IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFF SPOERLE, NICK LEE,
KATHI SMITH, JASON KNUDTSON,
on behalf of themselves and all others
who consent to become Plaintiffs and
similarly situated employees,

Plaintiffs,

v.

KRAFT FOODS GLOBAL, INC.,
Oscar Mayer Foods Division,

Defendant.

ORDER

07-cv-300-bbc

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This class action under the Fair Labor Standards Act and state labor law is scheduled for trial on July 28, 2008. Plaintiffs have filed a motion in which they seek to reopen discovery (it closed on June 27) and continue the trial so that they may investigate a new theory of damages.

Plaintiffs are seeking compensation for time spent donning protective gear before they clock in. Counsel for plaintiffs say they have not sought compensation for any gear employees don after they clock in because they believed that employees were receiving

compensation for that time. However, counsel learned recently at a deposition that employees are not necessarily being paid just because they have clocked in. Rather, employees are paid when their shift officially starts; they are not paid for any time after they clock in but before their official start time. Relevant to this lawsuit, employees are not compensated for any protective gear they don during the period before the shift starts, even if they have clocked in. Plaintiffs wish to expand the scope of the lawsuit so that it encompasses donning gear that occurs during that short time period.

With trial only three weeks away, plaintiffs need a compelling reason to obtain an order stopping everything and delaying the resolution of the case for an indefinite period of time. They say they have such a reason in the form of misleading representations made by defendant. In particular, they say defendant led them to believe that employees were paid for all "clocked in" time when it admitted in its answer the following allegation in the complaint: "When Class Members arrive at their workstations, they are required to swipe their timecard at terminals located at the workstation. At that point, they begin to be paid." Am. Cpt. ¶22, dkt #5; Ans. ¶22, dkt. #6. Because of that admission, plaintiffs were lulled into a belief that they had no further duty to investigate how the pay period was measured.

Although I find defendant's lack of candor troubling (an issue I will address further below), I cannot conclude that plaintiffs are entitled to the extraordinary relief that they seek. I reach this conclusion both because of plaintiffs' counsel's complete lack of diligence

in investigating the issue and because plaintiffs have failed to make any showing that reopening discovery would generate evidence that would allow them to substantially increase their potential damages in this case.

The lack of diligence of plaintiff's counsel can be traced to the beginning of the lawsuit. An obvious question is raised by plaintiffs' motion that they fail to answer: why didn't counsel *ask their clients* how they were paid? It is not plausible to believe that none of the named plaintiffs were aware that they were not paid for time after clocking in but before the shift began. This would mean that defendant was engaging in a serious and widespread deceptive practice, a charge that plaintiffs do not make in their motion. On its own, this basic failure of communication is enough to deny plaintiffs' motion.

Further, even if I assumed that defendant was lying to its employees and they failed to discover the discrepancies in their paychecks, plaintiffs concede in their motion that defendant produced documents in discovery that revealed that compensation was tied to the beginning of a shift rather than the time an employee clocked in. According to defendant, these documents were produced in September 2007. Missing from plaintiffs' motion is any explanation for their failure to review these documents.

Finally, plaintiffs acknowledge that they failed to conduct their 30(b)(6) depositions until just before the close of discovery. This was a baffling decision. As counsel must know, depositions often reveal new information requiring follow-up discovery. By waiting until the

eleventh hour, plaintiffs risked the very situation that has arisen, which is that they would have no time to get the discovery that they needed. Plaintiffs should not be rewarded for their procrastination and lackadaisical approach to discovery by receiving a do over. They cannot claim that they relied reasonably on defendant's answer when they could have and should have easily discovered the information they needed on their own.

Also important, it is far from clear whether the new road that plaintiffs wish to take would lead anywhere. Plaintiffs do not suggest that employees are *required* in any circumstance to clock in before their shift begins. In fact, defendant denies that they are. Thus, if employees clock in at the official start time, they are paid for any donning they perform after they clock in. They are not compensated if they choose to clock in early *and* their donning activities occur before the beginning of the shift. Plaintiff does not suggest any reason why it would be appropriate to require defendant to pay damages for these activities when it was the employees' own choice to start early. Even if such activities were compensable under the FLSA or state law, plaintiff gives no reason to believe that a significant number of employees actually don equipment between the time they clock in and their shift begins. Accordingly, plaintiffs' motion will be denied.

This is not to say that defendant's conduct was commendable or even acceptable. There is no mistaking that defendant admitted something in its answer that it knew was not true. Defendant states in its response that it had a "right" to admit the false allegation, dkt.

#188, at 5, but cites no authority for such a brazen proposition. Also, it attempts to argue that defendant's admission *was* accurate because employees *are* paid from the time they clock in. Defendant does not help its situation by advancing such a specious argument. Employees are paid from the time they do *anything*, if that also happens to be the time that their shift begins. The important point is that it is the commencement of the shift and not clocking in (or anything else) that triggers the beginning of the pay period. Defendant's admission was still false even if clocking in and the beginning of the pay period often occur at the same time. It cannot argue plausibly that it failed to see the difference.

Even more troubling, defendant failed to correct the false admission, even after this court adopted plaintiff's assumption in both the summary judgment order and the order granting class certification. Defendant's counsel justifies the inaction by saying defendant did not want to "annoy" the court with "irrelevant" facts. Dkt. #188, at 16. However, that was not defendant's call to make. This court found the fact relevant enough to include it in two separate opinions. That should have been enough to impel defendant's counsel to correct the error. Although the fact may not have been crucial to the case, that did not give defendant license to mislead plaintiffs or this court. It and its counsel had a duty of candor that they failed to meet.

Under Fed. R. Civ. P. 11(c)(3) as well as its inherent authority, a court may sanction a law firm for improper litigation tactics, so long as the firm has notice of the potential

sanction and an opportunity to respond. United Stars Industries, Inc. v. Plastech Engineered Products, Inc., 525 F.3d 605, 610 (7th Cir, 2008); Johnson v. Cherry, 422 F.3d 540, 548-49 (7th Cir. 2005). Accordingly, counsel for defendant may have until July 18, 2008, to show cause why they should not be required to pay a penalty of $5000 into the court for their lack of candor.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion to reopen discovery and continue the trial, dkt. #157, is DENIED.

2. Counsel for defendant may have until July 18, 2008 to show cause why they should not be sanctioned for their lack of candor.

Entered this 10th day of July, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge