

STATE OF MINNESOTA
COUNTY OF HENNEPIN

FILED

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DISTRICT COURT

FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

Gary J. Milner, Toni Bjerke, and
Annette Barrett, individually and on
behalf of all others similarly situated,

Court File No. 27-CV-01-15004
Judge Gary Larson

Plaintiffs,

v.

**ORDER AND MEMORANDUM
GRANTING PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF SETTLEMENT**

Farmers Insurance Exchange,

Defendant.

The above-captioned matter came on before The Honorable Gary Larson, Judge of District Court, on Plaintiffs' Motion for Final Approval of Settlement on August 31, 2009. Timothy J. Becker, Esq., Charles S. Zimmerman, Esq., and Anne T. Regan, Esq., appeared on behalf of Gary J. Milner, Toni Bjerke, and Annette Barrett ("Plaintiff Class"). George E. Preonas, Esq., and Frederick E. Finch, Esq., appeared on behalf of Defendant Farmers Insurance Exchange ("Defendant"). Steven G. Zieff, Esq., Donald H. Nichols, Esq., and James M. Finberg, Esq., appeared on behalf of the Objectors/Members of the MDL Class. Jackson Evans, Assistant Attorney General, appeared on behalf of the Department of Labor and Industry. Based upon the files and proceedings herein, the Court makes the following:

ORDER

1. Plaintiff Class' Motion for Final Approval of Settlement is **GRANTED**.

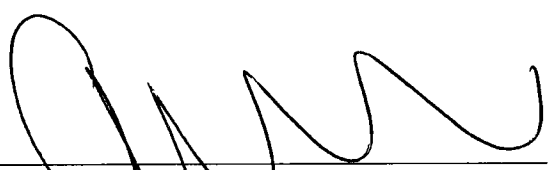
2. The attached memorandum is incorporated herewith.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT

Date : _____, 2009

10/27/09



Gary Larson
Judge of District Court
C-1655 Government Center
300 South Sixth Street
Minneapolis, MN 55487-0422

MEMORANDUM OF LAW

I. INTRODUCTION

Approximately eight years ago, Plaintiff Class commenced this action alleging Farmers Insurance Exchange (“FIE”) violated the Minnesota Fair Labor Standards Act (“MFLSA”) by misclassifying them as exempt from the MFLSA’s overtime protections. Ultimately, despite finding that FIE misclassified its workers (thereby entitling them to overtime), the jury awarded no damages. Additionally, the case resulted in rights for employees by entitling them to pursue civil penalties in the name of the Commissioner of Labor and Industry. As a result of the suit, FIE changed its policy of classifying workers for overtime pay.

The victories for Plaintiff Class in this case resulted in no monetary award to FIE’s employees for the overtime they worked. This Court entered judgment in favor of the Plaintiff Class and denied Defendant’s post-trial motions. Defendants appealed up to the Minnesota Supreme Court. The Supreme Court found that the misclassification of employees was not a violation of the MFLSA, the civil penalties were payable to the State, the record keeping issue was raised in Plaintiffs’ pleadings, basing civil penalties on a finding that employees worked more than 48 hours per week was error, and that the attorney fee award was excessive.

Upon return from Supreme Court, this Court ordered the parties in this case to mediation to try to achieve a settlement. As a result of the Settlement Agreement reached between Plaintiff Class and FIE, every Class member will receive over \$2,200. Prior to the final approval of settlement hearing, a few members of Plaintiff Class filed Objections to approval of the settlement.

Objectors are members of the previously-certified class in this action comprised of FIE’s personal lines insurance claim representatives employed in the State of Minnesota. Objectors are

also members of the class of Minnesota personal lines claims representatives certified on May 19, 2003, by the District of Oregon in the Multi-District Litigation (“MDL”) case. Plaintiff Class in this case and the MDL overlap. Of the approximately 201 members of Plaintiff Class, approximately 194 are also members of the MDL Class.¹ Thirty-four members of Plaintiff Class now object to final approval of the settlement in this case.

II. PROCEDURAL SUMMARY

A. The Multi-District Litigation action.

On March 12, 2002, the Judicial Panel on Multidistrict Litigation transferred a number of state cases then pending against Farmers Insurance Exchange (“FIE”) to the District of Oregon, thus initiating the Multi-District Litigation (“MDL”). Plaintiffs alleged federal claims under the Fair Labor Standards Act (“FLSA”), the Employee Retirement Income Security Act (“ERISA”), and state law claims under Minnesota, Oregon, Washington, and Michigan law. On stipulation of the parties, by the end of April 2002, the Minnesota and New Mexico actions were remanded to their respective state courts.

