THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4:14-cv-165-H-KS

ROGER SOUTHERLAND and GWENDOLYN DOZIER, as Individuals and as Representatives on behalf of all other similarly situated,

Plaintiffs,

v.

THE HILLSHIRE BRANDS COMPANY,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL CERTIFICATION OF AN FLSA COLLECTIVE ACTION; FOR FINAL APPROVAL OF SETTLEMENT; AND FOR FINAL APPROVAL OF ATTORNEYS FEES, COSTS AND SERVICE AWARDS

I. INTRODUCTION

Named Plaintiffs Roger Southerland and Gwendolyn Dozier ("Named Plaintiffs"), individually and on behalf of all FLSA Opt-In Plaintiffs ("Opt-Ins") ("Named Plaintiffs" and "Opt-Ins" collectively referred to as "Plaintiffs"), and Defendant The Hillshire Brands Co., file this joint motion respectfully seeking the Court's final approval of the parties' Settlement Agreement to resolve this action. Through this Settlement Agreement, the parties resolve the dispute at issue in this complex litigation, and in so doing, provide a substantial benefit to the Plaintiffs.

In this action, Named Plaintiffs alleged that Defendant violated the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), by failing to pay its non-exempt, hourly production employees at its Tarboro, North Carolina, bakery production facility all of the wages and

overtime compensation owed to them. *See* Complaint (Dkt. 1). The alleged uncompensated time included time that employees spend changing into and out of certain required sanitary items before and after the production shift. Named Plaintiffs' Counsel filed with the Court opt-in consent forms on behalf of 442 additional persons who desired to assert the same claims in this action. The Complaint also included a claim for common-law breach of contract based on Defendant's alleged breach of promise to pay Plaintiffs the agreed hourly wage for all hours worked and an alleged violation of the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, *et seq*. based on the same alleged facts. Both state-law claims sought recovery for both straight time and overtime wages.

On November 10, 2014, Defendant filed its Partial Motion to Dismiss the Complaint (Dkt. 26 & 27), which sought dismissal of the breach of contract claim, asserted that plaintiffs in the prior lawsuit involving the Tarboro plant that was captioned *Anderson v. Sara Lee Corp*., No. 4:03-cv-00031-H (E.D.N.C.) had released their FLSA claims in this lawsuit through the effective date of the *Anderson* settlement, and sought dismissal of Plaintiffs' claim of willfulness under the FLSA. *See* Dkt. 27. Plaintiffs filed their opposition to this partial motion to dismiss on August 20, 2015. *See* Dkt. 51. On September 4, 2015, Defendant filed a Notice of Tentative Settlement and Withdrawal of Partial Motion to Dismiss (Dkt. 55), whereby Defendant withdrew its partial motion to dismiss without prejudice in light of the settlement in principle that the parties had reached.

Following extensive and good-faith arm's-length negotiations between counsel for the parties, Plaintiffs and Defendant have a settlement of this dispute which, pending final Court approval, settles and resolves all claims (both federal and state) in this action. The basic terms of the proposed settlement, which are set forth in the Settlement Agreement, attached as Exhibit 1

to Dkt. 69 (Dkt. 69-1), were set forth in the parties' Joint Motion for Preliminary Approval of Settlement Agreement and Conditional Certification of an FLSA Collective Action for Settlement Purposes (Dkt.69). On July 21, 2017, the Court approved the Joint Motion for Preliminary Approval and conditionally certified an FLSA collective action. (Dkt. 71, 72, 73) The Court also approved the form of notice to be sent to both existing and eligible opt-in Plaintiffs, as well as the consent-to-join form to be included with the Notice. (Dkt. 72, 73).

After preliminary approval of the settlement agreement, Class Counsel updated the addresses of putative class members provided by Defendant through a national postal service database. The Court-approved "Notice of Settlement of Collective Action Lawsuit" ("Notice"), and "Consent to Join Collective Action Settlement ("Consent Form"), were mailed to all Current Opt-in Plaintiffs and an additional 406 eligible Plaintiffs. (Dkt. 69-2 and 69-3). Of the 406 eligible Plaintiffs, 216 returned executed Consents, which have been filed with the Court. (Dkt. 74-79; 84) As of the date of filing this Motion for Final Approval and Memorandum, Class Counsel has not received any objections to the terms of the settlement, attorney's fees, or service awards to Named Plaintiffs. Class Counsel has not received any opt-outs.

The parties respectfully submit that this Joint Motion for Final Approval should be granted because the proposed settlement falls well within the range of reasonableness, particularly in light of the risks of establishing liability and damages, and there are no grounds to doubt its fairness. The settlement was negotiated by experienced collective action and class counsel after appropriate investigation of the claims and defenses. The settlement is a fair and reasonable compromise of a *bona fide* dispute between the parties. In addition, public policy favors the settlement of complex putative collective actions.[1]

[1] Because the conditions found by the Court regarding the suitability of conditional certification

Accordingly, the parties request that the Court: grant their joint motion, and enter an Order in a form substantially similar to the attached Exhibit A, (1) granting final certification of this Fair Labor Standards Act ("FLSA") collective action; (2) granting final approval of the parties' settlement as a fair and reasonable compromise of a bona fide dispute between the parties; (3) approving the attorney's fees and costs sought by class counsel; (4) approving the reasonableness of incentive awards to the Named Plaintiffs; and (5) dismissing this action, with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY.

