, the district court entered its Findings of Fact, Conclusions of Law, Order and Memorandum. (A.67-.83). Relying on the jury’s finding that Farmers had not passed the administrative exemption test, as well as “[the] clear evidence that Claims Representatives routinely worked in excess of 48 hours,” the trial court concluded Farmers violated MFLSA. (A.55) These violations included recordkeeping violations, because Farmers had not kept time records for these employees, as well as a violation of the Minnesota Rules promulgated by the Commissioner of Labor and to which employers are subject. As a result, the trial court concluded that Farmers was liable for civil penalties under Minn. Stat. § 177.27 subd. 7, in the amount of \$500 per person, per pay period. (A.55). It also awarded prospective injunctive relief under that same statute.

Importantly, the trial court carefully delineated who was subject to its order, by stating it “**ONLY APPLIES TO THOSE PLAINTIFFS AND MEMBERS OF THE CLASS THAT ARE NOT ALSO MEMBERS OF THE MDL FEDERAL COURT LITIGATION.**” (A.55 (emphasis in original)). In effect, the trial court carved out from the original 194-member class those persons over whom the MDL Court exercised jurisdiction, and who, in the trial court’s discretion, were at that time subject to the MDL Court’s Rule 54(b) judgment.

Consistent with the trial court’s order, Plaintiffs submitted their application for attorneys fees, costs, and expenses to the trial court. Farmers vigorously opposed this motion, and the trial court permitted multiple rounds of briefing over the course of three months. (Def. Mem., Apr. 27, 2005, May 23, 2005, June 10, 2005, June 22, 2005). After careful deliberation, the trial court issued its order on the Plaintiffs’ application for attorneys’ fees on September 13, 2005. (A.67).

C. The Amended Final Judgment

The Amended Final Judgment, which Farmers appeals, ordered Farmers from continuing to misclassify its claims representatives and to pay civil penalties to a list of persons entitled to civil penalties. As it did in its April 5, 2005 Order, the trial court excluded persons who had participated in the MDL litigation. (A.85) The Amended Final Judgment applies only to persons who a) never opted in to the MDL FLSA Class and opted out of the state law class, or b) were never part of the MDL class, such as the PIP employees. (A.85) The civil penalties thus apply only to PIP claims representatives

or to opt-outs. The injunctive relief applies to a) claims representatives who became employees of Farmers after the close of the class period in the MDL, i.e., “new hires,” b) claims representatives who did not opt in to the MDL class and opted out of the MDL class, or c) claims representatives whose claims were not represented in the MDL class, such as PIP claims representatives.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT RES JUDICATA DOES NOT BAR THE PLAINTIFFS’ CLAIMS.

The trial court did not err in ruling that res judicata did not bar the claims of persons who were not parties to the MDL action. First, elementary rules of res judicata, or claim preclusion, state that res judicata may only be applied between the same parties. Second, res judicata does not apply because under Minnesota law, no final judgment exists to which preclusive effect may be given. Third, even if res judicata was applicable and all the elements of res judicata were met, Farmers waived this defense by 1) failing to raise it as required by Minn. R. Civ. P. 8.03, and 2) acquiescing to the dual litigation in state and federal court.

A. The Trial Court Correctly Decided That Minnesota Claim Preclusion Law Should Decide the Effect Accorded to the MDL Judgment.

The trial court did not err holding that Minnesota law controls the question of whether the preclusive effect of the MDL judgment is determined by Minnesota law. The trial court correctly applied the rule from the *Davis v. Furlong* that procedural conflicts are to be resolved by applying the law of the forum state. *Davis v. Furlong*, 328

N.W.2d 150, 153 (Minn. 1983). Here, while the elements of res judicata in federal, Minnesota, and Oregon law are stated in substantially the same manner, a conflict exists because under Minnesota law, a judgment, whether state or federal, is not considered “final” and entitled to preclusive effect until the appeals process is terminated. *State Farm Mut. Auto Ins. Co. v. Spartz*, 588 N.W.2d 173, 175 (Minn. Ct. App. 1999)(citing *Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc.*, 128 N.W.2d 334, 341 (Minn. 1964)); *but see Scherzinger v. Portland Custodians Civil Serv. Bd.*, 103 P.3d 1122, 1128 (Or. Ct. App. 2004).²

1. Beutz, Not Semtek, Governs This Court’s Analysis.

The Minnesota Supreme Court has squarely stated that the “preclusive effect of a federal dismissal in state court is a matter to be determined by state courts under state law.” *Beutz v. A.O. Smith Hardware Prods, Inc.*, 431 N.W.2d 528, 531 n.2 (Minn. 1988). This rule regarding the preclusive effect of federal judgments has not changed since the Supreme Court’s decision in *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001), because *Semtek* concerns only the issue of the claim-preclusive effect of

² Notably, Farmers pointed out that “there is an unresolved question regarding the law to be applied...in assessing the preclusive effect of the MDL Judgment” and that “[t]he question of what law applies proves to be a difficult and interesting question.” (Farmers’ MOL Supporting Motion to Dismiss Based on Res Judicata at p. 2). Farmers argued to the trial court that it did not matter which law applied; accordingly, it is disingenuous now to claim that the trial court erred when the trial court simply issued a decision applying the law Farmers argued could apply.

federal diversity judgments. *Id.* at 500-09; *Marshall v. The Inn on Madeleine Island*, 631 N.W.2d 113, 118 (Minn. Ct. App. 2001).³

As Farmers admitted below, the MDL court did not sit in diversity. (Def. Mem. in Support of Mot. to Dismiss Based on Res Judicata, at p. 2). The MDL court had federal question jurisdiction over the FLSA claims of the class members who opted into the action, and then exercised jurisdiction over the pendent state law claims of those persons who did not opt out of the MDL Class. Under the rule stated in *Beutz*, this Court must apply Minnesota law to determine the preclusive effect, if any, of the MDL judgment.

B. The Trial Court Correctly Applied Res Judicata Principles.

Res judicata is an equitable doctrine that Minnesota courts refuse to apply rigidly if its application contravenes this State's public policy. *See AFSCME Council 96 v. Arrowhead Reg'l Corrections Bd.*, 356 N.W.2d 295, 299 (Minn. 1992)(noting *res judicata* is not a "rigid" doctrine and should not be applied where the result would be "unjust" to the non-moving party); *Johnson v. Consolidated Freightways, Inc.*, 420 N.W.2d 608, 614 (Minn. 1988) (refusing to apply *res judicata* where defendant attempted to gain tactical advantage by application of doctrine). In order to establish that Plaintiffs' claims are precluded, Farmers is required to prove the following: (1) a final judgment on the merits; (2) involving the same causes of action between cases, (3) where the parties are identical or there is privity, and (4) the estopped party had a "full and fair opportunity

³ Of special significance is the fact that the parties in *Marshall* did not "dispute the application of *Semtek*" to the case. Here, the parties dispute the application of *Semtek*.

to litigate the matter.” *See Hauschildt v. Beckingham*, 686 N.W.2d 829 (Minn. 2004); *State v. Joseph*, 636 N.W.2d 322, 327 (Minn. 2001).

1. Res Judicata May Only Be Applied Against the Same Parties.

The trial court plainly did not commit legal error when it decided that certain class members were not affected by the MDL Court’s Rule 54(b) judgment. The Final Judgment, as written, applies only to Plaintiffs who opted out or who never were part of the MDL Class.⁴ Mindful that it was barred by the MDL court from entering an order that “contravened” the MDL Court’s Rule 54(b) judgment, the trial court specifically found that its Final Judgment **“ONLY APPLIES TO THOSE PLAINTIFFS AND MEMBERS OF THE CLASS THAT ARE NOT ALSO MEMBERS OF THE MDL FEDERAL COURT LITIGATION.”** (A.55) (emphasis in original); *see also* A.63.