On April 18, 2003, the parties stipulated to waive a jury; bifurcate the trial into liability and damages phases; dismiss the ERISA claims and all defendants except FIE; and certify seven state law “subclasses” under the laws of Oregon, Washington, Colorado, New Mexico, Illinois, Minnesota, and Michigan. The MDL Court certified these state classes on May 19, 2003. Class notices went out explaining that there were other pending state law actions and that the opt-out deadline for the Minnesota Class had passed. The Notice further stated that,

[I]f you are a member of one of those classes, you may also remain

¹ The MDL class includes approximately 24 members who are not in the Plaintiff Class because they consented to join the federal FLSA claim in the MDL case, and the Plaintiff Class certification order expressly excluded such persons from the Plaintiff Class. Plaintiff Class includes approximately 25 members who are not in the MDL case, because they opted out of the MDL action or were “PIP” claims representatives not included in the MDL class definition.

a member of the state law Classes certified by the Court in this case. You do not need to take any action to remain a member of the state law classes certified by the Court in this case. However, it is possible that a judgment or settlement in either this case or one of the state court cases would bind you and prevent you from obtaining further relief in another court.

(MDL Class Certification Notice, p. 8.)

The MDL case was tried in September 2003. Following the court's finding of facts and conclusions of law on liability, the MDL plaintiffs moved for an injunction in federal district court under the All Writs Act, to stay the *Milner* action. FIE opposed the motion. After liability was determined, a Special Master determined damages. The parties reached agreement on the amount of damages owed to each Minnesota MDL Class member who submitted a claim. On December 17, 2004, the district court entered judgment on the claims of the Minnesota class in the MDL. Of the 90 members of the Minnesota MDL Class who submitted valid claims, 75 are joint MDL/*Milner* Class members.

Judgment was entered and the court awarded nearly \$52.5 million to the 1,039 former and current adjusters who filed the necessary claims paperwork. The parties filed cross-appeals with the Ninth Circuit Court of Appeals. In a decision issued September 14, 2006, and amended on March 30, 2007, the Ninth Circuit held that all claims representatives encompassed by the MDL were exempt from the overtime pay requirements of the FLSA, reversed the MDL Court's judgment, and ordered the court to enter judgment in FIE's favor on the FLSA claims. The Ninth Circuit also reversed the MDL Court's judgment on the MFLSA claims and remanded the claims back to the MDL Court.

Plaintiffs' MFLSA claims, however, were not transferred to the MDL Court through proper procedures. Because the state law claims were not transferred by the MDL Panel, the MDL Court could not remand the Minnesota claims back to Minnesota state court and, therefore,

dismissed the Minnesota Class for lack of subject matter jurisdiction. The Minnesota Class commenced an appeal to the Ninth Circuit from the MDL judgment dismissing them on jurisdictional grounds. The appeal is still pending.

B. The *Milner* action.

FIE claims representatives in Minnesota initiated a class action lawsuit for failure to pay overtime compensation pursuant to the Minnesota Fair Labor Standards Act (“MFLSA”). The *Milner* class sought compensatory damages for failure to pay overtime compensation; a declaratory judgment setting forth the rights of Plaintiffs and obligations of FIE regarding compensation and penalties; an accounting of compensation, interest, and penalties owed; and injunctive relief. In March 2003, this Court ordered that Notice of this action be sent. The Notice stated that the Class excluded any person “who had commenced a separate lawsuit to recover unpaid wages or consented in writing to join the federal multi-district litigation.”

A jury returned a verdict in the *Milner* case on October 22, 2004, after the liability trial in the MDL case was concluded. The jury found that the personal lines claims representatives were not exempt from overtime pay under the MFLSA, but awarded no compensatory damages. On November 19, 2004, the *Milner* Plaintiffs filed a motion for judgment notwithstanding the verdict or, alternatively, a new trial on their damage claims. On January 12, 2005, the MDL Court granted FIE an injunction preventing Minnesota courts from taking any further action on the Minnesota MDL Class claims in *Milner* pending appeal to the Ninth Circuit. Thus, no judgment was entered in *Milner* with respect to the Joint MDL/*Milner* Class. The Ninth Circuit ordered the MDL Court to vacate the injunction, upon remand, but the MDL Court has not yet done so.

On April 5, 2005, the *Milner* Court entered judgment in favor of the non-MDL *Milner*

Class. The judgment included an award of civil penalties and an injunction against continuing to classify the class as exempt. FIE appealed the *Milner* judgment, claiming that civil penalties had to be paid to the State rather than the individual class members. The Minnesota Supreme Court agreed with FIE and remanded the case back to this Court for recalculations of the amount of penalties and attorneys fees. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 618 (Minn. 2008).

