

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RAFAEL DURAN, individually and on	)	
behalf of all similarly situated people,	)	
	)	
Plaintiff,	)	Case No. 1:11-CV-00313-RJJ
v.	)	
	)	Honorable Robert J. Jonker
SARA LEE CORPORATION d/b/a	)	
SARA LEE FOOD & BEVERAGE, SARA	)	
LEE FOODSERVICE, AND COUNTRY	)	
COMMONS, a foreign corporation,	)	
	)	
Sara Lee.	)	

**BRIEF IN SUPPORT OF JOINT MOTION FOR APPROVAL  
OF THE PARTIES' PROPOSED SETTLEMENT**

The parties, through their counsel, jointly request that this Court approve their proposed settlement of the present case — a collective action filed pursuant to the Fair Labor Standards Act (“FLSA”).

**Background**

In his Complaint, Plaintiff Rafael Duran alleged that Defendant Sara Lee Corporation (“Sara Lee”) violated the FLSA by allegedly failing to pay for time spent donning and doffing certain personal protective equipment (“PPE”) at the beginning and end of his shift (“PPE Claim”) as well as certain good manufacturing practices (“GMP”) gear at the beginning and end of his shift (“GMP Claim”), and by allegedly failing to pay for donning and doffing during his unpaid meal break (“Meal Break Claim”).

In March 2012, the Court granted Duran’s Motion for Conditional Certification. Subsequently, approximately 70 current or former Sara Lee employees opted in to this lawsuit. Many of those individuals eventually were dismissed from the lawsuit for one reason or another.

The parties and counsel engaged in thorough discovery over more than 18 months, including dozens of depositions, extensive document productions, and many sets of answers to interrogatories. After the completion of discovery, both parties moved for summary judgment. The Court granted in part and denied in part Sara Lee's motion for summary judgment. The Court also denied Plaintiffs' cross-motion for summary judgment. In addition, the Court denied Sara Lee's motion for decertification.

In February 2014, the Court bifurcated the case, for purposes of trial, into separate liability and damages phases. By the time of trial, Duran and 25 other Plaintiffs (the "Opt-in Plaintiffs") remained in the lawsuit. In March 2014, after a trial limited to the issue of liability, the jury returned a split verdict. The jury returned a verdict in favor of Plaintiffs on their PPE Claim and found that Sara Lee willfully violated the FLSA with regard to that claim. The jury also returned a verdict in favor of Sara Lee on Plaintiffs' GMP Claim and on their Meal Break Claim. After the trial on liability concluded, the parties continued their settlement discussions and have since negotiated a proposed settlement of the entire lawsuit.

As explained below, the parties believe the settlement is a reasonable resolution of bona fide disputes. The parties desire to avoid uncertainty on the issue of damages and the outcome of any appeals on liability and/or damages, and to avoid incurring further litigation expenses. If the proposed settlement is approved by this Court, the parties will memorialize the terms applicable to each plaintiff through individual written agreements and will then file a stipulation or agreed motion to dismiss the case in its entirety and with prejudice.

#### **Legal Standard**

A federal district court may approve a stipulated settlement of a suit brought in a federal district court pursuant to Section 16(b) of the FLSA. *See, e.g., Martin v. Indiana Michigan*

*Power Co.*, 292 F. Supp. 2d 947, 960 (W.D. Mich. 2002) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1355 (11th Cir. 1982)). To approve a FLSA settlement, the court must determine whether the settlement is a “fair and reasonable resolution of a bona fide dispute over FLSA provisions.” *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 719 (E.D. La. 2008). If the settlement agreement reflects a “reasonable compromise” over issues that are “actually in dispute,” the district court may approve the settlement “in order to promote the policy of encouraging settlement.” *Lynn's Food Stores, Inc.*, 679 F.2d at 1354. In the analogous area of class action settlements under Rule 23 of the Federal Rules of Civil Procedure, the Sixth Circuit has identified seven factors that should aid a court in its determination of whether a class action settlement is fair, reasonable, and adequate:

(1) the risk of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

*Crawford v. Lexington-Fayette Urban Cnty. Gov't*, 2008 WL 4724499, at \*3 (E.D. Ky. Oct. 23, 2008) (citations omitted).

