IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

In re: DIRECTECH SOUTHWEST, INC., FAIR LABOR STANDARDS ACT (FLSA) LITIGATION	]	No. 2:08-md-1984
	]	Section F
	]	Judge Martin Feldman
THIS DOCUMENT RELATES TO LAICHEV, ET AL. v. JBM, INC. ET AL.	]	Magistrate 1
	]	Magistrate Sally Shushan

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL CERTIFICATION OF RULE 23 SETTLEMENT CLASS AND FINAL APPROVAL OF RULE 23 CLASS ACTION SETTLEMENT AGREEMENT

INTRODUCTION

The Parties come before the Court seeking final approval of a Settlement Agreement that resolves the litigation between Plaintiffs – a class of Ohio job-based technicians – and the Defendants, MultibandEC Incorporated f/k/a JBM, Inc., DirecTech Holding Co., Inc., DirecTV, Inc., and John Basil Mattingly ("Defendants") (collectively, "the Parties"). Plaintiffs alleged that Defendants failed to properly pay them for overtime hours worked in violation of Chapter 4111 of the Ohio Revised Code. Defendants denied those allegations and actively contested those allegations during the litigation process. However, with the assistance of a private mediator and through extensive negotiations, the Parties were able to reach a settlement.

After settlement was reached, the Parties jointly requested that this Court conditionally certify the Rule 23 Settlement Class and preliminarily approve the Rule 23 Class Action Settlement Agreement. On January 24, 2011, this Court granted said motion and entered an

Order conditionally certifying the Rule 23 Settlement Class and preliminarily approving the Rule 23 Class Action Settlement Agreement.

The Parties now request that this Court issue a Final Order and Judgment of Dismissal with Prejudice to include the following:

1. Certifying the Settlement Class for purposes of the settlement;
2. Granting final approval to the Rule 23 Class Action Settlement Agreement, adjudicating the terms thereof to be fair, reasonable, and adequate, and directing the consummation of its terms and provisions
3. Dismissing *Laichev, et al. v. JBM, Inc., et al.*, Case No. 07-cv-802 (S.D. Ohio), Case No. 10-2938 (E.D. La.) on the merits and with prejudice and permanently barring all Rule 23 Class Members (aside from those filing timely and valid Requests for Exclusion), including the Class Representatives, from prosecuting against any Released Parties any of the Released Claims, as set forth in Sections 5.1 and 5.2 of the Rule 23 Settlement Agreement, and issuing a judgment and entry to that effect; and
4. Retaining jurisdiction to enforce the terms of the Settlement Agreement.

I. CASE BACKGROUND

A. Summary of Plaintiffs' Allegations

Class Representatives and the settlement class they represent ("Rule 23 Class Members") consists of all Ohio job-based technicians employed by Defendant JBM, Inc. between August 24, 2005 and December 31, 2008 who did not join this litigation as a § 216(b) Class Member. Plaintiffs alleged that Defendants failed to pay all overtime hours worked in violation of Chapter 4111 of the Ohio Revised Code.

Defendants, on the other hand, have disputed those allegations. Defendants have expressly denied, and continue to deny the allegations made by Plaintiffs in this lawsuit. Furthermore, Defendants have denied and continue to deny any liability associated with the causes of action pursued by Plaintiffs and/or the persons they seek to represent. If this case were to proceed through the litigation process, Defendants would aggressively pursue multiple defenses on both the merits of the Plaintiffs' claims and on class certification.

B. Settlement Negotiations

After litigating these claims over multiple years, the Parties eventually enlisted the assistance of a private mediator in an effort to determine if resolution through settlement was possible. During mediation, after significant arm's length negotiation and two separate in-person mediation sessions, both Plaintiffs' and Defendants concluded that settlement of these claims, based upon the terms outlined in the Rule 23 Class Action Settlement Agreement, was in the respective best interest of each party.