C. Terms of the Settlement Agreement.

The *Milner* Plaintiffs and FIE negotiated a Settlement and Release of Claims guaranteeing that every member of the Class will receive a monetary award. The Agreement is a sixteen page, comprehensive document. The Release states, in part,

Plaintiff Class “unconditionally, irrevocable, and forever release, acquit, absolve, relieve, and discharge FIE and all other Releasees of and from any and all claims, rights, penalties, demands, damages, losses, actions, disputes, controversies, promises, debts, accounts, duties, suits, costs and expenses (including, but not limited to, attorneys’ fees and costs), judgments, orders, agreements, liens, charges, complaints, causes of action, obligations, or liabilities of any and every kind, in law or in equity whether known or unknown, past or present, suspected or unsuspected, matured or unmatured, fixed or contingent, apparent or concealed, based on any act, omission, event, occurrence, or nonoccurrence *through October 6, 2004*, including but not limited to any claims or causes of action asserted in the litigation, that could have been asserted in the litigation, that arise or may arise out of, or are directly or indirectly related to the litigation or the transactions, events, occurrences, acts, or omissions that are or were involved in the facts, circumstances, or incidents giving rise to the litigation, or any claims or causes of action based on any federal, state, or local statute, rule, regulation, order, or law, or on any other grounds whatsoever, including, without limitation, the Minnesota Fair Labor Standards Act, the Employee Retirement Income and Security Act (“EIRSA”), Minnesota Wage and Hour statutes, or Minnesota state common law, whether or not previously brought before any state or federal court or before any state or federal or any other governmental agency. The released claims include claims under any common law, statutory or equitable doctrine or theory and consist of claims regarding (i) the failure to pay for overtime hours or other wages, including claims

related to how overtime is calculated; (ii) accurate creation, retention, and preservation of records; and (iii) improper termination pay and improper pay after determining that payment was due. This release also includes any claim for penalties or other damages arising from a claim for late payment of wages or benefits under any applicable state or federal law, and any claim for contribution to any FIE profit-sharing or other employee benefit plan. This release also includes a release of all claims for attorneys' fees and costs incurred by CERTIFIED CLASS members or by PLAINTIFFS' COUNSEL in connection with the LITIGATION and settlement of the LITIGATION. *This release does not include any claims that cannot be waived as a matter of law nor does it include claims unrelated to the MFLSA claims in this lawsuit, such as claims for employment discrimination or wrongful termination of employment.* The claims released under this Section are referred to as the "CERTIFIED CLASS MEMBER RELEASED CLAIMS.

(Settlement Agreement at ¶ 5.)²

The Agreement also states that,

Prior to trial, all members of the certified class were offered the opportunity to opt out as members of the certified class and declined to do so. The litigation has already resulted in a verdict and the notice shall not provide an opportunity to opt out of the settlement agreement. This settlement agreement is expressly conditioned upon this paragraph 9.5.

(Settlement Agreement at ¶ 9.5.)

The proposed Agreement provides a total of \$1,500,000 to pay the claims of the Plaintiff Class, proposed Class Representative service awards, and litigation and settlement costs and attorneys' fees. The fund would be allocated as follows: (1) \$450,000 to be divided equally among the 200 Class Members; (2) \$25,000 to the State of Minnesota as a civil penalty; (3) \$25,000 as compensation to the three Class Representatives as compensation for their expenses

² After oral arguments, the parties made two changes to the Release language. The emphasized language denotes these changes. The phrase "through October 6, 2004" replaces the old language, "to the date of execution hereof." The original also did not include the following, "This release does not include any claims that cannot be waived as a matter of law nor does it include claims unrelated to the MFLSA claims in this lawsuit, such as claims for employment discrimination or wrongful termination of employment."

and services in representing the Plaintiff Class; and (4) \$1,000,000 as attorneys' fees, costs and expenses.

D. Terms of the Settlement Notice.

Notice of the proposed settlement was sent to every class member. The Notice is eleven pages long. It clearly stated that anyone receiving the notice had the right to object to the Settlement. The notice also laid out the recovery available under the settlement, the potential outcome of the case, a statement of attorneys' fees and costs sought, contact information, in case of questions or concerns, reasons for the settlement, and basic information about the proposed Settlement.

The basic information included the following subjects: (1) Why did I receive this Notice; (2) What is this lawsuit all about; (3) Why is this Lawsuit a class action; (4) Why is there a Settlement; (5) How do I know if I am part of the Settlement; (6) Are there exceptions to being included in the class; (7) What does the Settlement provide; (8) What do I have to do to receive a payment; (9) When will I [sic] receive my payment; (10) Can I exclude myself from the Settlement; (11) What am I giving up if the Settlement is approved by the Court; (12) Do I have a lawyer in this case; (13) How will the lawyers be paid; (14) How do I object to the Settlement; (15) When and where will the Court decide whether to approve the Settlement; (16) Do I have to come to the hearing; (17) May I speak at the hearing; (18) What happens if I do nothing at all; and (19) How can I get more information.

E. Objectors' objections to the proposed Settlement Agreement.

The Objectors in this case are 34 members of the previously-certified class comprised of FIE personal lines insurance claim representatives employed in Minnesota. They are also members of the class of Minnesota personal lines claims representatives certified on May 19,

2003 by the District of Oregon in the MDL case.

The Objectors argue that the proposed settlement is flawed in three respects. First, they argue the proposed settlement does not provide class members with a new opportunity to opt out of the settlement. Second, they assert the proposed settlement purports to release many claims that were not alleged in this case, based on facts that were not alleged. Finally, Objectors argue that the notice fails adequately to inform class members of the terms and consequences of the proposed settlement, including the broad release, or about what possible benefits and/or risks might be available to them in the MDL litigation.