### **Discussion**

In this case, the parties’ proposed settlement is a fair and reasonable resolution of a bona fide dispute over Plaintiffs’ claims that Sara Lee violated the FLSA, and the proposed settlement comports with the relevant considerations set forth above.

The parties have existing, bona fide disputes on a number of factual and legal issues in the case. For example, with respect to the factual issues, the parties have produced (and would produce at a damages trial) different testimony, documentary evidence and opinions about, among other things, the time it supposedly takes to don and doff PPE, the time spent walking to and from work areas, and the time spent walking to and from the entrance of the plant, all

relative to when employees entered and exited the plant and clocked in and out. The parties also have disagreements on several legal issues, such as whether the *de minimis* doctrine is a viable defense, and, if so, whether Plaintiffs' PPE Claim is or is not compensable pursuant to that doctrine. Given the strong likelihood of appeals in the absence of a settlement, many of these and other related issues involve uncertain and unresolved outcomes. Nonetheless, the discovery conducted and evidence elicited thus far, including at the trial on liability, have enabled the parties and their counsel to assess the respective strengths and weaknesses of their cases and of potential appeals by either party as to the matters in dispute.

The parties have reached the conclusion that their proposed settlement is, subject to court approval, in their best interests, as it is a reasonable resolution of the matter. The proposed settlement will eliminate, for both sides, the extensive time, uncertainty and risks associated with continuing this litigation. If, for example, the parties went to trial on damages, Sara Lee would face the obligation of paying an uncertain amount of damages and additional attorney's fees and costs, absent a successful appeal. If, on the other hand, Sara Lee did appeal and ultimately prevailed, in whole or part, Plaintiffs would face the potential of possibly recovering nothing, and, moreover, being responsible to pay Sara Lee its taxable costs plus certain attorney's fees already imposed as sanctions by Magistrate Judge Brenneman (that this Court upheld over Plaintiffs' objection). Alternatively, many Plaintiffs might be entitled to a smaller amount of damages, and some Plaintiffs could recover no damages as a matter of law, if the Sixth Circuit concluded – contrary to the jury's verdict – that a two-year statute of limitations were applicable because Sara Lee did not act “willfully” under the FLSA. A reversal on the issue of willfulness also likely would affect Plaintiffs' claim for liquidated damages.

Further, even without any appeals, some Plaintiffs might recover nothing if they failed to

appear for a damages trial.<sup>1</sup> A settlement also reduces the risk that any such Plaintiffs might recover zero dollars. In sum, because it is not certain, among other things, how a jury might resolve the damages issues, or how the Sixth Circuit might resolve likely appeals, either on liability or damages (or both), the proposed settlement is a reasonable resolution for all parties.

The proposed settlement also is fair because the aggregate amount of the settlement to be paid to the 26 Plaintiffs (\$85,000) bears a reasonable relationship to the amount of time in dispute, each Plaintiff's respective participation in the case, and the risks of proceeding with the litigation. *See Exhibit 1*, Template Settlement Agreement. Under the parties' proposed settlement, the vast majority of the settlement funds will be distributed among all 26 Plaintiffs based on a formula that accounts for their hourly rates of pay and the number of days that they actually worked within the statutory three-year period preceding the filing of their consent forms. The payment calculations are based on 14.38 minutes per day of unpaid time.<sup>2</sup> This figure, when applied to all 26 Plaintiffs and doubled to account for the potential recovery of liquidated damages, amounts to an aggregate total of \$77,725. As to the remaining amount of the settlement proceeds, the parties propose that each Plaintiff who was deposed in the case would receive \$250, and any Plaintiffs who testified at trial would receive a \$250 payment (whether or not they were deposed). This amounts to an additional \$7,250 in the aggregate. Finally, the remaining \$25 would be paid to Plaintiff Nakia Moody, who will receive the lowest settlement

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<sup>1</sup> Several Plaintiffs who were properly served with subpoenas to appear for trial at the liability phase did not, in fact, appear for trial.