A. The Previous Wage And Hour Claim in *Anderson* Against This Same Defendant.

Plaintiffs' counsel previously represented the plaintiffs in the *Anderson* litigation in this Court, which, like this lawsuit, brought claims under the FLSA for pre- and post-shift donning and doffing activities performed by hourly employees at the Tarboro facility, and which was conditionally certified as a collective action under the FLSA.[2] Named Plaintiffs Roger Southerland and Gwendolyn Dozier were plaintiffs in *Anderson*. In 2013, the parties reached a settlement after 10 years of litigation, full discovery, and filing summary judgment briefing and two appeals. The gross settlement amount approved by this Court in *Anderson* was $1,400,000.00, which included proceeds distributed to the plaintiffs as well as attorney's fees and costs. A history of the litigation, including the extensive discovery conducted and two appeals to the Fourth Circuit that occurred during the course of the decade-long lawsuit, is set forth in the

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of a collective action for settlement purposes, set forth on pages six through nine of the Court's Order and Memorandum and Recommendation (Dkt. 71), still apply, and because the parties have stipulated in the Settlement Agreement to certification of a collective action for settlement purposes only, the parties respectfully request that the Court grant final collective action certification for settlement purposes.

[2] By the time the *Anderson* litigation was settled, it did not include state-law claims.

Anderson parties' memorandum in support of joint motion to approve settlement, No. 4:03-cv-00031-H, at Dkt. 199.

Since the *Anderson* litigation, Defendant has made process changes at its Tarboro facility that it contends, and Plaintiffs agree, minimize the amount of time hourly production employees spend on pre- and post-shift clothes-changing activities and compensates those employees for such activities.

B. Plaintiffs' Complaint In This Action.

On September 2, 2014, the Named Plaintiffs filed the instant action. As in *Anderson*, they alleged that Defendant violated the FLSA by failing to pay its non-exempt, hourly production employees at its Tarboro, North Carolina, bakery production facility all of the wages and overtime compensation owed to them. *See* Complaint (Dkt. 1). The alleged uncompensated time included time that employees spend changing into and out of certain required sanitary items, namely the frock and required footwear, before and after the production shift. In addition to wage and hour claims under the FLSA, the Complaint also included a claim for common-law breach of contract based on Defendant's alleged breach of promise to pay Plaintiffs the agreed hourly wage for all hours worked and an alleged violation of the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1, *et seq*. based on the same alleged facts. These state-law claims sought recovery for both straight time and overtime wages. (As a result of the settlement, the state law claims will be dismissed.) (See Dkt. 71-1, p. 4.) After filing the Complaint, Named Plaintiffs' Counsel filed with the Court opt-in consent forms on behalf of 442[3] additional persons who desired to assert the same claims in this action.

[3]Of these individuals, thirty-four either stopped working at the Tarboro plant before the beginning of the maximum relevant limitations period for Plaintiffs' claims or otherwise do not appear in Defendant's pay data for the Tarboro plant. Accordingly, the parties agree that these

C. Defendant's Partial Motion to Dismiss

On November 10, 2014, Defendant filed its Partial Motion to Dismiss the Complaint (Dkt. 26 & 27) which sought dismissal of the breach of contract claim, asserted that the *Anderson* plaintiffs had released their FLSA claims in this lawsuit through the effective date of the *Anderson* settlement, and sought dismissal of Plaintiffs' claim of willfulness under the FLSA. *See* Dkt. 27.

Plaintiffs filed their opposition to this partial motion to dismiss on August 20, 2015. *See* Dkt. 51. On September 4, 2015, Defendant filed a Notice of Tentative Settlement and Withdrawal of Partial Motion to Dismiss (Dkt. 55), whereby Defendant withdrew its partial motion to dismiss without prejudice in light of the settlement in principle.

Should the case have proceeded, Defendant would have pursued its partial motion to dismiss through adjudication, and, with respect to any portions of the lawsuit surviving the Court's decision, deny all liability. Defendant does not concede that the activities at issue are compensable under the FLSA or the North Carolina Wage and Hour Act, and it denies that it entered into contracts with Plaintiffs to pay for the activities at issue. Defendant also disputes that this case is suitable for collective action treatment under the FLSA, although for purposes of this settlement only it agrees to certification of the FLSA claims to facilitate their resolution. Defendant has vigorously defended its policies and practices, and absent settlement would continue to do so through trial and through appeal of any adverse judgment.

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thirty-four individuals are not eligible to receive funds pursuant to this settlement, although by virtue of having filed their consents to join the FLSA claims in this case, they are included in and bound by the terms of the settlement as Participating Plaintiffs (as that term is defined in the Settlement Agreement). This notwithstanding, pursuant to the agreement of the parties, these 34 may secure their inclusion by submitting pay stubs or other valid proof of employment to the Employer, subject to verification, during the recovery period. To date, Plaintiffs' counsel has received nothing from any of these individuals which alters information reported by the employer.