While Plaintiffs' counsel believes Plaintiffs' claims are meritorious, and that they could eventually prevail on the merits of those claims, Plaintiffs' counsel has also considered the risk of continued litigation. Specifically, Plaintiffs' counsel has considered the possibility that if the case is not settled now, the case might not result in any recovery whatsoever or that the case might result in recovery several years from now on terms that are less favorable to the Rule 23 Class Members than that which is currently being offered in the Rule 23 Settlement Agreement. Thus, Plaintiffs' counsel is satisfied the terms and conditions of the Settlement Agreement are fair, reasonable, and adequate and that settlement is in the best interests of the Rule 23 Settlement Class.

Defendants' counsel also believes the Defendants have available to them defenses on both the merits and on class certification which could allow Defendants to ultimately prevail in this litigation. However, like Plaintiffs' counsel, Defense counsel is mindful of the risk and expense of continued litigation. If the litigation continued Defendants would continue to bear the burden, expense, and uncertainty of litigation. As a result, Defendants believe that the terms of the Settlement Agreement are in its best interest. Defense Counsel is also satisfied that the terms and conditions of the Settlement Agreement are fair, reasonable, and adequate and that settlement is in the best interests of the Defendants.

II. PRELIMINARY APPROVAL OF THE RULE 23 CLASS ACTION SETTLEMENT AGREEMENT

The Court granted preliminary approval of the Parties' Settlement Agreement on January 24, 2011. By that Order, and for settlement purposes only, the Court conditionally certified the Settlement Class. The Settlement Class included all Ohio job-based technicians employed by JBM, Inc. between August 24, 2005 and December 31, 2008 who did not join this litigation as a § 216(b) Plaintiff. Following entry of the preliminary approval Order, Rust Consulting, Inc. ("Rust") administered the claims process for the proposed settlement on the Parties' behalf, consistent with the Settlement Agreement and the Court's Order. The claims period opened on February 10, 2011 and closed on April 11, 2011. (Declaration of Caryn Donly ("Donly Dec.") ¶9, attached as Exhibit A). During the claims period, 42% of the 912 eligible Class Members or 380 individuals timely filed a claim form. (Donly Dec. ¶12). The Rule 23 Class Members who returned valid and timely Claim Forms (the "Rule 23 Claimants") claimed approximately $582,553.35 or 63% of the Rule 23 Settlement Fund. (Donly Dec. ¶12).

III. THE PROPOSED SETTLEMENT SHOULD BE APPROVED AS FAIR, ADEQUATE AND REASONABLE

A. The Fifth Circuit Favors Settlements and Presumes the Fairness of a Settlement Proposed by Competent and Experienced Counsel

The Fifth Circuit has stated that the standard for reviewing a proposed settlement of a class action is whether the proposed settlement is "fair, adequate and reasonable" and has been entered into without collusion between the parties. *See Ayers v. Thompson*, 358 F.3d 356, 368 (5th Cir. 2004); *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 878 (5th Cir. 1987); *Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re Educ. Testing Serv. Praxis Principals of Learning & Teaching: Grades 7 – 12 Litig. ("ETS")*, 447 F. Supp. 2d 612, 619 (E.D. La. 2006).

Courts routinely encourage parties to attempt to resolve disputed claims by reaching a settlement. This is true in the Fifth Circuit where courts have held that settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.ed 426, 428 (5th Cir. 1977) (quoting *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)). Given the particularly complex nature of class actions, the public interest in favor of settlement weighs decidedly in favor of compromised settlements.

When a court is asked to determine if a proposed settlement is appropriate, the court is not required to substitute its own judgment for that of the parties or to decide the merits of the case itself. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983). In fact, when a court is reviewing a proposed settlement, the court may give considerable weight to the opinion of experienced counsel who believes that settlement is in the best interest of the class. *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

In the case at bar, settlement was reached after a great deal of informal and formal discovery was obtained by both parties. The parties worked diligently in reviewing and auditing a considerable amount of company and employee documents. Extensive interviews of class members and depositions of company witnesses were taken. The facts that were gathered were then applied to the legal principals that were presented in this case and counsel for both Parties were able to accurately evaluate the case. Both Parties were able to recognize the strengths and weaknesses of its case. Given the uncertainty that confronts both Parties if this case should continue, both Parties believe this settlement is fair, adequate, and reasonable. As such, the Parties respectfully submit the settlement should by approved by the Court.