<sup>2</sup> Sara Lee disputes that the 14.38 minute figure correctly represents the time actually needed per day for donning, doffing and walking by any employees at its Zeeland plant. Sara Lee maintains that the number is significantly lower and it would, if a damages trial were necessary, produce evidence to that effect. Nonetheless, in the interest of settlement and to reduce the uncertainty and expense of further litigation, Sara Lee, without admitting that 14.38 minutes is correct or representative of any employees in Zeeland (or, for that matter, any other plant), is willing – subject to this Court's approval – to accept that figure in order to resolve the present case.

payment of the 26 Plaintiffs. *See Exhibit 2*, Spreadsheet with amount to be paid to each Plaintiff.

Under the terms of the proposed settlement, Sara Lee would pay Plaintiffs' counsel the aggregate amount of \$640,000, which would be comprised of \$600,000 for reasonable attorneys' fees and \$40,000 for costs. Plaintiffs' counsel submits that these fees are lower than Plaintiffs' actual attorney's fees incurred in prosecuting the action on Plaintiffs' behalf, but they are willing to compromise on their fees. Sara Lee, for its part, believes that the amount of reasonable fees should be lower, but it too is willing to compromise for purposes of this proposed settlement. The parties jointly believe, however, that the proposed resolution of attorneys' fees and costs is reasonable because of the many issues presented in the case, the lengthy nature of the litigation, the dozens of depositions taken, and the amount of resources spent in mediations, motion practice, discovery, trial, post-trial analysis, negotiation and resolution of Plaintiffs' claims.

Pursuant to the parties' proposal, Sara Lee will have 30 days after the later of the date(s) on which: (i) Plaintiffs' counsel delivers to Sara Lee's counsel an executed Agreed Motion or Stipulation Of Dismissal With Prejudice of the lawsuit, and (ii) Sara Lee's counsel receives from Plaintiffs' counsel at least 20 of the 26 Plaintiffs' executed individual settlement agreements and W-4 and W-9 tax forms, to issue the settlement checks to Plaintiffs and the check to Plaintiffs' counsel for their fees and costs. The parties agree that the proposed settlement, including all payments to Plaintiffs and their counsel, is contingent upon at least 20 of the 26 Plaintiffs executing the agreements and providing the tax forms.<sup>3</sup>

Finally, both sides compromised on key claims and defenses and appellate rights, and the proposed settlement represents a true compromise as to damages in light of the available

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<sup>3</sup> Plaintiffs' counsel believes that their clients will execute the individual written agreements and provide the necessary tax forms. If, however, Plaintiffs' counsel are unable to obtain the necessary signatures on the settlement agreements, the parties' counsel will, at that juncture, discuss other options for a potential resolution of any issues.

evidence. The proposed settlement also represents an arm's-length negotiation by counsel. It provides relief to all 26 Plaintiffs, and eliminates the inherent risks both sides would bear if this litigation were to continue. Given these circumstances, a presumption of fairness should attach to the proposed settlement. *See Lynn's Food Stores*, 679 F.2d at 1354 (recognizing that courts rely on the adversarial nature of a litigated FLSA case resulting in settlement as an indication of fairness).

**Conclusion**

For the foregoing reasons, the parties respectfully request that the Court find that the parties' proposed settlement reflects a fair and reasonable resolution of bona fide disputes, and issue an order approving the proposed settlement.

Dated: July 30, 2014

Jointly submitted by:

SOMMERS SCHWARTZ, P.C.

MAYER BROWN LLP

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By: /s/ Andrew S. Rosenman

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**CERTIFICATE OF SERVICE**

I certify that on July 30, 2014, I electronically filed the forgoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

By: /s/ Andrew S. Rosenman  
Andrew S. Rosenman