

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Ibrahim Roble, et al,
individually and on behalf
of others similarly situated,

**PLAINTIFFS' AMENDED
MEMORANDUM IN SUPPORT OF
UNOPPOSED MOTION FOR FINAL
APPROVAL OF SETTLEMENT
AGREEMENT**

Plaintiffs,

v.

Celestica Corporation, et al,

Court File No. 06-cv-2934 JRT/FLN

Defendants.

Abdinor Farah, et al,
individually and on behalf
of others similarly situated,

Plaintiffs,

v.

Celestica Corporation, et al,

Court File No. 07-cv-3766 JRT/FLN

Defendants.

I. INTRODUCTION

On September 6, 2008, this Court granted preliminary approval to the settlement agreement in these cases. Dkt. 481. The parties have directed notice to the collective class, in accordance with the terms of the settlement agreement, and now return before

this Court seeking final approval of the settlement. Because the settlement represents a fair and reasonable result for class members, the Court should grant its final approval of the settlement agreement.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs originally filed the Roble action on July 6, 2006. They filed their first amended complaint on February 19, 2007. On February 9, 2007, the Court conditionally certified a nationwide collective class under the Fair Labor Standards Act. Plaintiffs distributed judicial notice to the collective class pursuant to Court order.

In the following months, approximately 2,700 employees filed consent forms to opt in to this litigation. On August 21, 2007, Plaintiffs filed the Farah matter on behalf of individuals who did not return their consent forms within the deadline established in the Roble matter. On June 10, 2008, the parties began a two day mediation session with Joan Morrow. That mediation led to a settlement agreement the parties executed in mid-August 2008.

III. SUMMARY OF THE SETTLEMENT AGREEMENT AND ALLOCATION

The Settlement Agreement, previously submitted to the Court at Dkt. 479, resolves the Fair Labor Standards Act (“FLSA”) claims of over 1,900 Plaintiffs who are proper members of the conditionally certified action. The Settlement Agreement provides for \$1,700,000 in settlement funds to be paid by Defendants to resolve these claims. In conjunction with final approval of the settlement, Plaintiff’s Counsel seeks Court

approval of \$536,932.53 in attorneys fees and \$72,931.73 in costs from the \$1,700,000 settlement fund.

Pursuant to the allocation formula in the settlement agreement, each Plaintiff received \$3.41 for each day they worked for Defendants. For an employee who earned \$12.00 an hour, the \$3.41 represents over 11 minutes of overtime wages per day. Considering that Plaintiffs' complaint alleges 10 to 15 minutes of uncompensated time per day, Dkt. 165 at ¶ 21, the settlement provides substantial value for Plaintiffs' claims. Each Plaintiff also received the benefit of a three year statute of limitations, which would not have been guaranteed if the litigation had gone forward. See 29 U.S.C. § 255(a) (providing for three year statute of limitations only in instances of "willful" violations). The \$3.41 per day offer is also free and clear of attorneys' fees and costs.

Plaintiffs' Counsel distributed monetary offers to approximately 1,836 Plaintiffs. Helland Decl. ¶ 5. Additionally, 91 individuals received zero dollar settlement offers because they were outside the statute of limitations or otherwise did not qualify for the case. Id. These individuals were situated similarly to the 842 individuals dismissed by the Court as a part of its preliminary approval order. See Dkt. 481.¹ As provided for in the Settlement Agreement, a group of 25 plaintiffs who had become unreachable received zero dollar offers as a part of the settlement allocation. A list of these Plaintiffs is attached as Helland Decl. Exh. 1. Mail sent to these employees throughout the litigation

¹ Plaintiffs' Counsel contacted the 842 already-dismissed individuals prior to agreeing to their dismissal. Further investigation revealed that the additional 91 should have been in the group of 842. However, because Plaintiffs had been unable to reach them to discuss their dismissal, the parties provided them with notice of the settlement and their zero dollar offer.

of the case was returned as undeliverable, in up to 5 times for some individual Plaintiffs. Helland Decl. ¶¶ 3, 4. Plaintiffs' Counsel unsuccessfully attempted to reach these Plaintiffs through phone and email. Id. Plaintiffs' Counsel also searched for new addresses using internet databases, on up to six different occasions for some individual Plaintiffs, to no avail. Id. Plaintiffs' Counsel also sent the addresses through the National Change of Address registry. Id. Despite these efforts, Plaintiffs' Counsel was still unable to reach these Plaintiffs.