D. The Parties Conducted Extensive Negotiations And Entered Into A Fair and Reasonable Settlement Agreement.

In September 2015, after several months of negotiations both before and after a full-day's settlement conference in Dallas, Texas in June 2015, the parties reached an agreement to settle this case, subject to the Court's approval, as memorialized in the executed Settlement Agreement. (Dkt. 69-1.) The Settlement Agreement provides for certification of Plaintiffs' FLSA claims for settlement purposes and for Settlement Notice to be sent to those additional 406 individuals eligible to opt into the FLSA claims, allowing them the opportunity to opt into the settlement. Collectively, those individuals who elect to opt in, as well as Named Plaintiffs and current Opt-In Plaintiffs, are defined in the Settlement Agreement as "Participating Plaintiffs." Defendant will pay a Gross Settlement Amount of $425,000.00, which includes payments to Participating Plaintiffs as a compromise of their claims for compensatory and liquidated damages under the FLSA and compromised attorney fees and costs in the amount of $132,420.00. The Settlement Agreement details the distributions of the Settlement Fund to Participating Plaintiffs. (Dkt 69-1, Sections 5.1-5.9.)

The Settlement Agreement is a fair, just, and reasonable resolution of Plaintiffs' claims for unpaid wages (including overtime compensation), liquidated damages, interest, and attorney's fees and costs. It was negotiated at arm's length by experienced counsel to resolve bona fide disputes between the parties with respect to (i) liability, and (ii) the amount of back pay allegedly due under the FLSA for time spent by hourly production, maintenance, and B&R employees at the Tarboro facility in donning and doffing certain required clothes and sanitary items during the maximum limitations period. The Settlement Agreement provides for a full release of all claims that Plaintiffs may have against Defendant regarding pre- and post-shift clothes-changing activities. Upon final approval of the Settlement Agreement, , there will be no

remaining matters in dispute between the parties, and the case should be dismissed with prejudice.

E. Service Payments to the Named Plaintiffs

The Settlement Agreement provides for service payments to the two Named Plaintiffs in the amount of $3000.00 each. The Named Plaintiffs not only leant their names to this action, coming forward to prosecute this action, they also worked closely with Plaintiffs' counsel to assist with determination of the factual support for and processing this action. They have provided continuing assistance to Plaintiffs' counsel to communicate with potential class members. In addition, Named Plaintiffs took days off from work without compensation (or using unearned leave) to help reach this Settlement during negotiations that took place over a full day in Dallas, Texas, in June 2015, in addition to travel days to and from Dallas, and have each agreed to the terms of the Settlement.

F. Preliminary Settlement Approval And Mailing of Notice to Named and Current Opt-In Plaintiffs and Eligible Plaintiffs.

On July 21, 2017, the Court preliminarily approved the Settlement (Dkt. 71 and 72), and conditionally certified the settlement class for settlement purposes. Notice of Settlement of Collective Action Lawsuit ("Notice"), as approved by the Court (Dkt. 72, 73), was mailed out to all class members on Exhibit A (Dkt. 69-2), which identified the Named and Current Opt-In Plaintiffs who opted in shortly after the Complaint was filed, and to all potential Opt In Plaintiffs on Exhibit B (Dkt. 69-3), which identified those individuals who are eligible because they worked for Defendant in an "hourly production, maintenance, or boiler and refrigeration ("B&R") position anytime between September 2, 2011, and September 23, 2015," but had not yet opted in as of the date of preliminary approval. (See Dkt. 71-1, p. 1.) Pursuant to the Settlement Agreement, and the Court's Preliminary Approval of Settlement, the court-approved

Notice and "Consent to Join Collective Action Settlement" ("Consent Form") were to be mailed within 30 days of the Court's preliminary approval. (Dkt. 71, p. 7 of 10.)

The Court-approved Notice and "Consent to Join Collective Action Settlement" ("Consent Form") were mailed by First Class Mail, on August 11, 2017. (Declaration of Malick Manga re Service of the Settlement Notice on All Prospective Collective Class Members, Exhibit B to Joint Motion for Final Approval ("Manga Declaration"). Before the Notice was mailed, Defendant provided Excel lists of all potential class members who had worked for Defendant during the class period, with their last known mailing addresses. Class counsel was responsible for providing Notice to putative settlement class members. Specifically, the notice was to be mailed by first class mail, postage prepaid, to the last known, most current address of each settlement class member who met the class definition by working in the positions described above "anytime between September 2, 2011, and September 23, 2015."

After receiving the Excel list(s) of Named and Current Opt In Plaintiffs (Dkt. 69-2) and eligible putative plaintiffs (Dkt. 69-3), Plaintiffs' Class counsel arranged for and paid an independent mailing service to update the lists using the National Change of Address (NCOA) database maintained by the United States Postal Service (USPS). Class Counsel, through this mailing service, utilized the program known as Quadient, formerly known as Satori, to obtain the latest change of addresses, if any. (Manga Declaration ¶¶ 4-5). This resulted in up-to-date mail-able address records for 850 putative settlement class members. The mailing service then printed envelopes addressed to all current opt-in plaintiff and eligible putative class members.