III. LEGAL ANALYSIS

A. Standard of review.

As fiduciary to the class, the Court carefully considers class member objections. *See In re BankAmerica Corp. Sec. Litigation*, 350 F.3d 747, 751-52 (8th Cir. 2003). When faced with a motion for final approval of a class action settlement, the court is to determine whether the settlement is “fair, reasonable, and adequate.” Minn. R. Civ. P. 23.05(a)(3); *SST, Inc. v. Minneapolis*, 288 N.W.2d 225, 231 (Minn. 1979); *Heller v. Schwan’s Sales Enters., Inc.*, 548 N.W.2d 287, 289 (Minn. Ct. App. 1996). “The court must compare the settlement terms with the likely rewards the plaintiff would have received after a full trial.” *SST*, 288 N.W.2d at 231.

B. Notice of the Settlement satisfies due process requirements.

Notice meets the requirements of Minn. R. Civ. P. 23.05 and due process if it is reasonably calculated to reach the class members and inform them of the existence and opportunity to object to the settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999). A notice “may consist of a very general description of the proposed settlement.” *Grunin v. Int’l House of Pancakes*,

513 F.2d 114, 122 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975).

Here, the Court approved the content of the proposed Notice of Settlement and ordered that notice be disseminated by first-class mail. The Court-approved notice plan apprised class members of their rights to participate in or object to the Settlement. Two hundred notices were mailed to the last known address of each Class member appearing in Settlement Class Counsel's database. All Class members were sent the long form notice.

The Notice stated that anyone receiving the notice had the right to object to the Settlement. It also laid out the recovery available under the settlement; the potential outcome of the case, a statement of attorneys' fees and costs sought; contact information, in case of questions or concerns; reasons for the settlement; and basic information about the proposed Settlement. The Notice discussed the parallel MDL claims and stated that that claim was dismissed with prejudice and is now on appeal. The Notice adequately described the scope of the claims released, directed Class members to Class Counsel for further information. Class Counsel maintained a website, posting the Notice and the Settlement Agreement. Class Counsel posted their contact information and answered numerous phone calls from Class members about the scope of the Settlement and Release.

The Notice unquestionably alerted the recipients that they were members of a pending class action, that a settlement had been proposed, and that they had the right to state their objections at a fairness hearing.

C. Renewed opt-out rights are inappropriate in this case.

Individual members of a class action are entitled to opt-out of a class one time. Minn. R. Civ. P. 23.03(b). All members of the *Milner* class were afforded an opportunity to opt out when the class was originally certified in 2003.

1. *A second opt-out period is discretionary.*

Minn. R. Civ. P. 23.05(c) provides an additional opt-out period that is purely discretionary. The justification for the discretionary opt-out provision has no application to the *Milner* class and the proposed Settlement. Minn. R. Civ. P. 23.05(c) provides: “In an action previously certified as a class action under Rule 23.02(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”

No Minnesota case law interprets this rule. Little guidance is given in the Committee Comments which state that Minn. R. Civ. P. 23.05 permits a second opt-out right where there may be changes in information or the nature of asserted claims may have changed. *See* Adv. Cmte. Cmt. to 2006 Amendments to Rule 23.05 of the Minnesota Rules of Civil Procedure. Federal Rule of Civil Procedure 23(e)(4) includes the same provision as Minnesota’s 23.05 and provides guidance in interpreting and applying the Minnesota Rule. The Transmittal Report to Congress on the 2003 Amendments to Rule 23 included the following excerpt from the Advisory Committee Report,

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action. The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court’s discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court’s decision. Among these are

changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Rule 23(e)(4) must be read in context. In *Premier Electrical Construction Co.*, the Seventh Circuit stated that the principal purpose of the 1966 revision of Rule 23 was to end one-way intervention in class actions. 814 F.2d 358, 364 (7th Cir. 1986) (internal citations omitted). The additional opt-out rule is meant to provide the court with discretionary authority in situations where a settlement is reached before a case ever gets to trial. Here, there was a trial, a verdict adverse to the class, and appeals have been exhausted.

Even in cases where plaintiffs seek a second opt-out before trial, courts have routinely refused to use their discretion to allow an additional opt-out period. For example, in *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), four plaintiffs brought suit in Arizona federal court. Later, the plaintiffs chose to participate in a joint trial in an MDL case consolidated in Ohio. *Id.* at 295. The Ohio court allowed the plaintiffs to opt-in, but deemed that all previous decisions by out-of-state plaintiffs to participate in the common-issue trial were binding. *Id.* at 296. Subsequently, several out-of-state plaintiffs sought to opt-out. *Id.* The court denied their request, and a jury later found against the plaintiffs. *Id.* at 301. On appeal, the Sixth Circuit affirmed the trial court's order denying the request to opt out before trial. *Id.* The court noted that neither appellants nor the trial court could cite any legal authority to support a claim of entitlement to a second opt-out period. *Id.* at 301-02.