The settlement notice required that Plaintiffs' Counsel receive releases and rejections by November 3, 2008. On November 4, 2008, Plaintiffs' received 8 release forms accepting the settlement offer. Helland Decl. ¶ 8. On November 5, 2008, Plaintiffs received an additional 10 release forms accepting the settlement offer. Id. Plaintiffs request that late releases and rejections received by November 14, 2008 be included in the settlement. Plaintiffs' Counsel will not actively solicit late release forms, but will provide the Court with updated settlement numbers at the final approval hearing on November 17, 2008.

So far, 1,493 have returned signed settlement offers and releases agreeing to the terms of the settlement. Helland Decl. ¶ 6. Only four Plaintiffs (0.002%) have elected to reject their settlement offer and withdraw from their case. These four Plaintiffs' claims total \$276.23. Helland Decl. ¶ 6; Exh. 2. Pursuant to the settlement agreement, these individuals will have 30 days to re-file their claims if they so choose. Thus far, a total of 350 Plaintiffs who received monetary settlement offers did not respond, despite Plaintiffs' Counsel's attempts to reach these individuals. See Helland Decl. ¶ 6. Of these

350 people, 210 had offers under \$100, and 312 had offers under \$500. Id. Only 11 had settlement offers of \$1,000.00 or more. Id. Based on the current response, \$65,163.06 from non-responding Plaintiffs will be allocated to the *Cy Pres* fund. This number will decrease if more Plaintiffs return release forms before the final settlement hearing.

IV. THE COURT SHOULD GRANT FINAL APPROVAL BECAUSE THE SETTLEMENT IS A FAIR AND REASONABLE

A private action brought under 29 U.S.C. § 216(b) can only be settled after a District Court reviews the agreement for fairness. Lynn's Food Stores, Inc. v. U.S., 679 F.2d 1350, 1353 (11th Cir., 1982); see also Copeland v. ABB, Inc., 521 F.3d 1010, 1014 (8th Cir. 2008) (citing Lynn's Food Stores). Here, the Court should approve the settlement because it provides for a fair resolution of Plaintiffs' claims.

**a. The Parties' Arm's Length Settlement Negotiations Recognized
Potential Defenses To Plaintiffs' Claims**

Prior to mediation, Plaintiffs moved for summary judgment and Defendants responded. The parties mediated this case before the hearing on that motion. Prior to mediation, the parties exchanged mediation briefs. Through the summary judgment and mediation briefing, the parties articulated their strongest legal and factual arguments. Defendants' briefing included the following arguments:

- The time at issue was *de minimis*.
- The equipment Defendants required Plaintiffs to wear was not "integral and indispensable" to Plaintiffs' principal work activities. See Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2nd Cir. 2007).

- Some employees could not recover because they were subject to a valid collective bargaining agreement, and the equipment Plaintiffs' wear was "clothing" under 29 U.S.C. § 203(o). See Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1067 (D.Minn. 2007); Anderson v. Cagle's, Inc., 488 F.3d 945 (11th Cir., 2007).
- The time spent donning and doffing was less than the amount Plaintiffs claimed.
- Defendants did not require employees to clock in after donning or clock out before doffing. Some employees clocked in before donning and were therefore paid for some of that time.
- Liquidated damages and a three year statute of limitations would not apply to the case.

