IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE TYSON FOODS, INC.,	)	
FAIR LABOR STANDARDS ACT	)	MDL Docket No. 1854 4:07-md-01854-CDL
LITIGATION	)	ALL CASES EXCEPT 07-CV-00093

MEMORANDUM IN SUPPORT OF JOINT MOTION
FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

Plaintiffs and defendant Tyson Foods, Inc. request court approval of their settlement agreement resolving plaintiffs' claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19, and dismissal of plaintiffs' claims with prejudice. A copy of the settlement agreement ("Agreement") is attached hereto as exhibit 1.

I. LITIGATION HISTORY

Plaintiffs are individuals currently or formerly employed by Tyson Foods who work or worked in certain hourly poultry processing positions at one or more of defendant's facilities during the individual limitations period applicable to each plaintiff.

A. *Fox* Lawsuit

In June 1999, 11 plaintiffs filed *Fox v. Tyson Foods, Inc.*, No. 99-cv-1612

(N.D. Ala. 1999), asserting company-wide violations of the Fair Labor Standards Act. Plaintiffs sought conditional certification and issuance of notice under section 16(b) of the FLSA. Many individuals filed consents to join *Fox*. On October 15, 2006, the district court denied plaintiffs' motion for conditional certification and issuance of notice. *Fox v. Tyson Foods, Inc.*, No. 99-cv-1612, 2006 WL 6012784 (N.D. Ala. Oct. 15, 2006).

The *Fox* court retained jurisdiction over the three named plaintiffs from the Albertville, Alabama facility, and severed the claims of the remaining seven named plaintiffs who had worked at different facilities. *See Fox v. Tyson Foods, Inc.*, No. 99-cv-1612, dkt. no. 602. In December 2006, the district court dismissed without prejudice all *Fox* opt-in plaintiffs, and in January 2008, transferred their claims to other district courts. *See id.*, dkt. nos. 606, 612. Following denial of conditional certification, multiple collective actions involving one or more facilities were filed in 2007.

B. MDL Transfer

In September 2007, the Judicial Panel on Multidistrict Litigation ("JPML") transferred and consolidated 18 collective actions and two "tag-along" actions before this Court. *See In re Tyson Foods, Inc. Fair Labor Standards Act. Litig.*, No. 4:07-md-01854 (M.D. Ga.) ("MDL"), dkt. no. 1. In March 2008, the JPML transferred five additional collective actions to the Court as tag-along actions. *See*

MDL dkt. nos. 53, 61. In October 2008, the JPML transferred one additional tag along action. *See* MDL dkt. no. 476. Attachment B to the Agreement provides a complete list of the actions included in this MDL proceeding.

C. MDL Proceedings

In January 2008, the parties agreed to conditionally certify all of the actions included in the MDL proceeding pursuant to 29 U.S.C. §216(b). This included 40 facilities. *See* MDL dkt. no. 29. The parties further agreed to conduct discovery and file motions to decertify and dispositive motions at eight "test plants."

In April 2008, notice was sent to all hourly poultry processing workers who had worked in relevant positions at the MDL facilities during the preceding three-year period. At certain MDL facilities, the limitations period was extended due to tolling orders entered by the transferor courts before the MDL transfer order was issued. Notice recipients were provided 60 days to join the relevant MDL action. Notwithstanding the 60-day period, defendant agreed to accept all otherwise valid consents filed by opt-in plaintiffs through December 31, 2008.

In October 2008, the court ruled that any opt-in plaintiffs from the original *Fox* action had to re-affirm their consents to join if they had not worked at any of the plants represented by the original *Fox* plaintiffs.[1] *See* MDL dkt. no. 477.

[1] In addition to Albertville, the other *Fox* plants were located in Berlin, Maryland; Center, Texas; Corydon, Indiana; Jackson, Mississippi; Noel, Missouri; Robards, Kentucky; and Vienna, Georgia.

In July 2009, after extensive discovery at the corporate level and the eight test plants, defendant filed a motion for partial summary judgment based on the Portal-to-Portal Act, 29 U.S.C. § 254, two motions for partial summary judgment based on section 3(o) of the FLSA, 29 U.S.C. § 203(o), and motions to decertify the collective actions at the eight test plants. *See* MDL dkt. nos. 593, 596-605. In March 2010, the Court denied defendant's Portal Act motion and decertification motions, but granted in part the section 3(o) motions. *See* MDL dkt. nos. 698-99.

In denying the motions to decertify the collective actions, the Court stated it would try *Williams v. Tyson Foods, Inc.*, No. 07-cv-00093 as a "bellwether trial" and, "depending on the *Williams* experience, the Court [would] either transfer the other [seven test] cases with reassurance that they are manageable as collective actions or [would] reconsider [the decertification] ruling." *See* MDL dkt. no. 699 at 14-15.

D. Mediation

In September 2010, the Court continued the trial in *Williams* until February 2011 and, at the request of the parties, stayed the other MDL actions to permit the parties to engage in mediation before the Hon. Kathleen Roberts (ret.). *Williams* dkt. no. 244. The parties continued mediation with mediator Hunter Hughes and in December 2010 reached an agreement to resolve *Williams* and continue mediation of the remaining MDL actions in February 2011. The Court approved settlement

in *Williams* in February 2011. *See Williams* dkt. no. 279. In May 2011, the parties reached an agreement-in-principle to resolve the MDL actions, and now present the final agreement for court approval.