B. The Fifth Circuit's Fairness Factors

The Fifth Circuit as developed its own test in which six factors, commonly referred to as the *Reed* factors, are examined by the district court in determining whether or not to approve a proposed class action settlement. *See Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). Those factors are: (1) the existence or not of fraud or collusion behind the proposed settlement; (2) the complexity, expense, and likely duration of the litigation should the settlement be rejected; (3) the stage of the proceedings and the amount of discovery that has been completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery for the class; and (6) the opinions of the class counsel, class representatives, and absent class members. *Id*. As will be discussed below, in the case presently before the Court, all six factors weigh in favor of the approval of the settlement.

First, the Settlement Agreement in this case was reached over a period of several months, under the direct supervision of an independent mediator. The Parties' interests were protected by their respective counsel, each of whom zealously represented its client. The Parties only agreed

to a settlement after each side came to believe the terms of the settlement were in their best interest based upon all the factors that had to be considered. No bad faith, fraud or collusion was present in the negotiation of this settlement. As a result, the first *Reed* factor favors settlement.

Second, if the proposed settlement were rejected by the Court, the litigants would be subject to a complex, expensive, and long litigation process. Settlement, at this juncture, will allow the litigants to save time and money in addition to furthering judicial economy. The Fifth Circuit requires courts to consider the amount of time and money the litigants will save, as well as the savings recognized by the judicial system if settlement is approved. *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 1983). Thus, the second *Reed* factor is also in favor of settlement.

Third, a district court must consider whether the case is far enough along and whether a sufficient amount of discovery has been conducted to allow the Parties to adequately assess their respective cases. Here, thousands of documents were exchanged in addition to the numerous interviews and depositions that were taken. This has given counsel for both Parties, who are experienced wage and hour class action attorneys, an adequate opportunity to determine the strengths and weaknesses of the case from each Party's perspective. The mediation process was extensive and took place over a period of several months. This allowed both sides a further opportunity to ensure their understanding of the case was sufficient to protect their clients' interests. This case had proceeded far enough and sufficient discovery has taken place to ensure that the interests of all Parties have been adequately addressed and protected. This factor favors settlement as well.

Turning to the fourth and fifth factors, which will be addressed together; these factors also demonstrate that settlement is fair, reasonable, and adequate. These factors ask the court to examine the probability of the plaintiffs' success on the merits as well as the range of possible

recovery. In the case at bar, both sides engaged in an extended analysis in an effort to determine the answer to these questions. Through discovery the Parties attempted to decide the number of hours the class members likely would have worked, how many were likely to reduce or inflate their hours, and whether Defendants would be liable for such failure. The Parties also engaged in discovery that would allow the parties to determine if final class certification was likely and whether Defendants' defenses on the merits of the case were plausible. Based upon the Parties' analysis it seems unclear whether Plaintiffs would have prevailed. Likewise, the range of possible recovery is large. It is possible that if this case were not settled now, recovery may not take place at all or recovery could take place years into the future and in an amount less favorable than the proposed settlement. Given the risks involved, both Parties are likely to benefit from the guarantees that this settlement provides. As a result, these factors also weigh in favor of settlement.

The final factor to be considered by this Court is the opinions of class counsel, class representatives and the absent class members. Class counsel, along with defense counsel, believes the settlement is fair, adequate, and reasonable. This is important because all counsel involved in this case are experienced in wage and hour class action litigation. Counsels' experience has led them to agree that the proposed settlement is in the best interests of their respective clients. Additionally, since the notice period started, only one valid and timely Rule 23 Class Member Opt-Out has been received and zero objections have been received. (Donly Dec. ¶13 and ¶14). This factor provides further evidence that the settlement should be approved.

C. The Notice Process used by the Parties Meets the Requirements of Due Process

As previously stated, the Parties engaged Rust to provide notification and administration services in this case. Rust has an extensive background in providing these services in class

action matters. (Donly Dec. ¶2). Rust has provided claim notification and/or claims administration services in more than 3,000 cases, of which, more than 900 have been labor and employment cases. (Donly Dec. ¶2).