Similarly, in *Denney v. Deutsche Bank AG*, the court refused to order a second opt-out

period. 443 F.3d 253 (2d Cir. 2006). The court explained,

the original notice informed all class members of the basic settlement terms. The terms for class members have only improved since the notice was sent. That the terms for opt-outs have likewise improved does not mandate a new opt-out period. An additional opt-out period is not required with every shift in the marginal attractiveness in the settlement; there is always the chance that a better deal will come along for those who opt out.

Id. at 271. *See also, Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992)

(“Here the MDL 551 Class Members were given notice of the action and afforded an opportunity to opt out. The MDL 551 Class Members also were given notice of the proposed settlement and afforded the opportunity to object. This is all that Rule 23 requires”).

Objectors cite to several cases to support their argument that a second opt-out period is, in fact, necessary in this case. First Objectors look to *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983). *Holmes* was a Federal Rule 23(b)(2) class, which does not require an initial opt-out period. There, the court decided to require an initial opt-out period because *Holmes* was a Title VII case, and the settlement at issue involved money damages, not simply injunctive relief. *Id.* at 1154-55. Unlike *Holmes*, here, Plaintiff Class did have an initial opportunity to opt out. Moreover, Plaintiff Class members were not forced to join the litigation after bringing individual claims. Rather, Objectors voluntarily elected to be part of both the MDL Class and the *Milner* Class. For these reasons, *Holmes* is inapplicable to this analysis.

Next, Objectors look to *In re Diet Drugs*, 385 F.3d 386 (3d Cir. 2004), for support. *In re Diet Drugs* is also distinguishable on its facts. There, the additional opt-out provision was added by an amendment to the original settlement agreement because there was a possibility that the settlement fund would become insolvent. *Id.* at 392-93. The court found that an additional opt-out right was necessary because the terms of the original settlement were substantially changed.

Id. Here, there is no amendment to change the fundamental terms of the Settlement; rather, it is the original Settlement that is at issue. Further, there is no risk of insolvency in this case. FIE is quite willing to pay the Settlement amount. For these reasons, *In re Diet Drugs* also bears no weight in these proceedings.

Finally, Objectors rely on *Nilsen v. York County*, 228 F.R.D. 60 (D. Me. 2005), to contend that this Court must authorize a new opt-out period. In *Nilsen*, the parties settled a claim for damages resulting from illegal strip searches conducted in the county jail. *Id.* There, the district court mandated a second opt-out period due to concern about the disparity among individual claims. *Id.* at 61. The settlement in *Nilsen* provided twice the recovery for women as for men and awarded each individual the same amount regardless of how many times they were strip searched. *Id.* at 61. Here, on the other hand, the jury determined that every class member was entitled to zero damages. For purposes of this post-verdict Settlement, all class members are in exactly the same position, and every dollar they receive under the Settlement is a dollar more than they would have received from the jury's verdict. Unlike *Nilsen*, every class member will also receive the same amount of money under the Settlement.³ Comparing these cases, the nature of the Class members' claims does not weigh in favor of providing a second opt-out period.

Also weighing against Objectors' argument, comparing the present case with *Nilsen* ignores the potential problem of one-way intervention. See *Premier Electrical Construction*, 814 F.2d at 364 (stating that the principal purpose of the 1966 revision of Fed. R. Civ. P. 23 was to end one-way intervention in class action lawsuits). *Nilsen's* history established that a second opt-out right may trigger one-way intervention problems. See *Tardiff v. Knox County*, 567

³ Named Class representatives will actually receive additional compensation to reimburse them for the inconvenience, time, and expenses they incurred representing the interests of the entire class. This is discussed in detail in Section III, D(3) of the Settlement Agreement.

F.Supp.2d 200, 213 (D. Me. 2008) (holding that while a named class representative can opt out of a settlement and bring a separate suit, “she cannot successfully claim issue preclusion and certain other benefits from court decisions or litigation decisions made in the class action”). A renewed opt-out period may preclude the Class from claiming the benefit of any prior rulings in either this case or the MDL proceedings. At a minimum, this issue adds an additional layer of cost, complexity, and risk to the case.

Here, unlike the cases Objectors cite, this case has been tried to a final verdict, and appeals, including an appeal to the Minnesota Supreme Court, have been exhausted. Objectors chose to be a part of the *Milner* class. Contrary to Objector’s arguments, Minnesota law does not entitle them to a second post-verdict opt-out period.

2. *No new information has become available to Class members.*

Objectors argue that the information now available to class members is different from the information they had before. Objectors’ argument is misleading. The only possible new information available to the class is that after a trial, the jury awarded no compensation for lost wages. The additional opt-out period based on “new information” was created for situations where settlement is reached early, but after the initial opt-out period has expired. It was not intended to allow an absent class member to see the final result after trial before making an opt-out decision.

In *Automotive Refinishing Paint Antitrust Litigation*, the parties and the court agreed that a second opt-out was not necessary because there were “no significant developments since the original opt-out that would require us to provide for a second opt-out period. Moreover, class members still have the opportunity to object to the terms of the settlement.” MDL No. 1426, 2004 WL 1068807, at *3 (E.D. Pa. May 11, 2004). The same is true here. The only new

development is the jury verdict, which does not necessitate another opt-out period. The Notice clearly explains that the Class has a right to object and how to do so.