In its Findings of Fact, the trial court required Farmers to “provide the stated information regarding who qualifies as a Plaintiff that would be subject to the above Order and the relevant length of time each Plaintiff worked as a CR.” (A.64.) Farmers voluntarily complied, and identified those persons who were entitled to civil penalties because they were not part of the MDL class. In its Amended Final Judgment, the trial court then denoted which persons were entitled to civil penalties, and excluded persons who were part of the MDL class from the award of prospective injunctive relief. (A.85)

⁴ Eleven of the twenty-five persons, known as PIP Claims Representatives, listed on the trial court’s final judgment not only were not participants of the MDL litigation, but were never part of the MDL Class. Despite clear agreements to the contrary, FIE now apparently contends their claims were “litigated” in the MDL litigation.

The injunctive relief thus applies to a) claims representatives who became employees of Farmers after the close of the class period in the MDL, i.e., “new hires,” b) claims representatives who did not opt in to the MDL FLSA class and opted out of the MDL class, or c) claims representatives whose claims were not represented in the MDL class.

No authority supports the proposition that non-parties to a Rule 23(b)(3) class action are in privity with any member of that class, much less the class representatives. *Sondel v. Northwest Airlines, Inc.*, is completely inapposite. 56 F.3d 934, 939 (8th Cir. 1995). *Sondel* does not contemplate that persons who opted out of a Rule 23 class, or who were never encompassed in that class, are bound by underlying class litigation, particularly where the relief sought is different. Such an argument would nullify the Rule 23 opt-out mechanism and the fundamental due process concerns that mechanism serves to protect. See Minn. R. Civ. P. 23.03(b)(2)(stating that court “must” direct notice to class); 5 Newberg on Class Actions § 16:24, at 262 (4th ed. 2000); see also *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997)(finding no privity because the plaintiff was not a class member).

Further, *Sondel*, and the cases cited therein, were class actions brought under Rule 23(b)(2) of the Federal Rules of Civil Procedure (*cf.* Minn. R. Civ. P. 23.02(b)), and involved “public laws.” *Sondel*, 56 F.3d at 963 n.2. Classes certified under Rule 23(b)(2) tend to seek injunctive and declaratory relief only. 5 Newberg on Class Actions § 16:17, at 214-15 (4th ed. 2000).⁵ Courts are more inclined to apply “virtual

⁵ As a result, “less stringent” notice requirements attach, and the due process concerns are not implicated. *Id.* In contrast, the MDL involved classes brought under Fed. R. Civ. P.

representation” principles in cases involving “public laws” where “the number of plaintiffs with standing is potentially limitless.” *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996)(Voting Rights Act). In these cases, “if the plaintiff wins, by definition everyone benefits.” *Id.*

Here, Farmers has come forth with zero evidence stating that the 25 people listed in the trial court’s Amended Final Judgment, and any Minnesota claims representatives hired after the injunction was ordered, were part of the MDL class.⁶ Nor has Farmers established that any of these people received notice of, and remained in, the MDL action. The district court would have committed clear legal error if it had found that any of these people were affected by the MDL court’s judgment, because the 25 persons identified in the trial court’s Amended Final Judgment were not parties in the MDL litigation. While this is a class action, the nature of the dispute is private, involving only Farmers’ and its claims representatives employees, and the number of plaintiffs with standing is confined. Thus in contrast to the *Sondel* line of cases, the interests of judicial economy are served by the trial court’s one-time award of civil penalties (to those persons not party to the MDL) and the injunction establishing rights in the future. Farmers’ attempt to have this Court apply virtual representation principles in this context is meritless, and should be rejected.

23(b)(3); accordingly, class members were required to receive notice of the claims in order to be bound by the judgment. *See* SR00158 (certifying Rule 23(b)(3) MDL Class).

⁶ In fact, Farmers concedes that there were 14 opt outs in the MDL action that remained *Milner* class members. App. Br. at 10.

2. The All Writs Act Injunction Has Temporarily Achieved the Res Judicata Results Farmers Wants as to Those Class Members Who Were Also Part of the MDL.

The true issue that Farmers obfuscates, but seeks a ruling on, is what effect, if any, the trial court's judgment has on those dual class members for whom the Plaintiffs are currently prevented from seeking civil penalties and other relief. As noted, Plaintiffs have appealed the MDL Court's continued injunction of the trial court. That appeal is still pending. If the injunction is lifted, Plaintiffs will have to move the trial court to amend its judgment further (including, but not limited to, the appropriateness of the compensatory damages finding, which Plaintiffs were precluded from doing by the MDL court's stay). At that point, the parties may again debate the effect of the Rule 54(b) judgment on the dual class members. However, that issue has never been presented to the Minnesota trial court, and is not now properly before this Court. Farmers' request to seek a ruling as to the effect of the MDL judgment on **all** of the class members in this action is premature at best and misleading to this Court at worst.

3. Res Judicata Does Not Apply Because the Appellate Process in the MDL Action Has Not Been Exhausted.

If this Court should find that further analysis is necessary, it will determine that that the MDL Court's Rule 54(b) judgment is not a "final" judgment on the merits. Under Minnesota law, a judgment becomes final only after the appellate process is exhausted. *Dixon v. Depositors Ins. Co.*, 619 N.W.2d 752, 759 (Minn. Ct. App. 2000); *State Farm Mut. Auto Ins. Co. v. Spartz*, 588 N.W.2d 173, 175 (Minn. Ct. App.

1999)(citing *Indianhead Truck Line, Inc. v. Hvidsten Transport, Inc.*, 128 N.W.2d 334, 341 (Minn. 1964)).

Dixon involved a series of lawsuits between Dixon and Depositors Insurance. In general terms, Dixon originally sued defendants in federal court (*Dixon I*). *Dixon*, 619 N.W.2d at 755. Ultimately, the federal court found for Depositors Insurance and entered a final judgment, which Dixon did not appeal. Following the dismissal of his federal case Dixon filed a second claim in state court (*Dixon II*). *Id.* In response, Depositors Insurance urged the district court to dismiss the state court action, contending the claim was precluded by *res judicata*. The district court agreed and granted defendant's motion. Dixon appealed. *Id.*

In affirming the district court's decision, the court of appeals evaluated the concept of a "final judgment" for purposes of *res judicata*. Ultimately, the court rejected the notion that preclusion attaches following entry of the district court's judgment, instead concluding that a "final judgment" exists when *all* appeals are exhausted. Specifically, the court noted, "An order or judgment becomes final after the appellate process is terminated or the time for appeal has expired." *Id.* at 755 (quoting *State Farm Mut. Auto. Ins. Co. v. Spartz*, 588 N.W.2d 173, 175 (Minn. App. 1999) (citations omitted)).

Although the trial court did not specifically address or rule on whether the MDL court's judgment was "final" for the purposes of *res judicata*, it would not have been error to conclude that it was not. Farmers has appealed all of the MDL Court's rulings in the Ninth Circuit. *In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation*, Nos. 05-35080, 05-35082, 05-35145, 05-35146, 05-35509, 05-35501 (9th

Cir.). Accordingly, the MDL court's Fed. R. Civ. P. 54(b) judgment is not entitled to preclusive effect because it is not a "final" judgment on the merits. Farmers' failure to satisfy this element prevents it from claiming that the district court committed legal error.

C. Even if All of the Elements of Res Judicata Are Met, Farmers Waived This Affirmative Defense and Acquiesced to the Dual Litigation.

This Court is faced with the simple task of establishing that Farmers has failed to establish that claim preclusion applies. However, even if all of the elements of res judicata were met, Farmers is not entitled to raise or rely upon res judicata because it waived that defense.

1. Farmers Waived Its Affirmative Defense By Failing to Timely Plead or Raise the Issue to the Trial Court.

Farmers waived the affirmative defense of res judicata by failing to plead or raise it prior to trial. Rule 8.03 of the Minnesota Rules of Civil Procedure requires a party "to set forth affirmatively...res judicata" in its answer. *Mitchell v. City of St. Paul*, 36 N.W.2d 132, 137 (Minn. 1948); Minn. R. Civ. P. 8.03. A defendant's failure to raise an affirmative defense by amending its pleadings prior to trial results in a complete waiver of the availability of the defense. *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 41 N.W.2d 528, 532 n.3 (Minn. 1988)(stating failure to amend pleadings to assert defense results in waiver); *see also Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980)(finding that failure to plead or argue res judicata prior to trial makes defense unavailable); *St. Cloud Aviation, Inc. v. Pulos*, 375 N.W.2d 543, 545-46 (Minn. Ct. App. 1985)(holding

that failure to move to amend to seek an affirmative defense prior to the end of trial constitutes a waiver of the defense).