Plaintiffs dispute each of these factual and legal defenses and believe they would have ultimately succeeded in their claims. However, recognizing the risk these defenses presented, Plaintiffs believed that this settlement provided value to the collective class. The parties engaged in arm's length negotiations during the two days of mediation and for approximately two months after mediation. The parties finally signed a settlement agreement on or about August 15, 2008.

b. The Settlement Agreement Provides Fair Value To Plaintiffs

As noted above, each Plaintiff received \$3.41 per day for a three year statute of limitations. For an employee who earned \$12.00 an hour, the \$3.41 represents over 11 minutes of overtime wages per day. Plaintiffs receive this amount free and clear of any

attorneys' fees and costs. Considering that Plaintiffs' complaint alleges 10 to 15 minutes of uncompensated time per day, and in light of the defenses outlined above, the settlement is an eminently fair resolution of Plaintiffs' claims.

c. Only 4 out of 1,836 Of Plaintiffs Rejected Their Offer

Another indication of the fairness of this settlement is that only four employees have rejected their settlement offers.² The four rejected offers total \$276.23 – a miniscule fraction of the settlement amount.³ In total, 1,493 employees have accepted their settlement offers. The \$65,163.06 allocated to the unreachable, non-responding Plaintiffs will be donated to charity. This number will decrease if more Plaintiffs return release forms before the final approval hearing. The overwhelming response of Plaintiffs accepting their settlement offer supports a decision by this Court that the settlement is a fair resolution of Plaintiffs' claims.

d. The Court Should Approve Plaintiffs' Counsel's Request For Fees And Costs

Counsel in common fund cases may recover those expenses that would normally be charged to a fee paying client. In re Guidant Corp. Implantable Defibrillators Prods. Liability Litig., MDL No. 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008). Generally, the percentage-of-fund method is used in common fund cases to determine a fee award. Id. at *6. This method involves a routine calculation of fees that is based on a

² The four rejecting Plaintiffs are listed in Helland Decl. Exh. 2. Pursuant to the settlement agreement, these four Plaintiffs have the right to refile their claims within 30 days.

³ This \$276.23 is the only portion of the settlement amount that will revert to Defendants.

percentage of the common fund recovered. Id., citing Blum v. Stenson, 465 U.S. 886, 900 n.16 and In re U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002). It is well established in the Eighth Circuit that courts may utilize the percentage-of-fund method when awarding attorney fees from a common fund. Id., citing Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1157 (8th Cir. 1999). A court's award of attorneys' fees in common fund cases need only be reasonable under the circumstances. Id.

Absent its own established factors, the Eighth Circuit has employed the twelve-factor test from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719-20 (5th Cir. 1974) to determine the reasonableness of a percentage fee award in common fund cases. In re Guidant, 2008 WL 682174, at *4; see also In re U.S. Bancorp Litig., 291 F.3d at 1038. Those factors are:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee for similar work in the community;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the undesirability of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

Johnson, 488 F.2d at 719-20. Not all the factors apply, and “the court has wide discretion as to which factors to apply and the relative weight to assign to each.” Id., quoting In re Xcel Energy, Inc., Sec., Derivative & “ERISA” Litig., 364 F. Supp. 2d 980, 993 (D. Minn. 2005).

Here, pursuant to the settlement agreement, Plaintiffs' Counsel requests \$72,931.73 in costs⁴, and 33 percent of the remaining consideration, or \$536,932.53, in fees.⁵ The 33% contingency fee represents the fee agreed to between Plaintiffs' Counsel and individual Plaintiffs. Helland Dec. ¶ 8. The requested amount is **almost two and a half times** Plaintiffs' Counsel's lodestar in this case. See Helland Decl. ¶ 10. The requested fees are reasonable in light of the following factors:

Time and labor: This litigation has spanned over two years in required intensive work by all parties. Plaintiffs' counsel engaged in discovery; took or defended approximately fourteen depositions; reviewed documents; responded to discovery requests; briefed several motions involving complex and novel legal issues; conducted site inspections around the country; and conducted significant fact discovery through interviews with its clients. Helland Decl. ¶ 9. Plaintiffs' Counsel spent hundreds of hours securing interviews with over 1,700 Plaintiffs. Id. Plaintiffs' Counsel followed up with the Plaintiffs in this class as new factual issues arose in the litigation. Id. Because of the relatively low value of each Plaintiff's claim, the time necessary to properly investigate and prosecute this case is high when compared to the damages at stake. Thus, Plaintiffs' Counsel's lodestar significantly exceeds the attorneys' fees requested here; to date, Plaintiffs' Counsel has spent over **\$1,318,000.00** in time working on this case.