Here, Class members have already been part of the class through the trial stage. A second opt-out period after a jury verdict would simply serve to give Plaintiff a chance to fare better in other litigation. This would circumvent the purpose of the justice system by giving Plaintiff Class two bites at the same apple. Losing at trial is a risk inherent in any claim. Permitting an additional opt-out period would simply relieve the Class of a risk that they agreed to assume by becoming part of the class in the first place.

Objectors argue that new information came out at trial because evidence was presented that overtime was worked. However, the Minnesota Supreme Court ruled to the contrary. Objectors also state that FIE agreed to pay them in the MDL proceeding. The opposite is actually true. FIE appealed the MDL judgment and it was vacated. FIE never agreed to pay Objectors anything and maintains that it does not owe them anything.

As stated above, courts have great discretion in granting a second opt-out period. In this case, a renewed opt-out period is not appropriate.

D. The Settlement Agreement is fair, reasonable, and adequate.

In determining whether a settlement is fair, reasonable, and adequate, the “district court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that its decision rests on ‘well-reasoned conclusions’ and is not ‘mere boilerplate.’” *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005) (citing *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)). The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is “the strength of the case for plaintiffs on the merits, balanced against the amount

offered in settlement.” *Petrovic*, 200 F.3d at 1150 (internal quotations omitted).

The merits of this case have been fully tested. Plaintiff Class repeatedly argued that FIE’s designation of them as “exempt” under the MFLSA denied them critical statutory employment rights. Plaintiff Class prevailed on this issue at trial, although it was not granted a monetary award. FIE continues to dispute Plaintiff Class’ entitlement to remuneration of any kind. Absent this Settlement, Plaintiff Class would not likely receive any monetary relief. While FIE could pay more than it is agreeing to in the Settlement, this does not render a settlement inadequate. *See Petrovic*, 200 F.3d at 1152. The opportunity for the Class to secure any monetary recovery on any remaining claims is remote. Future relief, if any, in this proceeding, would go to the State, not the Class members.

Further, the road to recovery in the MDL proceeding is uncertain. The MDL Court already dismissed all Minnesota state law claims. In order for Objectors to maintain a viable claim in that case, the Ninth Circuit must reverse the MDL Court’s Order dismissing the MFLSA claim with prejudice. The MDL Court must then adopt *Milner*’s liability findings, reject the *Milner* jury’s damages verdict, and impose the MDL Court’s December 2004 decision as binding for those with dollar awards, but not binding for those with no damage recovery. Finally, the Objectors must then prevail on any appeals by FIE.

The Settlement Agreement provides a significant benefit on a class-wide basis to all *Milner* Class members, who may not otherwise obtain monetary relief. Objectors’ only guaranteed recovery is the \$2,238 per class member proposed in the Settlement. There are 201 members of the certified Class.⁴ Of these 200 Class Members, 75 joint members of the MDL and *Milner* classes were granted a monetary award in the MDL. Those awards ranged from \$245,617 to \$756. However, their claims were later dismissed for lack of jurisdiction. Objectors

⁴ Class Representative, Jim Oliver, has since died, reducing the number of Class Members to 200.

speculate that the Ninth Circuit could reinstate their claims and wish to risk a guaranteed recovery for every member of the Class, on the chance that that a fraction could recover more in the MDL. This argument for rejecting the current Settlement Agreement, does not relate to the fairness of the current Settlement, but the Objectors gamble of making more money in the MDL.

Given the jury's verdict, the Settlement is more than fair. Moreover, weighing heavily in the favor of approval FIE is willing to pay the settlement amount. Based on the strength of the case on the merits, balanced against the amount offered in the Settlement, and the likelihood of any class members receiving relief in the MDL proceeding, the Settlement Agreement is fair, reasonable, and adequate.

1. *Additional fairness criteria.*

Additional fairness criteria include: (1) the defendant's financial condition; (2) the complexity and expense of further litigation; and (3) the amount of opposition to the settlement. *In re Wireless Tel. Fed. Cost Recovery Fees Litigation*, 396 F.3d at 932.

First, FIE is able to pay the Settlement. "[T]he ability to ultimately collect a favorable recovery from a defendant is an important factor in determining the adequacy of a proposed settlement." *Spencer v. Comserv Corp.*, No. Civ. 4-84-794, 1986 WL 15155, at *7 (D. Minn. Dec. 30, 1986). *See, e.g., In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8th Cir. 1984); *Grunin*, 513 F.2d at 124. FIE is solvent, able, and willing to pay the Settlement amount. Viewed in terms of FIE's ability to pay, the fairness, reasonableness, and adequacy of the proposed settlement in this action is emphasized.