The parties have cooperated in identifying the individuals who submitted proper consents to join the MDL actions. The parties have reached agreement on the exclusion of certain consents based on failure to work in a relevant position during the relevant limitations period. The claims of these individuals, who are listed in exhibit 2, will be dismissed without prejudice. The parties have reached agreement on including 16,703 opt-in plaintiffs in the settlement. These persons are listed on exhibit A to the Agreement. *See* ex. 1, att. A.

II. ANALYSIS

A. Standard For Approval Of Settlement Agreement

The parties desire to resolve all plaintiffs' FLSA claims in these collective actions. "There are only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees." *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982). "These are: (1) 'a 216(c) payment supervised by the Department of Labor' and (2) 'a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable [resolution] of a bona fide dispute over FLSA provisions.'" *Dowling v.*

Athens Ahmed Family Rests., Inc., No. 3:08-CV-73(CDL), 2009 WL 1158852, *3 (M.D. Ga. Apr. 28, 2009) (Land, J.) (citing *Lynn's Food Stores*, 679 F.2d at 1355). In short, "If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages, that are actually in dispute, we allow the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation." *Lynn's Food Stores*, 679 F.2d at 1354.

Here, for nearly 12 years, the parties have exhaustively litigated numerous issues under the FLSA including the (1) application of the Portal-to-Portal Act to pre- and post-shift clothes-changing, washing, and walking activities; (2) propriety of certification of a collective action; (3) amount of time spent on the activities at issue; and (4) amount of paid non-production time allegedly provided to perform such activities. The parties believe their individual positions have merit, however, neither side believes prevailing in the litigation is a certainty, either at the trial or appellate level.

Thus, taking into account the uncertainty and risks inherent in this litigation, and the cost and time which would be required to pursue the litigation further, the parties have decided that it is desirable and beneficial to settle the litigation in the manner and under the terms set forth in their Agreement.

Since September 2010, the parties have engaged in mediation in person and

by telephone before the Hon. Kathleen Roberts (ret.) and attorney Hunter Hughes. Negotiations were also conducted without a mediator. Settlement discussions at all times were conducted in good faith and at arm's length. The agreement resolves the parties' disputes at all poultry facilities in the MDL litigation in their entirety.[2]

Plaintiffs' counsel have considered the potential value of plaintiffs' claims, and based on their assessment of the evidence, have concluded that the proposed settlement terms reflect a fair, adequate, and reasonable settlement for their clients in all respects. In reaching this conclusion, plaintiffs' counsel have appropriately considered the risks of litigation through trial and appeal, including but not limited to (1) a verdict that is adverse in whole or part on the issues of liability or damages; (2) exclusion of its expert witnesses as a result of defendant's anticipated motions in limine; (3) decertification at trial; and (4) reversal of the Court's March 16, 2010 rulings on the Portal-to-Portal Act and decertification.

B. Terms Of The Agreement

The total amount paid to plaintiffs is guaranteed to be at least $12,250,000, and may be as much as $17,500,000. This represents a substantial recovery for plaintiffs and it will be allocated fairly among the opt-in plaintiffs on a *pro rata* basis based on the number of work weeks during which they worked at least 38

[2] This settlement agreement also resolves the outstanding issue of attorneys' fees for *Williams*.

hours in a relevant position within the FLSA's three-year limitations period.[3] *See* 29 U.S.C. § 255(a). The parties agreed that plaintiffs not employed by defendant at the time the Agreement is finally approved by the Court (hereinafter "inactive class members") must return a completed IRS Form W-4 to receive payment under the settlement. Inactive class members who do not return a completed W-4 form within the time period specified will not receive their pro rata payment under the settlement, but will have their claims dismissed with prejudice. The pro rata share of any inactive class member who fails to return timely a completed W-4 form will be retained by defendant, except to the extent these amounts are needed to satisfy the guaranteed minimum payment of $12,250,000. Plaintiffs' release of claims is limited to wage-and-hour claims.

The parties had extensive payroll information for all members of the opt-in classes and used this information to prepare damage estimates. The parties have determined that the settlement amount agreed on for the opt-in plaintiffs compares favorably to other settlements reached in the poultry processing industry involving similar claims.

By separate motion, plaintiffs' counsel will seek approval for $14,500,000 in attorney's fees and costs. The parties have agreed that this amount is appropriate. To the extent the Court does not award the full amount of fees and costs requested,

[3] The *pro rata* calculation takes into account any tolling of the limitations period ordered by a transferor court while the MDL transfer motion was pending.

50 percent of the unawarded amount will be returned to defendant and 50 percent will be allocated to class members.

The limitations on publicity provisions are reasonable and do not restrain communications between plaintiffs and their counsel and provide for alternative dispute resolution to resolve any disputes regarding public statements about the settlement. In addition, these provisions expire in December 2012.

In sum, the parties request that the Court approve their settlement and find that their Agreement constitutes a "fair and reasonable [resolution] of a bona fide dispute" under the FLSA. *See Lynn's Food Stores*, 679 F.2d at 1355.

Dated: September 2, 2011.

Respectfully submitted,

/s/Joel M. Cohn

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Certificate of Service

I hereby certify that on September 2, 2011, I caused to be electronically filed the parties' Joint Motion for Final Approval of Settlement Agreement, Memorandum in Support thereof, and proposed Order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those registered as CM/ECF participants.

/s/Joel M. Cohn
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