After the Court granted preliminary approval of the Settlement Agreement, Defense Counsel provided Rust with a mailing list containing the Class Members' names, last known addresses, Social Security Numbers and settlement amounts. (Donly Dec. ¶7). In all, data for 912 Rule 23 Class Members was provided. (Donly Dec. ¶7).

The information was then processed and updated using the National Change of Address Database maintained by the United States Postal Service. (Donly Dec. ¶8). This database contains all requested changes of address filed with the United States Postal Service. (Donly Dec. ¶8). Therefore, if a potential Rule 23 Class Member had requested a change of address with the United States Postal Service, that new address would be used in connection with the mailing of the Class Notice. (Donly Dec. ¶8).

On February 10, 2011 Class Notices were mailed to the 912 Rule 23 Class Members. (Donly Dec. ¶9). Rule 23 Class Members were notified, using the Notice and Claims Forms approved by this Court, that they could submit a Claim Form postmarked by April 11, 2011, an Objection postmarked by March 22, 2011, or an Opt-Out Statement postmarked by March 22, 2011. (Donly Dec. ¶6 and ¶9). Rust received 258 undeliverable Notices. (Donly Dec. ¶10). Address traces were performed on 201 on those undeliverable Notices and those were re-mailed. (Donly Dec. ¶10). After the Notices were re-mailed, only 44 or 4.8% were subsequently returned as totally undeliverable. (Donly Dec. ¶10). Rust also received 14 Notices returned by the Post Office with forwarding addresses attached. (Donly Dec. ¶11). All 14 such Notices were promptly re-mailed using the forwarding address provided by the Post Office. (Donly Dec. ¶11).

Of the 912 Rule 23 Class Members, 380 have submitted claim forms. (Donly Dec. ¶12). This represents approximately 42% of all potential Rule 23 Class Members. (Donly Dec. ¶12). The 380 claim forms submitted represent approximately $566,883.79 in claims. (Donly Dec. ¶12). Additionally, there were 14 late claim forms submitted which the Parties have agreed to accept which equals $15,649.56 in claims. *Id*. Only one Opt-Out Statement was received and zero objections were received. (Donly Dec. ¶13 and ¶14; Opt-Out Statement attached as Exhibit B).

As discussed more fully above, the Parties believe that the Settlement Agreement this Court preliminarily approved on January 24, 2011, provides substantial benefits to the members of the class. Furthermore, the Parties are also convinced that the notice and claims process has been a success. A significant portion of the potential settlement class participated in the settlement with 63% of the settlement proceeds being claimed.

As this Court is aware, any Rule 23 Class Member who submitted a timely and proper claim pursuant to the claims procedure is entitled to payment under the Settlement Agreement. The one Rule 23 Class Member who submitted an Opt-Out Statement is excluded from the settlement class.

Because of the significant impact upon the rights of the proposed members of the Settlement Class it is incumbent upon the Parties to ensure that the notice and claims process is fair and reasonable. In this case, it is significant that 42% of the total Rule 23 Settlement Class have claimed a portion of the Rule 23 Settlement Fund. This represents a robust participation rate for a FLSA/Rule 23 state law wage and hour class action. *Rosenburg v. Internat'l Business Machines Corp.*, Case No. 06-00430 PJH (N.D. Cal. July 12, 2007) (FLSA and New York, Kentucky and California state law claims, 30% response rate); *Adams v. Inter-Con Security Sys.*,

Inc., Case No. C-06-5428 MHP (N.D. Cal. Feb. 28, 2008) (FLSA and California, Illinois and Maryland state law claims, 37% response rate).

This high participation rate far exceeds lower claim rates, which have been approved in other cases. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y 1970) (approving a settlement with a .04% claims rate). Also, the significant amount of funds claimed by Class Members surpasses the significantly lower amounts that other courts have approved. *See Williams v. MGM-Pathe*, 129 F.3d 1026, 1027 (9th Cir. 1997) (approving a settlement in which only $9,900.00 in claims were submitted to a $4.5 million settlement fund).