The record in this case unequivocally establishes the following:

- In November 2003, the MDL court found Farmers liable for violating FLSA. Farmers took no action to amend its answer in *Milner* to assert either claim or issue preclusion.
- From November 2003 to October 2004, Farmers vigorously litigated in Minnesota, yet never moved to amend its Answer.
- In December 2004, the MDL Court entered its Rule 54(b) judgment. Despite that, Farmers failed or refused to move to amend its Answer.

Despite having been aware of the potential defense for over two years, Farmers first raised its res judicata defense in January 2005, years after it answered Plaintiffs' Amended Complaint, and nearly 4 months after the jury returned its verdict. Plaintiffs vigorously opposed and objected to that defense, telling the trial court that Farmers had waived its right to it under Minn. R. Civ. P. 8.03 and 15.01. The trial court did not decide whether Farmers had waived its res judicata defense, thus preserving this objection for appeal.

2. Farmers Waived Its Affirmative Defense and Objections to Claim Splitting Because It Acquiesced to the Dual Litigation.

Even if this court finds that all of the elements of res judicata are met, and even if Farmers had timely raised res judicata as a defense to this action, res judicata still does not apply. In this case, the well-recognized “waiver-by-acquiescence” exception to claim preclusion bars both application of res judicata and Farmers’ objections to claim splitting. The “exception is implicated when a plaintiff pursues multiple actions involving the same

claim simultaneously, as opposed to sequentially. In such a circumstance, if the defendant ‘acquiesces’ to having to defend against the multiple actions by not raising an available objection in plaintiff’s pursuit of them, a waiver occurs.” *Aguirre v. Albertson’s, Inc.*, 117 P.3d 1012, 1023 (Or. Ct. App. 2005).⁷

In *Aguirre v. Albertson’s*, the Oregon Court of Appeals reversed a trial court’s determination that an individual plaintiff, Tina Aguirre, was precluded from litigating her claims because an MDL class action judgment resolved her individual wage and hour claims. 117 P.3d at 1021-1027. Aguirre, following her termination as an employee of Albertson’s, filed her action in Oregon state court alleging state wage and hour claims and a FLSA overtime claim. While the plaintiff and Albertson’s litigated her claims, which included removal to federal court, a subsequent remand, and arbitration, Albertson’s was defending against a putative class action in federal court in Idaho. *Id.* at 1014. Two weeks after Aguirre filed her initial complaint in Oregon’s Circuit Court, Albertson’s settled the putative class action, which resolved Aguirre’s overtime claims, and notice of the settlement was sent. *Id.* at 1015. The plaintiff did not receive notice of

⁷ Farmers cannot argue that the “waiver-by-acquiescence” exception does not apply. Oregon courts, whose claim preclusion law Farmers tells this Court it **must** follow, have long recognized and applied the exception stated in the Restatement (Second) of Judgments §26(1)(a). *Aguirre*, 117 P.3d at 1023. Regardless, this Court has also recognized the exception as stated in the Restatement (Second) of Judgments § 26(1)(a). *Buchanan v. Dain Bosworth, Inc.*, 469 N.W.2d 508, 510 (Minn. Ct. App. 2001)(finding exception did not apply because defendant did not tacitly or expressly acquiesce); *see also Klipsich, Inc. v. WWR Tech., Inc.*, 127 F.3d 729, 734 (8th Cir. 1997)(applying Indiana law and finding acquiescence to claim splitting when defendant had “ample opportunity” to object to the splitting of a single claim).

the settlement, even though she was also a class member; she continued to litigate without knowledge of the MDL settlement. *Id.*

Despite the settlement, Albertson's and the plaintiff proceeded to arbitration. After the arbitrator denied Albertson's motion to dismiss based upon claim preclusion, the case proceeded in the circuit court. *Id.* at 1016-17. Albertson's again moved for summary judgment based upon claim preclusion, and the trial court then found in favor of Albertson's, and dismissed the plaintiff's case. *Id.* at 1017.

The Oregon Court of Appeals reversed, finding that Aguirre's claims were not precluded because Albertson's had acquiesced to the dual litigation. In discussing the waiver-by-acquiescence exception, the court noted that:

The waiver-by-acquiescence exception is consonant with the claim preclusion doctrine, one of the main rationales for which is to protect a defendant from the harassment of defending against multiple actions. **If a defendant chooses to defend the multiple actions without complaint rather than exercise any available remedies to force the plaintiff to choose a single forum, there is no unfairness in holding the defendant to that choice.**

* * *

Equally important, **the exception avoids abuses...‘There is no reason to allow litigants to delay objecting to dual proceedings until they receive a favorable judgment in one proceeding.’**

Id. at 1023-1024 (quoting *Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1119 (9th Cir. 2003) and citing *Rennie v. Freeway Trans.*, 656 P.2d 919 (Or. 1982)). Applying these principles, the court found that Albertson's had acquiesced to the dual litigation because 1) it “sat on its rights” by not “timely exercise[ing] the procedural remedies available to it to avoid having to defend both actions simultaneously”; 2) it “hid the ball”

during discovery and failed to present the plaintiff with requested documents concerning the pending federal litigation; and 3) the plaintiff had not actively pursued her claims in federal court. *Id.* at 1024-1026.

Here, Farmers engaged in similarly egregious conduct. First, in a transparent attempt to play the federal and state courts off each other, it never objected to continuous litigation in the trial court—in fact, it **stipulated** to the overlapping classes. Throughout 2004 it engaged in a concerted effort to condone and encourage the dual litigation. After the MDL court issued its November 2003 Findings of Fact and Conclusions of Law, but prior to entering its Rule 54(b) judgment, Farmers moved for summary judgment in Minnesota, hoping to obtain a liability result different from that in the MDL court. In its memorandum supporting its motion for summary judgment, Farmers never once mentioned to the trial court that the MDL court had reached its findings on liability, much less attempt to have that order apply preclusively, either as to the issues or claims of the parties. Plaintiffs and the Class, not Farmers, called the MDL result to the court's attention, and were forced to defend against the summary judgment attempt.

Similarly, even when Farmers could have negotiated a stay of the trial court proceedings, it refused to do so. The MDL Plaintiffs moved to intervene in the Minnesota proceedings for the purpose of seeking a stay and preventing entry of the district court's order on summary judgment, which would have also delayed trial. Farmers' intention to use a potentially favorable order granting summary judgment offensively in the MDL court became clear when Farmers opposed that motion.

Second, after it failed to obtain a summary judgment order in its favor, Farmers permitted the action to continue to trial in the district court, even while knowingly engaging in the damages phase of the MDL action. The state court trial lasted three weeks, and involved considerable judicial resources. Farmers could have moved for a stay of the trial, pending the resolution in the federal court. It failed to do so, clearly wishing that the Minnesota jury verdict would act as an upset to the MDL liability findings. Only when the Minnesota jury found that Farmers had misclassified all of its Minnesota claims representatives did Farmers rush to have the MDL court enter its Rule 54(b) judgment.

The fact that Farmers belatedly attempted to raise a res judicata defense, after the MDL court entered its Rule 54(b) judgment, does not favor Farmers. The concerns articulated by the Oregon state court in *Aguirre* and the Ninth Circuit in *Rotec* apply with full force here. Litigants like Farmers should not be permitted **“to delay objecting to dual proceedings until they receive a favorable judgment in one proceeding.”** *Rotec*, 348 F.3d at 1119.

