IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROSELYN DEXTER, ERIKA DORN and
REBECCA MADER, individually and
on behalf of those similarly situated,

Plaintiffs,

v.

MINISTRY HEALTH CARE and
AFFINITY HEALTH SYSTEM,

Defendants.

OPINION & ORDER

14-cv-87-wmc

Plaintiffs in this case, current and former employees of defendants Ministry Health Care and Affinity Health System, alleged wage and hour violations premised on the Fair Labor Standards Act ("FLSA"), 219 U.S.C. § 216 *et seq.*, and state law. Specifically, they claimed that defendants required them to remain on-call or work during lunch breaks without compensation. Pursuant to an unopposed motion, the parties in this matter seek final approval of their settlement agreement. (Dkt. #65.) Plaintiffs have also filed an unopposed motion for attorney fees. (Dkt. #59.) For the reasons that follow, as well as those set forth in the opinion and order granting preliminary approval of this settlement (dkt. #58), the court will grant final approval of the settlement terms and award plaintiffs' counsel most of the fees requested, subject to the caveat noted below.

A. Final Approval

1. Adequate Notice

In their documents seeking final approval of the settlement, plaintiffs now represent that of 642 class members, just nine (or about 1.4%) have excluded themselves from the

settlement. Further, no objections to the settlement were filed as of the close of the objection period. (Decl. of Nathan D. Eisenberg (dkt. #67) ¶¶ 3-4.)

Counsel mailed out approved notices to all class members and received between eighteen and twenty-five notices back in the mail. Those envelopes returned with a forwarding address were re-sent; some eighteen others required a public records search for updated addresses. After re-sending, no notices came back as undeliverable. (*Id.* at ¶ 2.)

Additionally, class counsel received inquiries from a total of eight individuals who believed they should have been included in the class-wide settlement: three who were erroneously not included and five who worked in the Cardiac Rehab group with in-patient responsibilities. The Cardiac Rehab group was not originally included in the settlement, but class counsel has since determined those individuals warranted inclusion. (*Id.* at ¶¶ 5-6; Br. Support Final Approval (dkt. #66) 3-4.) Fortunately, they can be paid from the contingency fund created by the settlement agreement; and if that fund were to be exhausted, defendants have agreed to pay any outstanding amount in addition to the agreed-upon $1.1 million settlement.

Accordingly, the court is satisfied this addition to the class is warranted and approves the supplemental notice provided by class counsel for these new eight class members, four of whom counsel indicates have already affirmatively joined the class. (*See* dkt. #69.) Counsel has also spoken with another of these individuals, and does not anticipate objections or requests for exclusion. Nevertheless, at the fairness hearing, the court expressed concerns about approving a settlement before some class members have received formal notice. To assuage those concerns, the court and counsel agreed that a brief stay of the court's order

approving the final settlement would be appropriate pending dissemination of the supplemental notice to the late-identified class members.

2. Fairness

The average claim for a class member is $1,050.94, based on the same calculations reviewed by the court in its order granting preliminary approval. (Mar. 25, 2015 Opinion & Order (dkt. #58) 4-5.) There is no claims process, ensuring the maximum number of class members will receive payment from the settlement. In total, plaintiffs represent that more than 98% of the funds available to the class have already been claimed by its members. Class counsel also confirmed that the actual value of each individual class member's claim should represent about 65-70% of the estimated maximum value of the class members' claims. Given the contingencies of any litigation, the court finds those to be a reasonable and fair result for class members.

Based on Friday's fairness hearing at which only the parties' counsel appeared -- as well as on their representations, the parties' written submissions, the lack of any objections and limited number of requests for exclusion, and the entire record in this case -- the court concludes that the parties' settlement is fair, reasonable and adequate pursuant to Federal Rule of Civil Procedure 23(e) and that the settlement represents a fair and reasonable resolution of a bona fide dispute over FLSA claims. The method used to calculate each plaintiff's share of the settlement fund also appears to reflect a fair and reasonable approximation of the relative value of his or her claim, making the result substantially beneficial to plaintiffs in light of the attendant risks of further litigation. Finally, the enhancement payments of $5,000 to each named plaintiff in this litigation are reasonable in

light of their assistance in the litigation, including responding to discovery and preparing for depositions.