Malick Manga, who was retained by Class Counsel for this purpose, formatted the Notice and the Consent Form and caused them to be printed and placed in the pre-printed envelopes. Mr. Manga then applied appropriate postage for first class mail to each envelope,

and deposited the envelopes for mailing at the United States Postal Service Office at 14071 Peyton Drive, Chino Hills, California on August 11, 2017. (Manga Declaration, ¶¶ 6-8).

Thirty-four envelopes mailed to eligible class members in Exhibit B were returned as undeliverable. Seventeen envelopes mailed to Named and Current Opt-In Plaintiffs in Exhibit A were returned as undeliverable. A number of these returned undeliverable addresses on envelopes were updated again and re-mailed. (Manga Declaration ¶ 8)

The Settlement Agreement provides that Class Members had to return to Class Counsel Alvin Pittman at his office address, either by mail or facsimile, a completed signed Consent Form by October 14, 2017, a Settlement Notice period of at least 60 days from mailing, in order to be eligible for a settlement payment. (Exhibit C to Joint Motion for Final Approval, Declaration of Alvin L. Pittman ¶ 5). Of the Notices and Consent Forms mailed out to 406 eligible opt-in plaintiffs on August 11, 2017, Class Counsel Pittman received 216 completed, signed Consent Forms.[4] These 216 Consent Forms have all been filed with the Court as of November 7, 2017. (Dkt. 74 to Dkt. 79 and Dkt. 84). ((Exhibit C to Joint Motion for Final Approval, Declaration of Alvin L. Pittman ¶ 6; Manga Declaration ¶¶ 9-11). With the original Named and Opt In Plaintiffs, the total number of Consent forms filed with the Court is 660, of which 626 are indeed eligible settlement class members. *See supra* fn.3.

While the Settlement Agreement gives Defendant the right to void the settlement should less than 80% of the Eligible Plaintiffs opt into the case (*i.e.*, less than 325 Eligible Plaintiffs), Defendant has chosen to waive this right.

[4] 214 Opt In Plaintiffs on Exhibit B returned their Consent Forms on time. Defendant approved in writing pursuant to Section 4.3 of the Settlement Agreement (Dkt. 69-1, p. 9-10), the eligibility of 2 additional opt-in plaintiffs who returned their Consent Forms late, bringing the total to 216 additional Opt In Plaintiffs.

G. Lack of Class Member Objections or Requests to Opt Out

Putative Class members, including the Named Plaintiffs and Current Opt-In Plaintiffs (Exh. A, Dkt. 69-2) and the Eligible additional Opt-In Plaintiffs (Exhibit B, Dkt. 69-3), who worked at the Tarboro facility during the applicable three-year limitations period defined in the Notice, were provided the opportunity to object to the Settlement by informing Class Counsel by October 14, 2017 of their Objections, or appearing at the Fairness Hearing on December 5, 2017 to make their Objections to the Court. All Named and Current Opt-In Plaintiffs and all eligible additional opt-in Plaintiffs were informed about the attorney fees and expenses and service awards to Named Plaintiffs in the Notice of Settlement of Collective Action Lawsuit, approved by the Court (Dkt. 71-1, 72) and mailed to all Current Opt In Plaintiffs and eligible class members on August 11, 2017. (Exhibit C to Joint Motion for Final Approval, Declaration of Alvin L. Pittman ¶ 7; Manga Declaration ¶ 12).

With an objection deadline of October 14, 2017, as of November 21, 2017, no Current Opt In Plaintiff or eligible Opt-in Plaintiff has sent to Class Counsel an objection to any portion of the Settlement or allocation of Plaintiffs' attorney fees and expenses or to service awards to the Named Plaintiffs, or given notice to class counsel of their intent to opt-out of the Settlement or to object to the terms of the Settlement at the Fairness Hearing on December 5. (Exhibit C to Joint Motion for Final Approval, Declaration of Alvin L. Pittman, ¶ 7**;** Manga Declaration ¶12.)

III. ARGUMENT

Proposed settlements in FLSA collective actions generally require court approval because private settlement will not effectuate a valid release. *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007) ("[T]here is a judicial prohibition against the unsupervised waiver or settlement of [FLSA] claims."), *superseded on other grounds by regulation*, 73 Fed. Reg. 67987

(Nov. 17, 2008), *as recognized in Whiting v. Johns Hopkins Hosp*., 416 Fed. App'x 312 (4th Cir. 2011); *Howell v. Dolgencorp., Inc.*, No. 2:09-CV-41, 2011 WL 121912, at *1 (N.D. W. Va. Jan. 13, 2011) ("[C]laims for unpaid wages arising under the FLSA may be settled or compromised only with the approval of the District Court or the Secretary of Labor.").

In a private FLSA enforcement action, courts may approve settlements when the settlement proposed by the parties constitutes a reasonable compromise of the parties' bona fide dispute. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); *see also In re Dollar General Stores FLSA Litig*., 5:09-MD-1500, 2011 WL 3904609, at *2 (E.D.N.C. Aug. 23, 2011) (citations omitted). Here, the proposed settlement was negotiated at arm's length by experienced counsel and has the salutary effect of both providing meaningful monetary relief to Participating Plaintiffs and eliminating inherent risks both sides would bear if this complex litigation continued to resolution on the merits. Under these circumstances, a presumption of fairness should attach to the proposed settlement. *See Lynn's Food Stores*, 679 F.2d at 1354 (recognizing courts rely on the adversarial nature of a litigated FLSA case resulting in settlement as indicia of fairness); *see also In re Dollar General Stores FLSA Litig*., 2011 WL 3904609, at *2 ("There is a presumption in favor of approving a settlement as fair, . . . but court review is appropriate to ensure fairness to the parties.").

In *In re Dollar General Stores FLSA Litig.*, the district court noted there is no predetermined set of factors that a court must consider when assessing a settlement under the FLSA, but that "courts generally consider; (1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiff; (5) the probability of plaintiff's success on the merits and the

amount of the settlement in relation to the potential recovery." 2011 WL 3904609, at *2 (citations omitted). Consideration of these factors establishes that the parties' settlement is fundamentally fair and should be approved.

A. The Parties' Exploration Of The Facts And The Complexity And Likely Duration Of The Action Support Approving The Settlement

The first two factors strongly weigh in favor of approval of the settlement. While the instant litigation is in its early stages and the parties have not conducted formal discovery, both Plaintiffs' counsel and Defendant have developed extensive knowledge of pre- and post-shift practices at the Tarboro plant. Plaintiffs' counsel represented the *Anderson* plaintiffs, who included Named Plaintiffs Dozier and Southerland, during the ten years of the *Anderson* litigation. During that decade, the *Anderson* plaintiffs conducted extensive discovery and thoroughly vetted various aspects of the *Anderson* plaintiffs' wage-and-hour claims through two separate appeals and summary judgment briefing, culminating in a settlement negotiated after a lengthy mediation. Plaintiffs' counsel, as well as Defendant, are thus well-versed in the legal issues presented in this case and the potential exposure associated with Plaintiffs' claims. While some of the relevant pre- and post-shift clothes-changing practices have changed since the *Anderson* settlement, Plaintiffs' counsel is well aware of these changes both through conversation with the Named Plaintiffs, both of whom are currently employed at the Tarboro plant, and an all-day negotiating session involving both parties in June 2015.

As the ten-year litigation history of *Anderson* shows, litigating the FLSA issues raised in this case likely would span several years and would likely involve several complex issues. To date, 658 individuals in addition to the Named Plaintiffs have filed consents to join the FLSA claims in this case, of whom 626, including the two Named Plaintiffs, are indeed eligible Plaintiffs. If the case were to proceed, Defendant would vigorously contest conditional

certification of these putative Opt-In Plaintiffs' claims and would conduct substantial discovery, including discovery exploring how the Opt-In Plaintiffs' claims differ from one another. The parties likely would both move for summary judgment on some or all of the issues in this case, and, should a collective action be conditionally certified, Defendant would seek to decertify the claims at or before trial. Both parties are prepared to litigate any remaining claims through trial and appeal. Thus, by settling now, the parties will conserve substantial time and expense associated with litigating the claims to final disposition.

B. Absence Of Fraud Or Collusion And Experience Of Counsel

No evidence exists suggesting the settlement involved fraud or collusion between the parties. To the contrary, the settlement was negotiated at arms-length by experienced counsel over many months. Plaintiffs' counsel has been practicing law for over 30 years and has been involved in many class actions in the past, including FLSA collective actions. (See Declaration of Alvin L. Pittman in Support of Plaintiffs' Attorney's Fees and Costs, Dkt. 67). As noted above, Plaintiffs' counsel represented the *Anderson* plaintiffs in that prior FLSA litigation against Defendant. Defendant's counsel, too, have represented employers in numerous class or collective actions involving donning and doffing claims. This factor, too, weighs heavily in favor of approval of the proposed settlement. *See, e.g., Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) ("[T]he Settlement is the product of arm's length negotiations and, thus, is presumed to be fair and reasonable.").

C. Probability Of Plaintiffs' Success And Amount Paid In Settlement

When assessing the amount paid in settlement, the Court should take into account the risks and costs of litigation. *Parker v. Anderson*, 667 F.2d 1204, 1210 n.6 (5th Cir. 1982) (quoting *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 455 (2d Cir. 1974), *abrogated on other*

grounds by Goldberger v. Integrated Res., 209 F.3d 43 (2d Cir. 2000)); *accord Quintanilla v. A&R Demolition, Inc.*, No. H-04-1965, 2008 WL 5166849, at *5 (S.D. Tex. May 7, 2008). Endorsement of settlement by counsel for both parties is a "factor [that] weighs in favor of approval." *Quintanilla*, 2008 WL 5166849, at *5. When reviewing counsel's opinions, "a court should bear in mind that counsel for each side possess[es] the unique ability to assess the potential risks and rewards of litigation." *Id.*

Here, the Complaint contends that Plaintiffs spent up to 30 minutes per day on allegedly compensable pre- and post-shift clothes-changing activities. Defendant contends that the activities are not compensable but that, should they be found to be compensable in whole or in part, the time spent on such activities is significantly less than that alleged by Plaintiffs. Defendant also asserts that various process changes it has made at the Tarboro plant have significantly reduced Defendant's potential exposure compared with the Complaint's allegations. The parties further note that while employees sometimes recover on similar donning and doffing cases brought under the FLSA, in other instances the employer prevails, with a finding of no liability.

The proposed settlement is also consistent with the *Anderson* settlement, which involved a settlement fund of $1,400,000.00, including attorney's fees up to $452,000.00 and costs up to $79,650.00, as well as $25,000.00 each in service payments to the two named plaintiffs. As discussed above, *Anderson* settled after ten years of litigation, including two appeals to the Fourth Circuit, full discovery, and dispositive motions briefing and involved 230 collective action members.[5] These factors account for the difference in the gross settlement amounts

[5] As noted above, this Settlement Agreement provides for service payments to the Named Plaintiffs in the amount of $3,000.00 each. The substantial reduction from the *Anderson* litigation in the amount of service awards, attorney fees and costs is accounted for by the

between the *Anderson* litigation and the instant case, as does the fact that Defendant has made changes at the Tarboro plant that have reduced its potential exposure from Plaintiffs' allegations in this case.

As the foregoing discussion shows, the proposed settlement amount here is in line proportionally with *Anderson*. At the same time, through the proposed settlement, Plaintiffs will be avoiding a significant risk of no recovery and the time, hassle and cost of litigation.

D. The Court Should Approve The Reimbursement Of Class Counsel's Out-Of-Pocket Costs And Recovery Of A Compromised Fee

The reasonable attorney fees preliminarily approved should be finally approved, for those same reasons, facts and law cited in the motion for preliminary approval. (See Dkt. 67, and Dkt. 69, pp. 14-15.)

"Where . . . the settlement agreement[] also provide[s] for the award of attorneys' fees and costs to plaintiffs, as the prevailing parties under 29 U.S.C. § 216(b), the court's evaluation of the fairness of the settlement agreement[] must include a determination whether the attorneys' fees and costs are reasonable." *In Re Dollar Gen. Stores FLSA Litig*., 2011 WL 3904609, at *2. Here, the parties request that the Court approve the Settlement Agreement's provisions for actual attorneys' fees expended by Plaintiffs' counsel, which he would seek to obtain as a prevailing party under the applicable fee-shifting provisions of the FLSA, if the parties had not agreed to this compromise and Plaintiffs were to prevail. *See* 29 U.S.C. § 216(b) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

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difference in the gross settlement amounts of the two actions, compelled by changes in the process of donning and doffing sanitary gear and clothing at the Tarboro facility as a result of the *Anderson* litigation.

1. Class Counsel's Fees are Reasonable Under Either the Lodestar or Percentage Methods.

Plaintiffs' Counsel's lodestar alone exceeds the $132,420.00 that counsel seeks for both fees *and* disbursements, which totaled $21,780.00. The fees and costs of $132, 420 sought thus represent a compromise when compared to actual fees and costs incurred and are commensurate with the relatively brief length of the litigation, early stage of the proceedings, and familiarity with the issues given counsel's previous involvement in the *Anderson* litigation.

Plaintiffs' Declaration in Support of Attorney's Fees and Costs (Dkt. 67), filed in support of preliminary approval of reasonable attorney fees, supports final approval. The Declaration of Class Counsel details Attorney Alvin Pittman's extensive experience in practice for over 30 years, his extensive background in labor and employment litigation, and previous complex cases in which Class Counsel has been lead or co-lead counsel. (Dkt. 67, p. 2, ¶¶ 3-4).

Class Counsel's declaration also sets forth the extensive time spent even before filing the case to ascertain with certainty the factual support for the claims and to effectively communicate face-to-face with potential class members. (Dkt. 67, p. 3, ¶ 7). Before filing the Complaint, Plaintiffs' counsel spent considerable time meeting with putative class members and potential clients in North Carolina, near Tarboro, "interviewing over 220 class members to gain a clear understanding of the comprehensive facts, in light of the law, and to fully assess the ability of potential class members to serve as witness capable of giving testimony that would support the claim." (Dkt. 67, p. 3, § 7.) In addition, Class Counsel reviewed documents and records potential class members had that related to the claims, and reviewed and updated the law developed while processing the *Anderson* case. (*Ibid*.)

Class counsel made his experienced assessment of the uncertainties of success in an

evolving area of law as an attorney experienced not only with the law, but also with the facts involving the claims made in the previous action (*Anderson*) and settled in that case, and the facts of the remaining wage and hour claims. (Dkt. 67). The case was rigorously contested with a partial motion for dismissal early on in the case. (Dkt. 26 and 27, filed November 10, 2014). It was relatively certain the state law claims would not survive Defendant's partial motion to dismiss.. (See Section II. C., *supra*.)

The total amount of time spent up to filing of the Declaration of Alvin L. Pittman in Support of Plaintiffs' Attorney's Fees and Costs at the time of preliminary approval was 489 hours. The lodestar, unenhanced at counsel's rate of $500 per hour, totaled $244,500 at time of filing this declaration in August 2016. (Dkt. 67, p. 4, § 8; p. 5, § 10- p. 6, § 13.) Class counsel nonetheless agreed to accept $132,420, inclusive of costs, to facilitate settlement. (Dkt. 67, pp. 5-6, §§ 11-12.)

The Court may consider either the percentage or lodestar method in approving the award of fees to class counsel. *In re Wachovia Corp. ERISA Litigation*, 3:09 Civ. 262, 2011 WL 5037183 (W.D.N.C. 2011). In a common fund case, the courts typically apply the percentage-of-the-fund method and award attorneys a percentage of the common fund. *Ibid.* Federal courts here in the Fourth Circuit and in many other circuits generally prefer the percentage method. *Goldenburg v. Marriott PLP Corp.*, 33 F.Supp.2d 434, 438 (D.Md. 1998); *Maley v. Global Techs. Corp.*, 186 F.Supp.2d 358, 370 (S.D.N.Y. 2002). ("[T]here is a strong consensus--both in this Circuit and across the country--in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery.") The lodestar may serve as a cross check of the appropriateness of the percentage method in determining the reasonableness of the requested fees. *Kay Co. v. Equitable Production Co.*, 749 F.Supp.2d 455, 461 (S.D.W.Va. 2010). Here, under either

method, the attorney's fees and costs are reasonable. Plaintiffs' counsel handled this matter on a contingency basis, pursuant to written fee agreements with the named Plaintiffs.

District Courts in the Fourth Circuit usually consider several factors in determining whether fees are reasonable, including (1) the results obtained for the class, (2) the quality, skill, and efficiency of the attorneys involved, (3) the complexity and duration of the case, (4) the risk of nonpayment, (5) awards in similar cases, (6) objections, and (7) public policy. *In re Wachovia*, *supra*, 2011 WL 5037183, at *3.

As argued above, Class Counsel faced experienced defense counsel from a national law firm and yet obtained a significant recovery for the wage and hour violations still existing after the *Anderson* settlement. The quality of defense counsel should figure in assessment of Class Counsel's work. *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263. Class Counsel performed high quality work and pursued a fair and reasonable settlement for the class after determining that further litigation was risky and the benefits outweighed by the possibility of failure. The proposed settlement enables all opt-in Plaintiffs to receive a substantial percentage of their back-pay amount under their FLSA claim, after payment of attorney's fees, costs, and service payments.

The case has been pending since September 2, 2014. The case involved many of the same issues of pre and post shift donning and doffing that made the *Anderson* case complex. This case involved updating the law and fitting the facts of the present case into the parameters of donning and doffing cases around the country that resulted in favorable settlements. This factor supports the requested attorney's fees. Class Counsel also agreed to handle the case on a contingency fee basis, taking on the risk of non-payment. Defendant denied it had violated the FLSA and moved to dismiss some of plaintiffs' claims. The outcome, and thus payment, was not assured.

Awards in similar cases also support the reasonableness of the fees in this case. One-third recovery is a fairly common percentage in contingency cases and common fund cases. *See, Wineland v. Casey's Gen. Stores, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009) (approving attorney's fees of 33 1/3% of total settlement fund of $6.7 million, plus $150,000 in costs, in FLSA collective action on behalf of class of approximately 11,400 convenience store employees); *Kidrick v. ABC Television Appliance Rental*, No. 97-69, 1999 WL 1027050 *4 (N.D.W.Va. May 12, 1999). (one third); *Martinez-Hernandez v. Butterball, LLC*, NO. 5:07-cv-174 (awarding attorney fees of approximately 31.5% of the common fund).

Plaintiffs' class counsel's attorney's fee portion of the costs and fees sought is $109,980.00. That amount is less than 26% of the gross settlement amount of $425,000.00. The fee and costs sought combined, $132,420.00, is less than 31.5% of the gross settlement amount.

There are no objections to the settlement or fees. Public policy favors class counsel's requested fees. The FLSA are statutes that seek to protect workers' rights, including the right to a fair wage for the most vulnerable workers who lack sufficient bargaining power. *See, Cooper v. Smithfield Packing Inc.*, 5:10 Civ. 479-F, 2011 WL 3207912, *4 (E.D.N.C. July 27, 2011). Because of the complexity of the issues, these cases are not sought out by many attorneys. Thus, adequate awards of fees encourage attorneys to take on these cases. As part of the statutory scheme, the FLSA provides for fees to attorneys who represent these employees. Public policy and the above factors all weigh in favor of awarding Class Counsel's requested fee.