Here, a waiver resulted when Farmers not only acquiesced to dual litigation, but in fact stipulated to it. The trial court impliedly found that Farmers had waived its right to its res judicata defense. (A.61) (discussing policies served by res judicata). Farmers permitted both cases to proceed at the same time, failing to raise any objection to the pendency of both actions until it obtained the liability findings it most preferred, which was the split federal judgment. Because of that waiver, Farmers is not entitled to rely on claim preclusion, and the district court did not err in finding that res judicata did not

apply. This Court should affirm the district court's Amended Final Judgment and deny Farmers' appeal.

II. THE TRIAL COURT DID NOT ERR IN IMPOSING CIVIL PENALTIES AND AN INJUNCTION BECAUSE FARMERS VIOLATED MFLSA.

A. Standard of Interpretation

In construing MFLSA, Minnesota courts are obliged to ascertain and effectuate the intent of the Minnesota Legislature, and "must give effect to all [of MFLSA's] provisions." Minn. Stat. § 645.16. When interpreting the statute, a court must first determine whether the statute's language, on its face, is ambiguous. *See Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). "A statute is ambiguous when the language therein is subject to more than one reasonable interpretation." *Id.* If the statute's language is not "explicit," this Court may consider the following relevant factors:

- 1) the occasion and necessity for the law;
- 2) the circumstances under which it was enacted;
- 3) the mischief to be remedied;
- 4) the object to be attained;
- * * *
- 6) the consequences of a particular interpretation;
- 7) the contemporaneous legislative history; and
- 8) legislative and administrative interpretations of the statute.

Id. Farmers omits these considerations from this Court's standard of review and advocates a nonsensical interpretation of MFLSA that, if accepted, would turn the statute

on its head.⁸ The district court's reading of the statute is correct, and should be upheld by this Court.

B. The District Court Correctly Decided that Farmers Violated MFLSA.

Farmers erroneously contends that in order to prove a violation of MFLSA, an employee would have to prove the amount of back pay the plaintiff was owed. This founders as both a normative proposition and as a proposition to be applied to this case. The plain language of MFLSA indicates that the statute is to be construed as a whole, and that an employer violates MFLSA when it fails to comply with any of its provisions. *See* Minn. Stat. § 177.21 (“**Sections 177.21 to 177.35** may be cited as the ‘Minnesota Fair Labor Standards Act.’); Minn. Stat. § 177.27 subd. 4 (“The commissioner may issue an order requiring an employer to comply with sections **177.21 to 177.35**”), and subd. 8 (“An employee may bring a civil action seeking redress for a violation or violations of sections **177.21 to 177.35** directly to district court.”). Private litigants are not cabined to seeking relief under certain sections of the Act; they may seek relief under all provisions. Further, the statutory structure nowhere requires an employee to seek or prove compensatory damages before seeking prospective relief; rather, it permits an employee to seek either retrospective relief (i.e., pay me what you have not paid me because you have violated the act in the past) or prospective relief (i.e., stop violating the Act by misclassifying me as nonexempt and pay me properly in the future).

⁸ By definition, MFLSA is a law whose language is not “explicit” and must be read in conjunction with numerous rules adopted by the Commissioner of Labor. *See* Minn. Stat. § 177.28 (stating the commissioner may define terms).

Thus, to obtain relief under Minn. Stat. 177.27, including back pay, civil penalties, and injunctive relief, all an employee must do is prove a violation of “sections 177.21 to 177.35,” i.e., all an employee must do is prove a violation of MFLSA. Minn. Stat. § 177.27 subd. 8. Here, the district court concluded that Farmers failed to comply with essential provisions of the Act—proper classification of the claims representatives as employees entitled to MFLSA’s protections, which include the right to fair payment, as well as the recordkeeping provisions of Minn. Stat. § 177.30. Both of these types of violations were alleged in Plaintiffs’ complaint and subsequently litigated.

1. The district court correctly found multiple violations.

The district court, after presiding over a three week trial, and after return of the jury’s special verdict, concluded that Farmers committed multiple violations of MFLSA. *See* Minn. Stat. § 546.19 (trial courts draw conclusions of law). At the close of evidence, by special verdict, the jury made findings of fact as to Farmers’ liability under MFLSA and assessed the amount of recovery. *See id.*; Minn. Stat. § 546.22 (“When a verdict is found for the plaintiff in an action for the recovery of money....the jury shall assess the amount of recovery.”). Although the liability was clear, and the verdict was for the plaintiffs, the amount of recovery was calculated at zero because the jury decided plaintiffs had not met their burden in proving the amount of back pay that the Class was owed. (A.52); *see also* A.75.

Contrary to Farmers’ contention, the jury made no finding regarding the number of hours the Plaintiffs worked, nor whether the Plaintiffs were entitled in the future to pay

at overtime rates. (A.52). Instead, the jury clearly found the factual predicates for liability under MFLSA, because it found that Farmers had misclassified claims adjusters as “administrative” employees under MFLSA, because they did not 1) perform work directly related to management policies or general business operations, and 2) routinely exercise discretion or independent judgment. *See* A.36-A.38. The district court, finding that Farmers had violated MFLSA by virtue of this misclassification, also concluded that “[t]here is clear evidence that Claims Representatives routinely worked in excess of 48 hours.” (A.55). These twin findings, which Farmers does not contest in this appeal, made it easy for the trial court to conclude that MFLSA had been violated.

2. Misclassification is an actionable violation of MFLSA.

As the district court recognized, misclassification of employees is by itself actionable under MFLSA. Minn. Stat. § 177.28 states that the commissioner may adopt rules to “prevent circumvention and evasion” of any section of MFLSA; these rules provide further substance and guidance for when MFLSA is violated, and provide definitions for terms used in the Act. Here, the misclassification resulted because Farmers did not classify its claims representatives as “employees” to whom MFLSA applies. *See* Minn. Stat. § 177.23(6). Through this misclassification, Farmers circumvented and evaded MFLSA, and denied its claims representatives full pay.

The relevant rules promulgated by the commissioner that the trial court considered were Minn. R. Pt. 5200.0100, 5200.0180, and 5200.0200. Together, Minn. R. Pt. 5200.0180 and 5200.0220 make misclassification of employees as “administrative” a

violation of the Minnesota Rules, and thus actionable under MFLSA. See Minn. R. Pt. 5200.0180 (“Only where the employee's primary duties meet all the criteria under a particular test may the employer consider the employee to be exempt from the overtime wage provisions.”); Minn. R. Pt. 5200.0200 (setting the “primary duties” test for administrative employees). Farmers failed to prove that the claims representatives’ “primary duties” met all of the criteria set forth in Minn. R. Pt. 5200.0200. As a result, it failed that test, and was not entitled to consider its claims representatives as “exempt” from the overtime wage provisions.

3. The record is replete with evidence that Minn. Stat. § 177.25 was violated.

Despite the jury’s assessment of damages, the district court did find evidence that Minn. Stat. § 177.25 was violated, by virtue of its conclusion that “[t]here is clear evidence that Claims Representatives routinely worked in excess of 48 hours.” (A.55). The fact that the trial court did not articulate a violation of Minn. Stat. § 177.25 is irrelevant, because the trials court’s order establishes the predicate facts for a violation of that provision. Minn. Stat. § 177.25 requires an employer to pay any “employee,” as defined by § 177.23, overtime compensation for all hours worked beyond 48 in any single workweek. Accordingly, the district court found the predicates for a violation of Minn. Stat. § 177.25 because 1) Farmers had misclassified its claims representatives as “employees” who were not entitled to receive the protections of MFLSA, including overtime compensation, and 2) those employees routinely worked in excess of 48 hours.