The complexity and expense of further litigation is another reason to approve the Settlement Agreement. The certainty of a monetary recovery, nearly nine years after this suit was first filed, is drastically increased by this Settlement. The Minnesota MDL Class is at the

mercy of the Ninth Circuit, which has already denied the Class' claims in their entirety. Even if the Ninth Circuit reinstates the lawsuit, *Milner* Class members are barred from further recovery based on the Full Faith and Credit Act, which prohibits the federal court from issuing a judgment that is contrary to the jury's verdict. Here, the jury determined that the *Milner* Class has no remedy, and the Minnesota Supreme Court held that all civil penalties must be paid to the State. This Settlement eliminates the need for lengthy, uncertain, and expensive continued appeals.

Finally, the amount of opposition to the Settlement weighs in favor of approval. Even if a "significant percentage" of class members object to the settlement, the court may approve the settlement. *Van Horn*, 840 F.2d at 606 (approving settlement although 180 of 400 class members objected). Here, thirty-four people objected to the Settlement, while over 82 percent of the Class does not oppose the Settlement. The overwhelming majority of Class members do not oppose the Settlement. The number of Objectors does not eliminate the practical implications of the Settlement to the procedural posture of this case.

2. *The Settlement appropriately benefits class members.*

Although there is no rule that settlements benefit all class members equally, *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 n. 5 (5th Cir. 1981), a disparate distribution favoring the named plaintiffs requires careful judicial scrutiny into whether the settlement allocation is fair to the absent members of the class. Courts have refused to approve settlements on the ground that a disparity in benefits evidenced either substantive unfairness or inadequate representation. *See, e.g., Franks v. Kroger Co.*, 649 F.2d 1216, 1226 (6th Cir. 1981) (reversing district court's approval of settlement when "the 'preferred position' of the named plaintiffs should have signaled the district court of potential inequities in this proposed settlement"); *Plummer v. Chemical Bank*, 91 F.R.D. 434, 442 (S.D. N.Y. 1981) ("such disparities must be

regarded as *prima facie* evidence that the settlement is unfair to the class, and a heavy burden falls on those who seek approval of such a settlement”). The inference of unfairness may be rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations.

Here, the Class Representatives will receive a combined service fee of \$25,000, roughly \$8,333.33 per Representative. Each certified Class member will receive \$2,238.81, less withholdings required by law. The higher fee for the Class Representatives is rationally based on legitimate considerations and is part of a fair settlement. Class Representatives bore a heavier burden by incurring greater expenses in terms of time, inconvenience, and expense, for example, by responding to discovery, testifying at depositions, and representing the interests of the entire Class. None of the other Class members were required to answer discovery or testify in the matter. Moreover, the Class Representatives bore the risk of having to repay FIE’s taxable costs in this litigation. Thus, the higher award for the Class Representatives is consistent with a fair and reasonable settlement. *See, e.g., Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913-14 (S.D. Ohio 2001); *In re Dun & Bradstreet Customer Litigation*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (awarding two class representatives \$55,000 each and three \$35,000 each); *In re Linerboard Antitrust Litigation*, No. MDL 1261, 2004 WL 1221350, at *19 (E.D. Pa. Jun. 2, 2004) (awarding class representatives \$25,000).

The Settlement appropriately benefits all Class members. It ensures a recovery for every Class member, is reflective of the merits of the case, and eliminates future cost and inconvenience. Based on the above analysis, the Settlement Agreement is fair, adequate, and reasonable.

E. The release language is not overbroad.

FIE claims that the release is limited to those claims encompassed within the Amended Complaint. Those claims include: (1) the failure to pay overtime; (2) records keeping claims; and (3) improper termination pay. After oral argument, the parties made two changes to the Release to ensure that the scope was not overbroad. The parties limited the date of the waived claims to October 6, 2004, the date the jury trial started. The parties also inserted the following before the final sentence of the release, “This release does not include any claims that cannot be waived as a matter of law nor does it include claims unrelated to the MFLSA claims in this lawsuit, such as claims for employment discrimination or wrongful termination of employment.”

The Release language is sufficiently narrow to include only those claims that arise from the facts, circumstances, or incidents giving rise to the *Milner* litigation. The first and central issue in this case was FIE’s failure to pay overtime. This claim is released under the terms of the Settlement. The Amended Complaint references “compensation,” “wages due” numerous times, and generally is followed by “including overtime compensation.” The claims, as pleaded, contemplate more than just overtime pay. Paragraph 28 of the Complaint seeks declaratory relief regarding “hourly compensation” owed and “overtime compensation” owed. Thus, subsection (i) of the Release is appropriately drafted to mirror the Complaint.

The second claim is FIE’s failure to keep accurate time records. Although the Complaint does not contain an express claim for failing to keep proper records, Plaintiffs prevailed on this issue at trial. This Court found that FIE violated Minn. Stat. § 177.30 by not keeping required records of hours worked. The Minnesota Supreme Court affirmed. The claim for accurate creation, retention, and preservation of records is appropriately included in the release.

Finally, the Amended Complaint sought compensation for individuals who worked for

FIE at the time of filing or within the statutory period. Paragraph 28 of the Complaint distinguishes between “members of the Plaintiff Class who currently work for Farmers” and “members of the Plaintiff Class whose employment ended.” This section of the Release clearly relates to claims by those members of the Class “whose employment with Farmers ended” before the initiation of the lawsuit. Therefore, it was properly released under the Settlement because it arises from the same operative nucleus of facts as the pleaded claims. The Settlement does not include auto or homeowners’ claims by FIE insured, wrongful termination claims based on violation of discrimination laws, or any other claims brought or anticipated against FIE.

Objectors claim that the Settlement expands the class to include almost 200 additional people. This statement is untrue. The class remains unchanged. The case was tried to verdict on behalf of all 200 plus class members.

Because the Settlement Agreement encompasses only those claims contained in the Amended Complaint, the release language is not overbroad.

F. Class Counsels’ fees are reasonable and fair.

In suits brought by private parties, the MFLSA directs courts to award attorney fees when an employer has violated any part of the Act:

In any action brought pursuant to subdivision 8, the court shall order an employer who is found to have committed a violation or violations of sections 177.21 to 177.35 to pay to the employee or employees reasonable costs, disbursements, witness fees, and attorney fees.

Minn. Stat. § 177.27, subd. 10. Because Farmers violated the MFLSA by failing to keep the required pay and time records under Minn. Stat. § 177.30, Plaintiff Class is entitled to reasonable attorneys’ fees.

This Court previously found that (1) the time and labor necessary to prosecute this class action was substantial and warranted; (2) the case was a significant and complex one; (3) the Plaintiffs' attorneys secured substantial benefits not only for the Class, but also for all future Farmers claims representatives in Minnesota; and (4) the hourly rates normally charged by the plaintiffs' attorneys and paralegals are reasonable and are comparable to those charged by equally competent attorneys and paralegals in their respective communities. Now, the Court makes specific findings about the experience, reputation, and ability of counsel and the fee arrangement between counsel and Plaintiff class.

The Minnesota Supreme Court remanded this case for recalculation of the lodestar amount. *See Anderson*, 417 N.W.2d at 630 (remanding attorney fees award where it was not clear the district court took into consideration the "fees incurred on unsuccessful claims"); *Specialized Tours*, 392 N.W.2d at 542-43 (remanding attorney fees award for the district court to "weigh the results obtained"). Previously, this Court grant Class Counsel nearly 90% of the lodestar, and a 1.5 multiplier for the work in this case.

The Supreme Court was careful to point out that attorneys' fees award should be limited to an amount that is "reasonable in relation to the results obtained." *Hensley*, 461 U.S at 440. "[T]he results obtained factor is particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of the claims for relief." *Anderson*, 417 N.W.2d at 630 (internal quotation marks omitted). "[S]everal federal circuits measure success not only by looking at the difference between the judgment recovered and the recovery sought, but also by looking at the significance of the legal issues on which the plaintiff prevailed and the public purpose served by the litigation." *Milner v. Farmers Ins. Exchange*, 748 N.W.2d 608, 623 (Minn. 2008) (citing *Brandau v. Kansas*, 168 F.3d 1179, 1181 (10th Cir. 1999); *Farrar v.*

Hobby, 506 U.S. 103, 121-22,(1992); *Scott v. Sunrise Healthcare Corp.*, No. 95 C 1277, 1999 WL 787624, at *2 (N. D. Ill. Sept. 23, 1999)).

Here, Class Counsel obtained a successful result for their clients by establishing that FIE violated the MFLSA, must pay a large civil penalty, changed its overtime pay policy in response to the litigation, and negotiated compensation for the *Milner* Class. Yet Plaintiff Class failed to recover any compensatory damages on their primary claim, which must be taken into account in determining the reasonableness of the hours expended on this litigation. Class counsels' award is reduced to account for their limited success. *See Hensley*, 461 U.S. at 436-37. Reducing the award to Class Counsel to reflect the lack of a jury award, this Court looks to previous decisions by the State appellate courts.

In looking at the appeals in this case, the Minnesota Supreme Court and Court of Appeals awarded Class Counsel approximately 52.5% of their lodestar for their work on the *Milner* appeals. The final Settlement Agreement provides for roughly the same percentage of the lodestar to Class Counsel. One million dollars is adequate compensation for attorneys' fees, costs, and expenses. Given the time and labor Class counsel devoted to this case over an eight-year period; the amount of risk and cost associated with the litigation; the benefits provided to the Class; the fees counsel charged; and the experience, reputation, and ability of counsel, the Class Counsel award is well within the range of reasonableness. \$1,000,000 is a reasonable amount for attorneys' fees and costs in this case.

IV. CONCLUSION

The Notice was sufficient and an additional opt-out period is unwarranted in this case. The proposed Settlement is fair, adequate, and reasonable, and satisfies all requirements for final approval. The Settlement is not overbroad. The Settlement provides relief to the entire class,

without the risk of additional appeals and litigation and Class Counsels' fees are reasonable.

Plaintiffs' Motion for Final Approval of Settlement is granted.