⁴ Pursuant to the settlement agreement, Plaintiffs' Counsel has the right to request up to \$85,000 in costs. Because Plaintiffs' Counsel is only requesting \$72,931.73 in costs, an additional \$8,085.74 will be added to the *Cy Pres* fund.

⁵ Plaintiffs' Counsel discovered that the Consent Form for Mulugeta Girmay inadvertently was never filed. Plaintiffs' Counsel has agreed to pay this claim – which amounts to \$1,654.84, plus employer taxes – out of the Court awarded fees.

Helland Decl. ¶ 10.⁶ The lodestar amount is almost two and a half times the amount of Plaintiffs' Counsel's request. Plaintiffs' Counsel will spend additional time administering this settlement. Given the extensive time and labor involved in this case, the requested fee is reasonable.

Novelty and difficulty: During the litigation of this case, the case law in other circuits became increasingly harsh towards cases similar to this one. See, e.g., Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2nd Cir. 2007); Anderson v. Cagle's, Inc., 488 F.3d 945 (11th Cir., 2007). While Plaintiffs are confident they would have prevailed on their claims here,⁷ Plaintiffs would have had to overcome the difficult case law in other circuits in order to do so. The fact that Plaintiffs Counsel secured a just and fair settlement despite the difficult legal terrain supports an award of the requested fees.

The amount involved and the results obtained: As noted above, this case presented challenges for Plaintiffs' Counsel because of the sheer number of people involved and the relatively small size of each individual's claims. Although the total amount at stake in the case was low relative the number of Plaintiffs, Plaintiffs' Counsel obtained excellent results for each individual Plaintiff. The award for a Plaintiff earning \$12.00 an hour represents full recovery within the window of time claimed in the complaint – after attorneys fees and costs are removed from the settlement amount. A

⁶ Plaintiffs' Counsel will provide the Court with an itemization of attorneys' fees and costs upon request.

⁷ See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp., 556 F.Supp.2d 941 (W.D.Wis. 2008) (granting partial summary judgment to plaintiffs in a donning and doffing case).

33% contingency award is necessary in a case like this one to ensure that low wage Plaintiffs have access to the Courts in cases that yield small results on an individual basis.

Required skill and experience, reputation, ability of attorneys: Plaintiffs' Counsel has extensive experience in collective and class actions, and their practices are focused almost exclusively on Plaintiffs' employment law. In litigating this case, Plaintiffs' Counsel was able to draw on its experience in this area – including a recent award of partial summary judgment in a similar case. See Kasten, 556 F.Supp.2d 941 (W.D.Wis. 2008). The difficult legal terrain and meticulous factual detail in donning and doffing cases requires skillful prosecution.

Nature and length of the professional relationship with the client: Plaintiffs' Counsel has worked closely with the named Plaintiffs and hundreds of class members throughout the past two years to prosecute the case. This has required frequent updates to class members through U.S. mail, e-mail and telephone calls, including **individualized interviews with over 1,700 Plaintiffs**. This contact continues to the present. The personalized representation Plaintiffs' Counsel provided to this large class of Plaintiffs supports an award of the requested attorneys' fees.

Reaction of class members to the settlement: Only four out of 1,836 Plaintiffs rejected their settlement offers. The rejected settlement offers totaled only \$276.23 of a \$1,700,000 settlement. The overwhelming acceptance of the settlement offers suggests that Plaintiffs' Counsel secured a favorable result for Plaintiffs.

In sum, the Court should find that Plaintiffs' Counsel's requests for fees and costs, which correspond to the contingency fee agreement between individual Plaintiffs and

counsel, are reasonable in light of the extensive time and efforts employed by Plaintiffs' Counsel, the excellent results obtained, and the elevated risk of non-payment they incurred due to the complex nature of the issues litigated.

V. CONCLUSION

For these reasons, Plaintiffs request the Court grant final approval to the parties' settlement agreement.

Dated: November 10, 2008

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**L.R. 7.1(c) WORD COUNT COMPLIANCE
CERTIFICATE**

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I, Matthew C. Helland, certify that Plaintiffs' Memorandum in Response to Order to Show Cause complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word Version 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 2,907 words.

Dated: November 10, 2008

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