Even though the jury concluded that damages were too speculative and not capable of being computed on a class-wide basis, Minn. Stat. § 177.25 had been violated.⁹

4. *The district court properly concluded that Farmers violated Minn. Stat. § 177.30.*

Last, contrary to Farmers' misrepresentation, Plaintiffs alleged, and the trial court found, that Farmers violated Minn. Stat. § 177.30, because it had failed to keep proper records, including time records, for each of the Class members.¹⁰ (A.26); *see also* Pl. Mem. in Opposition to Def's Mem. in Support of Final Judgment, Nov. 19, 2004, at 29-33. Farmers' contention that it was not on notice of this claim is without merit, verges on bad faith, and is unhinged from the record. Farmers was on notice, both through pleading and discovery, that Plaintiffs' claim involved violations of section 177.30, and the issue was litigated before the trial court. Most important, prior to trial, Farmers **stipulated** to the number of pay periods at issue in the litigation, rather than provide Plaintiffs with time records. (A.47); *see* Minn. Stat. § 177.30 ("Every employer subject to sections 177.21 to 177.35 must make and keep a record of: (1) the name, address, and occupation of each employee; (2) the rate of pay, and the amount paid **each pay period** to each employee....). This stipulation resulted, of course, because Farmers maintained no time records for the claims representatives. In its answers to Plaintiffs' discovery, Farmers admitted that "[it] does not maintain documents specifically recording the hours worked

⁹ Given that the trial court specifically found the requisite facts to establish a violation of 177.25, any failure to specifically note Farmers violated 177.25 was a harmless error.

¹⁰ Farmers' **concedes** that a violation of § 177.30 is, in and of itself, actionable.

by exempt employees.” (SR00135; *see also* SR00123, SR00130, SR00141) Because Farmers was not able to prove that its claims representatives were exempt, the stipulation to the number of pay periods at issue is an admission that it violated Minn. Stat. § 177.30.

Minnesota courts have frequently cited the rule that when a party expressly or impliedly consents to litigate an issue not squarely raised in a pleading, that party waives any objection to “notice.” *In re Shandorf*, 401 N.W.2d 439, 442 (Minn. Ct. App. 1987); *see also Northern Timberline Equip., Inc. v. Gustafson*, 386 N.W.2d 778, 781 (Minn. Ct. App. 1986)(stating “when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”) Here, Farmers consented to litigate the recordkeeping issue, through its admission in discovery that it did not maintain time records for the claims representatives, and through its stipulation as to the number of pay periods for which it did not maintain these records.

Not only the stipulation to the number of pay periods, but also the pleadings and discovery, demonstrate that Farmers knew § 177.30 was encompassed within Plaintiffs’ case. Paragraph 32 of Plaintiffs’ Amended Complaint expressly referenced FIE’s violation of Minn. Stat. § 177.30. (A.26) Following from this allegation, Plaintiffs undertook exhaustive discovery to establish a violation of 177.30 in and of itself. As detailed in the record, Plaintiffs’ First Request for the Production of Documents, Nos. 1, 4, 7, 21 and 32, squarely addresses the recordkeeping claim. (SR000110-124). Similarly, Plaintiffs’ third set of document requests sought “time sheets” prepared by Farmers. *See* SR00141.

In the end, rather than provide Plaintiffs and the Class with claims representatives' time records—because no such time records existed—Farmers chose to stipulate prior to trial that the number of pay periods for the Class exceeded 12,870. (A.47) The only purpose to stipulate to the number of pay periods was to establish the number of times Farmers violated section 177.30. In essence, Farmers stipulated that if any provision of MFLSA had been violated, then Minn. Stat. §177.30 had also been violated. Accordingly, the district court was able to conclude that because the total number of times Farmers violated MFLSA was established through the stipulation, it was not necessary to order an accounting “to establish damages or civil penalties.” (A.63). Even if Farmers was not “on notice” of Plaintiffs’ section 177.30 claim, it clearly consented to litigate the issue by stipulating to evidence that applied solely to the recordkeeping claim.

C. The Trial Court Correctly Interpreted and Applied Minn. Stat. § 177.27.

Minn. Stat. § 177.27 makes clear that the remedies a private litigant may seek are identical to those available in public enforcement actions against employers. In addition, MFLSA’s legislative history, which Farmers altogether fails to acknowledge or address, makes clear that the trial court did not err in awarding plaintiffs’ civil penalties and injunctive relief.

1. Farmers’ Nonsensical Interpretation Defies the Plain Language of Minn. Stat. § 177.27, and Should Be Rejected.

The trial court properly derived its authority to impose civil penalties and an injunction by reading Minn. Stat. § 177.27 in its entirety. Farmers, on the other hand, contorts the meaning of that section and the purpose it serves. Farmers’ proposed reading

of the statute would create considerable uncertainty and unreasonable results in the application of MFLSA. Minn. Stat. § 645.17.

MFLSA is a remedial statute that should be broadly construed to effectuate the Legislature's intent. *State v. Indus. Tool & Die Works, Inc.*, 21 N.W. 31, 38 (Minn. 1945). As the trial court recognized, Minn. Stat. § 177.27 spells out the public enforcement provisions, as well as the private right of action, under MFLSA. Because the trial court properly interpreted the language of the statute, it correctly concluded that the Legislature assigned certain powers of the Commissioner of Labor to the district courts, including the ability to award civil penalties and injunctive relief.

Subdivisions 7 and 8 Provide Identical Remedies

Comparison of subdivisions 7 and 8 demonstrates the district court's interpretation of the statute is correct, and that both subdivisions provide identical or congruent remedies, whether the action against the employer is brought by the Commissioner of Labor or by the employee in the district court. Minn. Stat. § 177.27, subd. 8 provides a private right of action to sue under MFLSA. This provision also delineates the cumulative and alternative remedies a private plaintiff may seek in a civil action: restitution for wages and overtime compensation not paid, liquidated damages, damages, and **“other appropriate relief provided in subdivision 7 and otherwise provided by law.”** Minn. Stat. § 177.27 subd. 8. Thus, subdivision 8 explicitly embraces the “relief provided in subdivision 7” and allows an employee to seek, and a district court to award, that relief, in addition to remedies “otherwise provided by law.” *Id.*

Subdivision 7, in turn, first permits the commissioner to order an “employer to cease and desist from engaging in the violative practices,” i.e., to issue an injunction. Minn. Stat. § 177.27, subd. 7. Next, the commissioner may order the employer “to pay...back pay [i.e., restitution], gratuities, and compensatory damages, less any amount actually paid by the employer, and for an additional equal amount as liquidated damages.” *Id.* Compare with Minn. Stat. § 177.27 subd. 8 (“...the full amount of 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.”) The commissioner may also assess civil penalties, up to \$1,000, for each violation of the statute. *Id.*

To obtain its contorted reading of Minn. Stat. § 177.27, Farmers incorrectly reads out critical phrases of Minn. Stat. § 177.27 subd. 8. Contrary to Farmers’ reading, the “in addition to” language in subdivision 8 does not require that an employee prove the amount of restitution owed in order to seek or recover the additional remedies provided by the statute. The statute presumes that restitution is owed once a violation of MFLSA is established. *Id.* (“An employee who pays an employee less than the wages and overtime compensation to which the employee is entitled....is liable....”). Instead, the last sentence of subdivision 8, which is phrased in the future tense, can only be fairly read to mean “**In addition to [restitution or back pay], in an action under this subdivision [i.e., in a private action], an employee may seek damages and other appropriate relief provided by subdivision 7 and otherwise provided by law.**” This last sentence simply

denotes the alternative remedies a private plaintiff can plead in bringing an action under MFLSA.

The phrase “other appropriate relief” encompasses injunctive and civil penalty relief.

Although Farmers avoids stating it, the debate here concerns the meaning of the phrase “**other appropriate relief provided by subdivision 7.**” The statutory structure makes clear that phrase refers to the remedies available to the Commissioner of Labor. Of the remedies listed in both subdivisions 7 and 8, **only** civil penalties and injunctive relief are not made available to private plaintiffs in other provisions of Minn. Stat. § 177.27. *Compare* Minn. Stat. § 177.27, subd. 7 *with* subd. 8 and subd. 10. Farmers’ reading of the Act, which attempts to deny private plaintiffs the ability to seek the same remedies afforded to the commissioner, strips the phrase “other appropriate relief” of any meaning.

2. The Legislative History of Minn. Stat. § 177.27 Confirms That the District Court Correctly Decided Its Statutory Authority to Issue Civil Penalties and Injunctive Relief.

The district court concluded that the statutory provision was plain, and that the phrase “other appropriate relief” was not ambiguous. *See* A.53-54. However, to the extent this Court finds the phrase “other appropriate relief” not explicit, this Court must apply the factors in Minn. Stat. § 645.16, which directs, among other things, contemplation of contemporaneous legislative history, as well as the purpose of MLFSA. Consideration of these factors confirms the trial court was correct to order payment of civil penalties and injunctive relief.

The 1996 Amendments to MFLSA

In 1996, the Minnesota Legislature enacted dramatic changes to Minnesota's wage and hour laws. Specifically concerned that employers were, with increasing frequency, attempting to evade overtime payment by misclassifying employees or failing to keep accurate time records, the Legislature proposed dramatic changes to both Chapters 177 and 181. (SR00017-00019) The amendments to the wage and hour laws were authored, in part, by Representative Robert Leighton ("Leighton") in conjunction with the Minnesota Attorney General's office.

In January 1996, Leighton introduced House File No. 2841 ("HF 2841"). (SR00090-00093) HF 2841 proposed fundamental changes to the remedial scheme set forth in Chapter 177. Specifically, Leighton's proposal repealed section 177.33 (the "Employee Remedies" section) and incorporated it within the section outlining the remedies available to the Commissioner of Labor and Industry. *Id.* Most notably, the proposed amendments to section 177.27 created three new subdivisions that were ultimately adopted as Minn. Stat. § 177.27 subs. 7, 8 and 10.

Subdivision Seven - "The Commissioner's Remedies." The proposed Subdivision 7 dramatically overhauled the powers afforded the Commissioner. Specifically, the amendments authorized the Commissioner to secure the following remedies for employees:

- To enjoin (via a cease and desist order) employers from violating any section of MFLSA (i.e. any section between 177.21 through 177.35);
- To award back pay, gratuities and compensatory damages; and

- To award civil penalties against any employer who repeatedly violated “a section or sections” of the act (i.e. any section between 177.21 and 177.35).

(*Id.*; SR00095-00099) The proposed Subdivision 7, in effect, consolidated the Commissioner’s power, allowed him to enjoin employers from continued violations, increased the civil penalties from \$200 to \$1,000, and mandated imposition of civil penalties for employers who violated the Act.¹¹

Subdivision 8 - “The Employee’s Remedies.” The second fundamental change Leighton proposed was to alter the enforcement mechanism afforded to employees. Subdivision 8 was intended to replace the remedial scheme outlined in former Minn. Stat. § 177.33. Like its predecessor, Subdivision 8 allowed employees to seek compensatory damages for unpaid wages and overtime in the form of back pay, wages and liquidated damages. (SR00083; SR00095-00099) Unlike section 177.33, however, the proposed subdivision 8, which was ultimately adopted by the Legislature and signed by the Governor, entitled the employee to seek all remedies available to the Commissioner. These new privileges were “in addition” to any other remedy available. *Id.*; *see also* Minn. Stat. § 177.27 subd. 8. The authors’ proposal allowed the employee, for the first time, to stand in the shoes of the Commissioner for private enforcement proceedings, entitling the employee to seek civil penalties and injunctive relief for his or her own benefit.

¹¹ The version the Legislature ultimately adopted in 1996 made three fundamental changes to the Commissioner’s powers: (1) it clearly authorized the Commissioner to issue “cease and desist” orders as well as the terms for their compliance; (2) it increased the penalties from \$200 to \$1,000; and (3) it made imposition of the penalties mandatory by changing the language triggering application of the penalties from “may” to “shall”.

On February 5, 1996, Representative Leighton testified before the House Committee on Labor-Management Relations regarding the purpose, scope and intent of the proposed amendments. Leighton described the purpose of the amendments as follows:

The purpose of this bill is to hold those employers accountable and make sure that all employees in the state of Minnesota are paid the proper wage, the minimum wage, or are paid overtime wages that are due to them.

(SR00024) According to Representative Leighton, the enhanced enforcement mechanisms were required to confront the increasing frequency of violations. (*Id.*; SR00095-00099).

Mr. Scott Strand, a Deputy Counsel at the Attorney General's Office who represented the Department of Labor and Industry also provided testimony before the Committee. (*See* SR00024-00031) Strand explained to the Committee that the penalty provisions afforded the employee sufficient incentive to sue despite the fact the employer failed to keep accurate records (making compensatory damages difficult, if not impossible to prove--the precise problem confronting the Plaintiffs in this case). Specifically, Strand stated:

I think that drawing on my own experience as a counsel to the Department of Labor and Industry from 1982-87 and again from 1989-92. I know that in practice what happens when the call comes in when the complaint comes in about a wage problem typically the only answer that's available is to go and take their chances in conciliation court. We are very rarely taking large scale or even small scale labor standards enforcement mechanisms or enforcement actions against employers, and the reason for that has been that **the only remedy available has been to essentially to get back pay in other words to put the situation back to where it was before and there hasn't been any opportunity to impose a deterrent that would have an effect on other employers**

(SR00028) (emphasis supplied). In the end, both Representative Leighton and Attorney Strand concluded that allowing employees to seek the same remedies as the Commissioner, including civil penalties and injunctive relief, would strengthen Minnesota's wage and hours laws.

Nowhere is that intent more clear than in Assistant Attorney General Nancy Leppink's testimony before the House Judiciary Committee. In that testimony, Leppink confronted head-on the purpose and intent of the "additional" remedies:

The reason that it [the amendments to section 177.27 subd. 8] has been put here is an effort to make the act a little more user friendly, and **put the private civil remedies to follow the remedies that are available to the commissioner.** And so therefore, the only change in the law would be what follows: The language "in addition, the employee may seek damages and other appropriate relief provided by subdivision seven and otherwise provided by law." Subdivision seven refers to the remedies that would be provided by this bill to the commissioner if the commissioner pursued an enforcement action. **Those remedies would include compensatory damages that an employee might incur, in addition to their back wages, and..., their back wages damages. It would allow for injunctive relief and it would allow for the imposition of a civil penalty where there had been a willful or repeated violations. The language, "relief otherwise provided by law", would typically refer to punitive damages that would be awarded under Minn. Stat. sec 549.20. The goal of this is to, one, make the provisions for civil causes of action parallel with the remedies provided by the commissioner, and also to make the employee whole in respect to compensatory damages.**

(SR00040) In short, the Legislature's clear intent was to allow private litigants to seek the same remedies afforded the Commissioner. Moreover, the trigger for authorizing those remedies was a violation of **any** section of the Act, not the imposition of actual out-of-pocket loss. The district court correctly concluded that a private litigant may stand in the commissioner's shoes and pursue both injunctive relief and civil penalties.

D. Because Farmers Violated MFLSA, the Trial Court Correctly Concluded It Had the Power to Order Injunctive Relief.

The trial court properly concluded that its powers were coextensive with those of the commissioner, and therefore had the power to issue an injunction against Farmers' continued misclassification of its claims representatives. As discussed, the Legislature amended Minn. Stat. § 177.27, subd. 7 and 8 to allow an employee to seek, and the district court to award, equitable relief in the form of an injunction and civil penalties. As the trial court noted, injunctive relief was merited because it found that Farmers "violated a section identified in subdivision 4, or any other rule adopted under 177.28." (A.53). In the end, Farmers' argument is wrong on the facts, wrong on the legislative history and wrong on the law. Plaintiffs are entitled to injunctive relief.

E. Because Farmers Violated MFLSA, the Trial Court Correctly Concluded It Had the Power to Issue and Pay Civil Penalties to the Plaintiffs.

1. The Trial Court Had the Power to Issue Civil Penalties

The trial court also correctly concluded that it had the power to order civil penalties for Farmers' misclassification of its claims representatives. While no controlling authority guides this Court on the application of section 177.27, numerous cases evaluate the purpose and application of civil penalty provisions in the context of private remedial schemes.

Minnesota Courts look toward two factors to identify whether the statute imposes "penal" relief: (1) whether the act imposes punishment for a public offense; and (2) whether the penalty, in and of itself, is unrelated to the amount of actual damages. *See McDaniel v. United Hardware Distributing Co.*, 469 N.W.2d 84, 86-88 (Minn. 1991); *see*

also *Freeman v. Q Petroleum Co.*, 417 N.W.2d 617, 618 (Minn. 1988). Further, the Minnesota Supreme Court has noted that private litigants are entitled to pursue civil penalties in certain circumstance. *McDaniel*, 469 N.W.2d at 87. Thus, where a statute imposes a penalty, as in this case, the plaintiff is allowed to seek the penalty irrespective of his or her ability to prove actual compensable damages. *Id.*; see also *Ashland Oil Co. v. Union Oil Co.*, 567 F.2d 984, 991 (9th Cir. 1977). Given the clear public purpose of MFLSA, coupled with the fact that the penalty provision imposes a “fixed amount” for violation of the Act in and of itself, it is undeniable that MFLSA creates a penal statutory scheme. Accordingly, Plaintiff are entitled to seek civil penalties merely upon demonstrating a violation of the Act.

2. The Civil Penalties Are Payable to Plaintiffs

The trial court properly ordered that the civil penalties it assessed be paid directly to the plaintiffs.¹² As the legislative history to Minn. Stat. § 177.27 makes manifest, the Minnesota Legislature intended that any civil penalties recovered by private litigants in MFLSA actions were payable to the employees.

In contrast to Plaintiffs, Farmers cites no relevant or controlling authority for its blanket proposition that the civil penalties can never be payable to private plaintiffs. Instead, it relies on inapposite authority, which can be summarily dispensed with:

¹² Plaintiffs move to strike this argument of Farmers, because it was not raised below. Arguments raised for the first time on appeal are deemed waived. *E.g.*, *Soukop v. Molitor*, 409 N.W.2d 453, 256 (Minn. 1987).

- *Hoffman D.D.S. v. Delta Dental Plan of Minnesota*, 517 F.Supp. 564, 573 (D. Minn. 1981) stands for the proposition that a private plaintiff does not have standing to seek and recover a civil penalty under Minn. Stat. § 325D.56; because no other authority existed to support the plaintiff's contention that he had standing to seek civil penalties, the court held that civil penalties were not available.
- *State by Humphrey v. Alpine Air Prods.*, 500 N.W.2d 788, 792 (Minn. 1993), simply stands for the unremarkable proposition that the attorney general may seek civil penalties pursuant to Minn. Stat. § 8.31, and enunciates the standard of proof to be used in assessing civil penalties under the consumer fraud statutes.
- Minn. Stat. § 8.31, subd. 3a, commonly known as the private attorney general statute, permits a private plaintiff to recover damages for violations of specific statutes. In contrast to Minn. Stat. § 177.27, subd. 8, which specifically incorporates the remedies available in Minn. Stat. § 177.27, subd. 7, section 8.31 does not list civil penalties as one of the remedies available to private plaintiffs. Those remedies are reserved for the attorney general in Minn. Stat. § 8.31.

The district court's decision should be affirmed, because it comports with MFLSA's remedial purpose and the Legislature's intent, as expressed in the statute and legislative history. Farmers' request for a ruling finding otherwise runs contrary to that intent, and must be rejected.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS' FEES AND COSTS UNDER MFLSA.

A. Standard of Review

This Court applies an abuse of discretion standard when examining an award of attorneys fees and costs. *In re the Marriage of Benita A. Gully*, 599 N.W.2d 814, 825 (Minn. 1999); *Estate of Adolph L. Martignacco*, 689 N.W.2d 262, 271 (Minn. Ct. App. 2004)(quoting *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904

(Minn. Ct. App. 1995)). This is because the value of the legal services is a question of fact “to be determined by the evidence submitted, the facts disclosed by the record of the proceedings, and the court’s own knowledge of the case.” *State v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971). A district court does not abuse its discretion when it waives some or all of the requirements of Minn. R. Gen. P. 119, because that rule is itself a discretionary rule. *In re the Marriage of Benita A. Gully*, 599 N.W.2d at 825. Nevertheless, the court should provide a “concise but clear explanation of its reasons for the fee award.” *Anderson v. Hunter, Keith, Marshall, & Co.* 417 N.W.2d at 629-30 (Minn. 1988).

Here, the trial court weighed the multiple submissions by the parties, considered lengthy affidavits and detailed billing records, and determined that it had all the information necessary to examine the Plaintiffs’ fee award. Farmers vigorously contested the Class’s motion for attorneys fees, and thus was permitted not only a reply, but many rounds of briefing opposing the Class’s principal petition. In issuing its order, the trial court provided a “concise but clear explanation” of the fee award, which was supported by discussion of controlling precedent, calculations based on the billing records, and analysis of facts based upon the court’s own knowledge of the case. The trial court did not abuse its discretion, and this Court should not take Farmers’ indirect invitation to review the evidence submitted in order to second guess the trial court’s sound decision.

B. The Trial Court Correctly Derived Its Authority to Award Attorneys Fees and Costs from Minn. Stat. § 177.27.

MFLSA unambiguously establishes the right of an aggrieved employee who is the prevailing party in litigation against her employer to payment of attorneys' fees and expenses, including witness fees. Minn. Stat. § 177.27 subd. 10.¹³ The trial court correctly determined that the claims representatives were the prevailing party in the litigation, having concluded that Farmers violated multiple provisions of MFLSA. In its discretion, it awarded Class Counsel reasonable attorney's fees and costs.

C. The Trial Court Did Not Abuse Its Discretion by Using a Multiplier.

The trial court did not commit legal error or abuse its discretion in applying a multiplier to Class Counsel's lodestar. Farmers cites no controlling statutory provision or Minnesota case construing MFLSA's fee-shifting provision, which has stated that multipliers may **never** be used. The trial court could only have committed legal error if a case or statute stated that under MFLSA, an upward adjustment to an attorney's fee is never appropriate. *See generally Blum v. Stenson*, 465 U.S. 886, 901 (1984) (stating that district court did not commit legal error because statute did not proscribe upward adjustment to fee). In fact, the authority Farmers principally relies upon, *Blum v. Stenson*, shows that absent a statutory provision prohibiting a multiplier, an upward adjustment is well within the trial court's discretion. *Id.*

¹³ The Minnesota Legislature amended MFLSA with this subdivision in 1996. The Legislature clearly intended to strengthen enforcement of MFLSA by ensuring that employees would have access to competent counsel who would act, in essence, as private commissioners of labor. *Compare* Minn. Stat. § 177.27 subd. 10. *with* Minn. Stat. § 8.31 subd. 3(a).

Further, the district court did not abuse its discretion in adjusting the fee. Courts may award attorneys' fees using two accepted methods: the lodestar-multiplier approach or the percentage-of-the-benefit approach. *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-68 (D.C. Cir. 1993). Under the lodestar method of calculating attorneys' fees, the attorneys' hourly billing rates are multiplied by the number of hours the attorneys have reasonably expended litigating the case. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 (Minn. 1998); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The percentage-of-the-benefit approach, on the other hand, computes the attorney fee using a stated percentage, usually one-third, and applies that percentage to the total value of relief obtained, whether monetary or non-monetary. *See* 4 Newberg on Class Actions § 14:6.

The trial court properly determined the reasonableness of Plaintiffs' fee by applying the *State v. Paulson* factors, which remains the test of reasonableness under Minnesota law. 188 N.W.2d 424, 426 (Minn. 1971). Additionally, in its discretion, it determined that a multiplier was warranted because:

[T]he Plaintiffs' attorneys did do a good job in this case and did obtain a successful result for their clients. Either directly or indirectly, as a result of this litigation, the Defendant now pays all of its claims representatives in Minnesota overtime pay and is required to do so in the future as well. In addition, a large civil penalty has been assessed against the Defendant for its failure to comply with MFLSA in the past. **Also, despite the Defendant's claims, this Court believes without this litigation, the Defendant would not have adopted these policies on its own, nor impose a civil penalty on itself.**

(A. 74).