A lodestar cross check also confirms the fees are reasonable. A "reasonable fee is a fee that is sufficient to induce a capable attorney to undertake representation of a meritorious civil rights case." *Perdue v. Kenny A., ex. Rel. Winn.*, 130 S.Ct. 1662 1673 (2010). The fee award is based upon the reasonable hours expended multiplied by a reasonable hourly rate. *Dennis v.*

Columbia Collerton Med. Ctr., Inc., 290 F.3d 629, 652 (4th Cir. 2002). When courts use the percentage method, with the lodestar as a cross check of reasonableness, there is a presumption the lodestar is reasonable, and the courts do not engage in the usual rigorous scrutiny of the fees. *Kay Co.*, *supra*, 749. F.Supp.2d at 469. Here, the lodestar is $244,500.00. (Dkt. 67, Declaration of Alvin Pittman, ¶ 8, page 4). Nonetheless, Class Counsel was willing to reduce the fee to $132, 400.00 to facilitate settlement. (Dkt. 67, page 5, ¶ 10. a.).

All the above factors weigh in favor of the reasonableness of Class Counsel's requested attorney's fee and cost award of $132,420.00.

E. Service Payments Should Be Awarded To the Named Plaintiffs.

The Service payments of $3000.00 each to the Named Plaintiffs are consistent with the payments made and approved in this District, and in other jurisdictions, in wage-and-hour cases. They are intended to compensate the Named Plaintiffs for services they rendered to the other opt-in Plaintiffs in generating the settlement funds, the risks they bore and lost compensation they suffered when spending time to advance the settlement in this action.

Service payments are the norm in class and collective actions. *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000) ("[C]ourts routinely approve incentive awards to compensate named Plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." (citation omitted); *see also*, *In re Red Hat, Inc. Sec. Litig.*, No. 5:04-cv-473-BR, [Dkt. 231, p. 3] (E.D.N.C. Dec. 10, 2010) (awarding lead plaintiff $15,000); *In re Ins. Brokerage Antitrust Litigation*, 579 F.3d 241, 282, 284 (3d Cir. 2009) ($10,000 service award).

The purpose of a service payment is to "encourage socially beneficial litigation by compensating named plaintiffs [and active class members] for their expenses on travel and other

incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook." *Rowles v. Chase Home Finance, LLC*. No 9:10-cv-01756-MBS, 2012 WL 80570, at *4 (D.S.C. Jan. 10, 2012); *also see, In re Wachovia Corp. ERISA Litig.*, 2011 WL 5037183, at *7 (W.D.N.C. Oct. 24, 2011). The risks that service payments address include "the risk to the class representative in commencing suit, both financial and otherwise [and] the notoriety and personal difficulties encountered by the class representative." *Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645, at *7 (N.D. Cal. Aug. 9, 2010).

In approving the award of service payments, the Court should consider "the actions the plaintiff[s have] taken to protect the interests of the class, the degree to which the class has benefited from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *In re Tyson Foods, Inc.*, No. RDB-08-1982, 2010 WL 1924012, at *4 (D. Md. May 11, 2010) (internal citations omitted). Here, Named Plaintiffs performed substantial services to, and bore substantial risks for, opt-in Plaintiffs. Named Plaintiffs' services began before the initiation of the lawsuit in seeking help recognizing that not all time spent donning and doffing was compensated, even after the earlier lawsuit. Named Plaintiffs also helped in defining the precise wage and hour violations still existing, and in shaping the complaint for compensation, working with their counsel in developing the case, persevering through over 3 years of litigation, and ultimately helped effectuate a successful settlement for the class by engaging in negotiations by taking off time from work and traveling to a full-day face-to-face session in Dallas, Texas.

Named Plaintiffs also risked being held responsible for litigation costs if not successful. Thus, Named Plaintiffs should be compensated for the services provided and risks they bore by

bringing this action. Under the circumstances, $3000 is a reasonable service award.

F. The Class Members Have Reacted Favorably To The Settlement.

As of the filing of this memorandum and with an objection deadline of October 14, 2017, no class member has filed an objection to the Settlement or any aspect of the relief and awards sought as part of the Settlement. (See Section II.G., *supra.*) A comprehensive Notice program was effectuated in this Settlement. (See Section II.F., *supra*.) The fact that no one filed an objection weighs heavily in favor of final settlement approval. *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 212 (E.D. Pa. 2011) (two objectors in a class of approximately forty thousand weighs in favor of approving the settlement).

IV. CONCLUSION

The parties entered into a Settlement Agreement as a result of contested litigation and that resolves a *bona fide* dispute between the parties.. The parties engaged in lengthy investigation of the facts and law, and reached a settlement after months of negotiations, both before and after a full day's face-to-face negotiation session. The settlement is fair, reasonable and adequate. Accordingly, the Parties respectfully request that the Court enter an Order granting the Joint Motion for (1) final certification of this FLSA collective action; (2) final approval of the parties' settlement as a fair and reasonable compromise of a *bona fide* dispute between the parties; (3) approving the attorney's fees and costs sought by Class Counsel as reasonable; (4) approving the reasonableness of incentive/service awards to the two Named Plaintiffs; and (5) dismissing this action with prejudice.

Date: November 21, 2017

Respectfully submitted,

/s/ Alvin L. Pittman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record for Defendant via the Court's CM/ECF electronic filing system and by email on this, the 21st day of November, 2017:

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