

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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**RANDY CLENDENING, PAUL KLIKNO,  
EMMA THOMPSON, LATOYA THOMAS,  
BRYAN GARY, PATRICK HARRIS, CARL  
HARRIS, LAURYNE KERR, DEBORAH  
THOMPSON, STEVE CAMPBELL, DAWN  
BRYANT, JOHN PIKE, GREG WESSMAN,  
GREG WALL, and KEVIN BRUCE, on behalf  
of themselves and all others who consent to  
become Plaintiffs and similarly situated  
employees,**

**Plaintiffs,**

**v.**

**Case No. 11 CV 4540**

**KRAFT FOODS GLOBAL, INC, Cadbury  
Division, f/d/b/a CADBURY ADAMS USA LLC;  
and CADBURY SCHWEPPS, AMERICAS  
BEVERAGES, and CADBURY ADAMS.**

**Defendant,**

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**MEMORANDUM IN SUPPORT OF PETITION FOR APPROVAL OF SETTLEMENT  
AWARD, ATTORNEY FEES AND COSTS, AND DISTRIBUTION TO CLASS  
REPRESENTATIVES AND CLASS MEMBERS**

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**INTRODUCTION**

This is a class action for unpaid wages and overtime wages brought pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, (“FLSA”), the Illinois Minimum Wage Law, 820 ILCS 105/4, *et seq.*, and the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.* This Court granted preliminary approval of the parties’ proposed class action settlement (“Settlement”) on January 31, 2012, setting June 8, 2012 as the date for a Fairness Hearing. The court set a scheduling order at that time. In compliance with that schedule, the Class Notices

(amended as dictated by the Court), were mailed to all identified class members on or before March 13, 2012, explaining the terms of the Settlement and the Class Members' right to object or opt-out. No objections were received. One class member has opted out.

The amount of the Settlement Fund was resolved between the parties, discussed in detail with the court at the preliminary approval hearing, and explained to the Class in the Class Notice. The Settlement Fund ("Settlement Fund") totals One Million Sixty Thousand Three Hundred Fifty-two Dollars and Forty-eight cents (\$1,060,352.48) and is intended to resolve all Federal and Illinois state law wage and hour claims of the Class Representatives and Class Members, and to cap Defendant's liability -- other than for payroll taxes and settlement administration costs. The Plaintiffs believe that the Settlement is fair and reasonable in light of the delays and uncertainties of litigation, and seek its final approval, as well as the Court's approval of the common fund award of fees and costs from the settlement in the amount (i.e., the sum of (1) counsels' lodestar of \$202,595.25, (2) litigation expenses of \$5,951.85 and (3) a lodestar-multiplier of 1.28, which equates to \$56,541.02, bringing the fee to \$265,088.12 or 25% of the total Settlement Fund as promised in the Notice to the Class). Finally, the plaintiffs seek the Court's approval to pay service awards of \$1,000.00 from the Settlement Fund to each to the 15 class representatives for their efforts in support of settlement, and distribute the remainder of the fund *pro rata* among the class as more particularly described in the Settlement.

#### HISTORY OF THE PROCEEDINGS

Class Counsel filed this class action on July 5, 2011. Class Counsel were previously successful in a similar wage claim brought against this same defendant in the Spoerle case.<sup>1</sup> That case was litigated for over 4 years, which ultimately concluded when the United States Supreme Court denied Defendant's Petition for Certiorari. Based on counsels' prior involvement

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<sup>1</sup> Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427 (7th Cir. 2010)

in that case, counsel in this case were in a strong position to assess the value of the plaintiffs' claims and defendant's defenses and thus move to settlement discussions early on.

Lead counsel engaged in extensive informal discovery during the prosecution of the class action, including, but not limited to: floor plans, blue prints, payroll and wage payment data and information, information regarding clothing and personal protective equipment worn and used by employees, information regarding shift schedules and times, information regarding vacation and holiday schedules, and information regarding various employment policies, procedures and rules. Over a series of discussions and conferences during the months of September, October and November, 2011, counsel for the parties developed a calculation model based on the average wage for all Class Members for each year in the Class Period to estimate the amount of unpaid wages. The information gathered through the informal discovery allowed counsel to run the necessary final calculations to determine the unpaid wages. The settlement discussions allowed counsel to complete negotiations and set forth specific terms for a proposed Settlement.

On December 13, 2011, Lead Class Counsel met with the majority of the Class Representatives as well as many other Class Members to discuss the proposed Settlement. In addition, they created a website that allowed Class Members to remain updated on the progress of the case. The website specifically explained the settlement and included the power point presentation that formed the basis of the settlement discussions held during the meetings with Class Representatives and the Class Members. None of the Class Members in attendance objected to the proposed settlement and the Class Representatives approved the terms of the proposed Settlement.

On January 31, 2012 the Court granted preliminary approval of the Settlement. In compliance with the schedule the Court approved, Kraft provided the Class Members' names and

last-known addresses and, relying on the assistance of Rust Consulting, Inc., mailed the court-approved Notice of Class Action Settlement<sup>2</sup> to the Class Members. Updates regarding undelivered mailings and additional attempts to mail notices were performed by Kraft and Rust Consulting. The Court had ordered, and the Class Notice informed Class Members, that the deadline for filing an opt-out and/or objection was April 27, 2012, and that any such filings are to be reported by Plaintiffs by May 28, 2012. According to the reports received from Rust Consulting thus far, as described in their Declaration<sup>3</sup>, no objections were received and only a single class member submitted a request to be excluded from the Settlement..

### **AWARD**

Subject to the Court's approval, the Settlement Fund ("Settlement Fund") totals One Million Sixty Thousand Three Hundred Fifty-two Dollars and Forty-eight cents (\$1,060,352.48) and is intended to resolve all federal and Illinois state law wage and hour claims of the Class Representatives and Class Members, including claims for unpaid wages, penalties, a \$1000 Service award to each of the Class Representatives, attorneys fees and costs.<sup>4</sup> Defendant's settlement liability is thus capped by this amount, other than the Defendant's share of payroll taxes and settlement administration costs (including payment to Rust Consultants).

If approved by the Court, each Class Member shall be allocated a proportionate share of the Settlement Fund after the Settlement Fund has been reduced by: (a) the attorneys' fees and costs allowed under Paragraph 5 of the Settlement; (b) the Class Representative Service Awards allowed under Paragraph 4 of the Settlement; and (c) a \$20.00 minimum payment for each Class Member as allowed under Paragraph 3 of the Settlement. Each Class Member's proportionate share of the Settlement Fund will be determined by the number of weeks worked during the

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<sup>2</sup> See Notice, attached to Petition

<sup>3</sup> Declaration of Stacy Rowe, to be submitted by Defendant

<sup>4</sup> See Settlement, Paragraph 2, Pages 4-5, attached to Petition

Class Period and the average wage for that time, as established in more detail in Paragraph 3 of the Settlement.

### **THE SETTLEMENT TERMS ARE FAIR AND REASONABLE**

Class Counsel recommend that the Court approve this settlement as fair and reasonable for the Class. Each class member's recovery reflects close to full-compensation for the unpaid wages Class Counsel estimates for the donning, doffing they claim. This is an excellent result, as it provides certain, substantial recovery to the Class while avoiding significant risks arising from numerous defenses that Plaintiffs dispute but the Defendant has asserted – for example that the donning and doffing activities are preliminary and post-liminary to the principle activities of work at the plant and/or *de minimis*. As the Plaintiffs explained to the Court at the hearing for preliminary approval, the damages period is cut off as of the the date Defendant changed its policy regarding donning and doffing, such that Class Members were authorized to take their protective garments home, thereby allowing them to don and doff their clothes at home. For the same reason, the Settlement does not provide for prospective relief.

In sum, as the Court observed at the preliminary approval hearing, “the amount of the settlement fund represents a near-complete victory on liability and damages, and the settlement is otherwise fair. Moreover, injunctive relief is not required because Defendant changed its donning and doffing policies.”<sup>5</sup>

### **ATTORNEY FEES AND COSTS**

The attorneys fees counsel seek from the settlement are consistent with the terms of Settlement and Notice to the Class, and reasonable. As the court-approved Class Notice informed the Class Members, the Settlement allows for attorneys' fees, costs, and an

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<sup>5</sup> Docket Entry #24

enhancement up to 25% of the Settlement Fund, in two parts<sup>6</sup>. The first portion is Plaintiff's lodestar (plus litigation expenses). The second portion is a fee enhancement of the lodestar fees that allows Class Counsel to seek an additional amount in fees to bring the total fee up to 25% of the total Settlement Fund.

1. Lodestar and Litigation Expenses: The attorneys' fees and litigation expenses in this class action total \$208,547.10. The following chart itemizes each individual attorney's (and paralegals/office administrator's) hours worked through May 17, 2012, with the applicable hourly rate.<sup>7</sup>

<b>L&amp;C</b>	<b>Position</b>	<b>Hours</b>	<b>Rate</b>	<b>Fee</b>
James A. Olson	Partner: Grad. 1966	76.5	\$605	\$46,282.5
Ginger Murray	Partner: Grad. 1995	123.5	\$475	\$60,562.50
Levi Bjork	Atty.: Grad. 2010	55.25	\$250	\$13,812.50
Megan Corning	Atty.: Grad. 2011	2.0	\$250	\$500.00
Leanne Smith	Paralegal	11.25	\$90	\$1012.50
Dan Lenz	Atty.; Grad. 2010	1.5	\$250	\$375.00
Lori J. Kannenberg	Firm Administrator	8	\$125	\$1,000.00
Jennifer Olson Dolan	Attorney since 1992	14.25	\$385	\$5,486.25
MBG				
Sarah Siskind	Partner: Grad. 1977	49.0	\$585	\$28,665.00
Nancy Maldonado	Partner: Grad. 2001	56.2	\$395	\$22,199.00
<b>TOTAL</b>				\$179,895.25

<sup>6</sup> See Settlement, Paragraph 5, Page 7 as attached to the Petition

<sup>7</sup> Time records supporting the lodestar are attachments to the Declaration of Attorney Olson and the Declaration from Attorney Siskind. The supporting documents also address the reasonableness of the rates.

In addition, Lawton & Cates incurred expenses and paid advances in the amount of \$5,951.85. Finally based on experience in the Spoerle case, it is anticipated that Lead Counsel will need to provide another 40 hours in legal services (20 hours of Attorney Olson and 20 hours from Attorney Murray) to attend the Fairness Hearing, answer questions of Class Members/Representatives, as well as 10 hours of service of support staff, to work with Rust Consulting and Defense Counsel, Attorney Kaplan to complete the distribution process. This time will add an additional \$22,700 (\$12,100 for Attorney Olson's time, \$9,700 for Attorney Murray's time and \$900 for Leanne Smith's time) to the Lawton and Cates lodestar in the case, yielding a total lodestar for the firms combined of \$202,595.25.

## 2. The Common Fund Enhancement

The Settlement provides for a common fund enhancement of the lodestar, not to exceed 25% of the total Settlement Fund (\$265,088.12), as specified in Paragraph 5 of the Settlement. Given the lodestar, this \$265,088.12 fee reflects a multiplier of approximately 1.28. Class Members were informed of the provision in the Retainer Agreement and Class Notice, and none objected. Class Counsel submit that enhancement of \$56,541.02 is a reasonable one and request that the enhanced lodestar be awarded for the following reasons:

- a. **The Seventh Circuit favors common fund enhancements above lodestar to compensate counsel for risks of the kind counsel have undertaken in this case.**

Counsel's lodestar is the "starting point" for determining the proper fee under *Hensley v. Eckerhart*, 461 U.S. 424, 433, 434, n.9 (1983). However, where settlement has created a common fund, the Seventh Circuit favors fee enhancements above lodestar. For example, in *Matter of Continental Ill Sec. Litig.*, 962 F.2d 566 (7<sup>th</sup> Cir. 1992), the Seventh Circuit reversed the district court's refusal to award counsel a 20% recovery out of the class fund because it was

higher than counsels' lodestar, observing that "the failure to make any provision for risk of loss may result in systematic under-compensation of plaintiffs' counsel in a class action case, where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent one." It held that "[h]aving employed their professional skills to create a cornucopia for the class the lawyers for the class, [class counsel] were entitled under the principles of restitution to suitable compensation for their efforts." *Id.* at 569. The Court observed that a lodestar multiplier of 2.0 or percentage-of-the-fund of 25% or higher might be appropriate, *Id.* at 569, and remanded the enhancement issue to the district court.

In *Florin*, an ERISA class action that settled with a common fund, the Court held that using a multiplier was not merely permissible but mandated where plaintiffs' counsel "had no sure source of compensation for their services." 34 F.3d at 565. It awarded a risk multiplier of 1.53 (higher than the multiplier sought here). In *Cook*, 142 F.3d at 1015, the Court held that "no matter how dazzling the array of legal talent or how many hours will eventually be logged, there is nonetheless the possibility of no recovery" and, in that case as well, awarded a multiplier of 1.5. *See also United States District Court v. White*, 2001 SL 1204193 \*7(N.D. Ill., October 10, 2001) (recognizing that a multiplier of 2.0 "may be a sensible ceiling" and awarding multiplier of 1.3)

**b. This case meets the requirements for a fee enhancement.**

This was a contingent fee case in an area of the law that continues to emerge and results in conflicting results in different courts. As previously observed, there was thus always the risk in this case that defendant might prevail on one or more of its defenses and thus the possibility that the fees would never be paid and that expenses would not be reimbursed. Against these risks, the recovery secured by the proposed Settlement for the class was swift and substantial.

The modest risk multiplier of 1.28 bringing the requested fee to 25% of the Settlement Fund sought here is reasonable.

**c. The class representatives initially agreed to pay 33 1/3% of any gross settlement for the class as recovery for fees.**

The initial fee agreement provided that attorneys' fees would be the greater of 33 1/3% of any gross settlement collective common fund or judgment, plus litigation costs or statutory fees. The Class Members by and through the Class Representatives as well as other Class Members signed a retainer agreement, agreeing to pay counsel 33% of the Total Settlement Award.<sup>8</sup> This is a very typical fee arrangement.

**SUMMARY**

Plaintiffs request that the Court approve the Settlement Award in the amount of One Million Sixty Thousand Three Hundred Fifty-two Dollars and Forty-eight cents (\$1,060,352.48), to be distributed to the Class Members as set forth in the Settlement Agreement and Release of Claims, and Award Attorney fees including a lodestar in the amount of \$202,595.25, costs of \$5,951.85 and an additional \$56,541.02, as an enhancement, totaling \$265,088.12, which represents 25% of the total Settlement Award,

Respectfully Submitted,

**LAWTON & CATES, S.C.**

By: \_\_\_\_\_/s/\_\_\_\_\_  
Ginger L. Murray  
Registration ID # ILND-GT-4057  
Wis. State Bar No.: 1028352

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<sup>8</sup> See Retainer Agreement, signed by 227 Class Members, including all Class Representatives, attached to Declaration of James Olson

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