D. The Trial Court Did Not Abuse Its Discretion in Determining That Class Counsel's Lodestar Was Reasonable.

As the record makes clear, the trial court carefully scrutinized Plaintiffs' fee application. In arriving at the unenhanced lodestar figure of approximately \$1,258,179, the trial court weighed the multiple submissions of the parties, including fee affidavits nearly half a foot high that fully complied with Rule 119 of Minnesota Rules of General Practice. (*See* Becker Aff., Apr. 19, 2005, Apr. 29, 2005).

There is absolutely no doubt that when a statute authorizes fee-shifting, as MFLSA does, the prevailing party is entitled to recover reasonable attorneys fees based upon a lodestar analysis. *See Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 244 (8th Cir. 1996). It is also black letter law that fee shifting statutes permit recovery for fees that are greater than the any monetary relief actually recovered. *Id.* The reason for this is clear: Fee-shifting statutes exist in order to ensure that plaintiffs have access to competent counsel even though damages may be small or nonexistent. *Liess v. Lindemeyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984).

The lodestar may be adjusted upward or downward to account for the factors listed in *State v. Paulson*, but the unenhanced lodestar is presumptively reasonable. *SCSC Corp v. Allied Mutual Ins. Co.*, 515 N.W.2d 588, 603 (Minn. Ct. App. 1994). In analyzing the lodestar, a court need not "divide the hours worked between winning and losing claims" and is not required to "apportion the fee award mechanically on the basis of the [plaintiff's] success or failure on particular issues." *Hensley v. Eckerhart* 461 U.S. 424, 438 (1983) (affirming district court's award and explanation of attorneys' fees in a §

1988 case). Nor is Plaintiffs' counsel required "to record in great detail how each minute of [their] time was expended," provided the "general subject matter of [their] time expenditures" is identified. *Id.* at 436 n.12.

The reasonableness of the value of the legal services is a question of fact "to be determined by the evidence submitted, the facts disclosed by the record of the proceedings, and the court's own knowledge of the case." *Paulson*, 188 N.W.2d at 426. In assessing the award, "allowances should be made with due regard for all **relevant** circumstances, including the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client." *Id.*; accord *Johnson v. Georgia Hwy. Express, Inc.* 488 F.2d 714, 717-19 (5th Cir. 1974).

The trial court properly weighed these discretionary factors against the arguments of Plaintiffs and Farmers. In its discretion, the trial court reduced the Plaintiffs' requested lodestar by 10% the hours each attorney and paralegal worked, and did not award certain requested costs. Additionally, it did not award attorneys fees to a firm that failed to submit billing records. (A.68 at ¶ 7; A. 69 at ¶ 11). Farmers' declaration that the trial court abused its discretion is unfounded and unsupported in the record.

1. The Time and Labor Class Counsel Spent Was Eminently Reasonable, Given the Scope, Duration, Complexity, and Difficulty of The Litigation.

The district court recognized that the majority of time Class Counsel spent was reasonable, given the significance and complexity of the case. (A.74). The case lasted

“over three years and involved significant amounts of time and resources by multiple law firms”; importantly the case sustained itself through trial and post-trial motions. *Id.*

Much of the time required in this case stemmed directly from Farmers’ overzealous defense and offensive maneuvers in this case. The trial court knew that Farmers manipulated the procedural postures of the two separate litigations and denied any similarity for as long as it was convenient, submitting a motion for summary judgment in February 2004, three months’ after the MDL Court issued its findings of liability as to certain claims representatives. Farmers strenuously argued that the MDL Court’s liability findings had no preclusive effect, and sought a different result. Farmers was entirely unsuccessful, and the trial court appropriately denied summary judgment in September 2004. Additionally, Farmers, still seeking a different result, was entirely unsuccessful in avoiding liability at trial.

2. The Trial Court Analyzed the Amount Involved and the Results Obtained.

The trial court took into account both the amount involved and the results obtained. In its analysis of the fee award, the trial court stated, “[d]espite Defendant’s assertions, the Plaintiffs’ attorneys did do a good job in this litigation and did obtain a successful result for their clients.” (A.74). Plaintiffs were successful at trial, having established that Farmers’ claims representatives were nonexempt employees, and therefore Farmers had violated MFLSA. After trial they achieved further success in obtaining civil penalties and injunctive relief for the class. The district court, finding that

multiple violations of the Act were supported by the factual findings, decided that Plaintiffs were the prevailing party.

In this case, Plaintiffs' central claims were that FIE's pay practices were unfair and improper. Plaintiffs overwhelmingly succeeded in establishing these core claims. At trial, Farmers was found to have violated the Minnesota Fair Labor Standards Act as to each member of the *Milner* Class, which, as of October 2004, numbered 194 persons. Only four months **after** trial and the jury verdict did the federal court enjoin this Court from issuing an Order that would have awarded civil penalties to the entire *Milner* Class in an amount that exceeded \$6.4 million.¹⁴ The trial court recognized that it would be unfair to penalize Class Counsel for the significant time and effort expended in ensuring a finding of liability for the 194-person *Milner* Class, including for persons who had not prevailed in the MDL—e.g., Liability Claims Representatives and PIP Claims Representatives.

Still, the trial court's considerations did not always favor Plaintiffs, which proves that the trial court did not take at "face value" Plaintiffs' fee application. The trial court denied the Plaintiffs' request for the costs incurred as a result of employing Plaintiffs' damages expert, Dr. Glenn Harrison. In explaining the reduction, the trial court noted that "Mr. Harrison did not do an adequate job (and the jury apparently agreed)." (A.75). Thus, the trial court tied the Plaintiffs' failure to prove their compensatory damages to

¹⁴ Specifically, FIE stipulated that the number of unrecorded pay periods was 12,870. The court conclude each required a \$500 penalty. But for Farmers' procedural hijinks, the judgment in this case would have been \$6,435,000.

Dr. Harrison's testimony, and did in fact account for the "results obtained" when considering whether to award that expert witness fee.

Farmers altogether fails to acknowledge that it was unable to prevail on and defend the core claims of this case (i.e., that their classification system was and remains illegal). Even after trial, Class Counsel still succeeded in securing an award of civil penalties and injunctive relief. Farmers cannot deny that results of its failure—an injunction and civil penalties—are costly to it, or else it would not now attempt to appeal the trial court's order.

3. The Trial Court Correctly Found That Class Counsel's Hourly Billing Rates Are Reasonable.

In computing the lodestar, the hourly billing rate applied is the hourly rate normally charged in the community where counsel practices, i.e., the "market price." *E.g., McDonald v. Armontrout*, 860 F.2d 1456, 1459 (8th Cir. 1988) ("in most cases, billing rates reflect market rates — they provide an efficient and fair short-cut for determining the market rate"). Plaintiffs provided the trial court a survey conducted by Minneapolis Management Consultant Robert Hayden in November 2000, which stated that Zimmerman Reed's rates for complex, class action litigation in the Twin Cities community are merely average. (*See Becker Aff.*, Ex. O, Apr. 19, 2005). Plaintiffs also provided the trial court with orders from Hennepin County courts in which the Class Counsel's rates had been approved as reasonable. From this, the trial court correctly discerned that Plaintiffs' rates were reasonable, and was not required to rely upon the hearsay of an expert based in Los Angeles in order to make its findings.

4. The Trial Court Was Not Required to Analyze the Fee Arrangement.

Farmers misrepresents that Class counsel did not disclose the nature of its fee agreement. (See Pl. Application for Attorneys' Fees and Costs, Apr. 19, 2005, at 14). Regardless, in this case, whether the fee agreement was disclosed or considered by the trial court is irrelevant. See *Paulson*, 188 N.W.2d 426 (stating trial court should only give "due regard...to **relevant** circumstances.") MFLSA's fee-shifting provisions, like other statutes that shift fees, entitle the Class to recover from Farmers their reasonable attorneys' fees, costs and expenses. See generally *Liess v. Lindemeyer*, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984) (stating that fee-shifting statutes "eliminate financial barriers to vindication of a plaintiff's rights" and "provide incentive for counsel to act as private attorney general"). The availability of the fee-shifting statute obviates the need to analyze the fee arrangement.

CONCLUSION

For all of the reasons stated in this memorandum, the judgment of the trial court should be affirmed in its entirety.

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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 the brief is 13,965 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).