D. Benefits to the Settlement Class

The Settlement Agreement calls for Defendants to pay a total of One Million Three Hundred Fifty Thousand Dollars ($1,350,000.00) to the Rule 23 Settlement Fund. Of this amount, up to $450,000.00, was allocated for payment of Class Counsel fees and costs.

Rule 23 Claimants filed claims approximating $582,533.35. (Donly Dec. ¶12). When Class Counsel's fees and costs are subtracted from the Rule 23 Settlement Fund, $900,000.00 remained for payment to Rule 23 Class Members. Class Members then claimed approximately $62.99% of the funds available to the settlement class. Additionally, Defendants also agreed to pay the expenses of the Claims Administrator. The Claims Administrator's fees total an additional $93,529.95. (Donly Dec. ¶15). The Parties and their respective counsel believe that, under the terms of the Settlement Agreement, and based upon participation by Class Members in the settlement, Class Members are receiving substantial benefits through settlement.

E. Exclusions and Objections

The Settlement Agreement provides a procedure for Class Members to either opt-out of the settlement or object to its terms. The Notice received by Class Members detailed how either

option could be accomplished, should the Class Member desire to exercise their right to opt-out or object.

Specifically, a Class Member could opt-out by submitting a written and signed request for exclusion to the Claims Administrator. In order to be effective, the Opt-Out Statement had to be returned to the Claims Administrator via First Class United States mail and postmarked by March 22, 2011. This gave each Class Member 40 days to exercise his or her opt-out rights. Only one valid and timely Opt-Out Statement was received by the Claims Administrator. (Donly Dec. ¶13).

Likewise, a Class Member could object to the settlement by submitting a written statement to the Claims Administrator. In order to be effective, the Objection had to be returned to the Claims Administrator via First Class United States mail and postmarked by March 22, 2011. Again, each Class Member was given 40 days to exercise his or her right to object to the settlement. No Objections were received by the Claims Administrator. (Donly Dec. ¶14).

The low number of exclusions and the absence of any objections give even further support the assertion that the settlement reached in this case was fair, reasonable, and adequate. As a result, final approval of the settlement in this case should be granted.

F. Settlement Administration Services/Class Representative Payments

As this Court is aware, the Parties retained Rust to provide settlement administration services in this case. Rust is a qualified and appropriate entity to perform these services. Rust's qualifications are more fully set forth in the declaration of Caryn Donly, which accompanies this Motion. (Donly Dec. ¶2).

As indicated above, Defendants are responsible for the settlement administration fees incurred by Rust. The settlement administration fees in this case total $93,529.95. Counsel for

both Parties believes that the settlement administration fees charged by Rust are fair and reasonable. The Parties request this Court approve Rust as the settlement administrator.

The Settlement Agreement also allows the Rule 23 Class Representatives, Mourad Laichev and Eugene Leybman, to be paid an additional service award in the amount of $5,000.00 each for services that they provided to the prosecution of the case. Those services include, but are not limited to; investigatory work, meetings with Class Counsel, assumption of risks, and participation in mediation and related litigation activities. Defendants do not oppose these service awards or the amounts thereof. There have been no objections by any Class Member to the service awards or amount of these service awards. The amount of these service awards are well within reason, given this type of case. *See e.g.*, *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of $50,000.00); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990) (two incentive awards of $55,000.00, and three incentive awards of $35,000.00); *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 at *51-52 (N.D. Cal. Jan. 27, 2007) (a $25,000.00 service award in a FLSA overtime wages class action).

The Parties also believe the service awards, as set forth in the Settlement Agreement, are fair and reasonable. The Parties request the Court grant final approval of these service awards.

CONCLUSION

For the reasons set forth above, the Parties respectfully request that this Court enter an Order and Judgment granting final approval of the settlement of this dispute on the terms and amounts set forth in the Settlement Agreement, and that the Court grant final approval of the Settlement Class on the grounds set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, a copy of the above and foregoing was electronically filed with the Clerk of Court using the CM/ECF system and that same will be served to the following counsel of record through the CM/ECF system:

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