Accordingly, the court will approve the final settlement, but will (1) require the distribution of the supplemental notice no later than June 19, 2015; and (2) stay its order of final approval until July 27, 2015, so that new class members have an opportunity to object or exclude themselves. Once that time period has elapsed, the order approving final settlement will take effect without further order of this court.

B. Attorney Fees

Class counsel seeks an award of 33.33% of the settlement fund, or $366,630, which includes both costs and attorney fees. According to Nathan D. Eisenberg and Barry P. Gill, two of the attorneys representing the named plaintiffs and putative class, class counsel devoted more than 650 hours to this case and incurred about $3,200 in costs.[1] (Decl. of Nathan D. Eisenberg (dkt. #61) ¶ 2; Decl. of Barry P. Gill (dkt. #64) ¶ 2.) More specifically, they investigated the class claims, reviewed defendants' policies, interviewed class members, administered opt-ins, collected affidavits, prepared the named plaintiffs for depositions, drafted a conditional certification motion and amended complaint, reviewed more than 180,000 pages of discovery, and participated extensively in the negotiation and construction of the present settlement; they will remain involved in administering the settlement distribution. (Decl. of Nathan D. Eisenberg (dkt. #61) ¶¶ 4-17; Decl. of Barry P. Gill (dkt. #64) ¶¶ 3-6.) Of course, class counsel also bore the risk of no recovery should the claims fail for whatever reason. Finally, and importantly, The Previant Law Firm, S.C.

[1] The affidavits provide two different numbers: $4,000 (Decl. of Barry P. Gill (dkt. #64) ¶ 2) and $3,200 (Decl. of Nathan D. Eisenberg (dkt. #61) ¶ 2). The summary of incurred costs at dkt. #61-1 reflects $3,207.03 in costs.

initially entered into a 33⅓% contingent fee agreement with the plaintiffs, with that fee to be split between The Previant Law Firm, S.C. and Gill and Gill, S.C. (Decl. of Nathan D. Eisenberg (dkt. #61) ¶ 18.) Thus, the requested award is consistent with the parties' pre-suit negotiations and expectations.

Even so, there was no advance approval of this flat rate contingency figure by this court, and a district court may opt to review a request for attorneys' fees from a common settlement fund using the lodestar method. *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014) ("[I]n our circuit, it is legally correct for a district court to choose either. Doing so is obviously not an abuse of discretion."); *see also Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994) (approving both methods based on the circumstances). Moreover, the FLSA claim pursued here has become fairly common, and the legal and factual landscape was substantially more certain by the time this case was filed in early 2014, particularly for hospital care workers who were regularly being asked to remain on call or skip their allotted and uncompensated lunch breaks. As a result, the court finds the market would ordinarily reflect this in a contingency fee arrangement that is closer the typical structure of 25% if the case resolves early, 33% if the case survives the summary judgment stage and 40% if it proceeds to trial. Otherwise the result may be, as here, for compensation at an effective hourly rate of more than $560 per hour for a relatively straightforward case that settled even before dispositive motions.

For all these reasons, the court will approve the fee petition and award class counsel $330,000 in attorney fees and costs, which still works out to 30% of the class recovery and about $500 per hour worked.

ORDER

IT IS ORDERED that:

1) The parties' joint motion for final approval of the settlement agreement (dkt. #65) is GRANTED and the parties are directed to carry out its terms and provisions;

2) the enhancement payments of $5,000.00 to each of Roselyn Dexter, Erika Dorn and Rebecca Mader are APPROVED;

3) class counsel's petition for costs and attorneys' fees (dkt. #59) is MODIFIED as described above and GRANTED;

4) the settlement payments to the participating settlement class members (*see* dkt. #50-3) are APPROVED;

5) the supplemental distribution of notice is APPROVED; and

6) final approval of this settlement is STAYED until July 27, 2015, as described above.

Entered this 16th day of June, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge