

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

DONNA BATES, CATHERINE A.
STEFFA, and CAREN CHRISTENSEN,

Plaintiffs,

v.

KERRY, INC.,

Defendant.

OPINION AND ORDER

13-cv-142-wmc

On behalf of themselves individually and others similarly-situated, plaintiffs Donna Bates, Catherine A. Steffa and Caren Christensen bring this action alleging that defendant Kerry, Inc., denied plaintiffs and other employees overtime wages by improperly classifying them as exempt in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216, and Wisconsin state law. (Am. Compl. (dkt. #21).) Presently before the court is the parties’ joint stipulation for class certification under Federal Rule of Civil Procedure 23 and conditional certification of a collective action under the FLSA, 29 U.S.C. § 216(b) (dkt. #134), and plaintiffs’ unopposed motion for preliminary approval of settlement agreement (dkt. #135.) The court will grant both motions and set a fairness hearing for January 9, 2014, at 1:00 p.m.

BACKGROUND

Plaintiffs filed this class and collective action on February 27, 2013, (Compl. (dkt. #1)), and filed an amended complaint on May 3, 2013 (Am. Compl. (dkt. #21)). Plaintiffs allege that Kerry improperly classified as exempt the positions of Customer

Service Representative, Customer Care Representative, and Customer Care Coordinator. As a result of those classifications, employees in those positions who worked more than 40 hours per week were not compensated for any hours worked over 40. Defendant denies that these positions were misclassified as exempt.

On July 15, 2013, plaintiffs filed a motion for conditional certification of an FLSA collective action (dkt. #31), which defendant opposed (dkt. #123). Since that time, the parties have engaged in discovery, including the production and review of tens of thousands of pages of documents and the depositions of the three named plaintiffs and six other employees who have already opted into the proposed FLSA collective action. Both sides have also generated damages models. Before plaintiffs filed their reply in support of their motion for conditional certification, the parties reached a settlement on September 16, 2013, which is the subject of this order.

The settlement agreement provides for a \$525,000 settlement fund. As part of the settlement, the parties have stipulated to a Rule 23 class of state law claims and an FLSA collective action. In light of the hybrid claims, the settlement provides for three funds: (1) a “Two-Year Fund” allocated to class members who worked during the most recent two-year period preceding the initiation of the lawsuit; (2) a “Third-Year Fund” for those employees who have consented or will consent to join the FLSA collective action and who worked during the earliest year of the three-year period preceding the initiation of this lawsuit; and (3) an “FLSA Liquidated Damages Fund” for those employees who have consented or will consent to join the FLSA collective action. For settlement purposes, the parties agreed to attribute damages to one hour of overtime per

week plus the liquidated value of one hour of overtime where appropriate. The average claim for an individual participating in both the class action and collective action is \$3,254.26.

From the first amendment to addendum to the settlement agreement and the revised notice,¹ the settlement envisions the following options for class members:

Options	Result	Award	Release
Participate in Wisconsin state law settlement only	Do not opt out of class; do not opt into FLSA	2 years of overtime wages	Just state law claims
Participate in Wisconsin state law and FLSA claims by either (1) completing consent form or (2) cashing second check	Do not opt out of class; opt into FLSA	2 years of overtime wages and 3rd year of overtime wages and liquidated damages (if the latter two are applicable)	Everything (state law and FLSA claims)
Exclude yourself	Opt out of class; do not opt into FLSA collective action	Nothing	Nothing

Any settlement amounts allocated to individuals that are not claimed -- either because the individuals exclude themselves from the settlement, the payments were returned as undeliverable, individuals failed to cash their checks within 120 days, or individuals failed to submit timely consent forms -- will be distributed as a *Cy Pres* award to a nonprofit organization, Smiles (<http://www.smilestherapeuticriding.org/>).

¹ After the court raised a concern about the release language in the settlement agreement, the parties submitted a first amendment to addendum to settlement agreement and a revised notice. (Dkt. ##142, 142-1). As indicated during a telephonic hearing held on October 25, 2013, the court finds the amended language for the release and notice acceptable and assumes use of this amended language in preliminarily approving the settlement and certifying a collective action and class action for purposes of settlement.

Counsel intends to petition the court for attorneys' fees of one third of the settlement fund, plus costs. The settlement agreement also includes enhancement payments, \$7,500 for each of the three named plaintiffs, and \$2,500 for each of the six opt-in plaintiffs who were deposed and participated in discovery.

ORDER

I. Preliminary Settlement Approval

1. Based upon the court's review of plaintiffs' unopposed motion for preliminary approval of the settlement agreement and the first amendment to the addendum to that settlement agreement and revised notice (dkt. ##135, 142, 142-1), as well as all corresponding exhibits and papers submitted in connection with the motion, preliminary approval of the settlement is GRANTED.

2. The court concludes that at this preliminary stage, the proposed settlement "is within the range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998), and finds that it was reached as a result of vigorously-contested litigation to resolve bona fide disputes, *see Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982).

3. The court finds that the proposed settlement appears to be the result of extensive, arm's-length negotiations by counsel well-versed in the prosecution and defense of wage-and-hour class action lawsuits.

4. While the court is satisfied that the settlement is facially reasonable, it intends to scrutinize plaintiff counsel's application for attorneys' fees when the time comes for final approval of the settlement. Specifically, the court may use counsel's hourly billing records and rates as a factor in determining an appropriate fee award.

II. Certification of the Rule 23 Class and FLSA Collective Action

5. For settlement purposes only, the court certifies the following class under Fed.

R. Civ. P. 23(e) (the "Rule 23 Class"):

All Customer Service Representatives, Customer Care Representatives, and/or Customer Care Coordinators (including such position titles that began with the terms "Senior" and/or "Lead Key Account") (collectively, the "Class Positions") who (a) worked for Defendant in Wisconsin at any time from February 27, 2011, through the date on which the Court preliminarily approves the settlement, and (b) were paid as salaried, exempt employees during any portion of that time period while holding one or more of the Class Positions.

(Joint Stip. (dkt. #134) ¶ 1.)

6. The Rule 23 Class meets all of the requirements for settlement class certification under Fed. R. Civ. P. 23(a) because:

- a) there are more 94 members of the class.
- b) the class members share common alleged issues of fact and law, including:
 - i. whether defendant failed to pay appropriate overtime compensation to the named plaintiffs and members of the class in violation of and within the meaning of Wis. Stat. § 103.03 and Wis. Admin. Code § DWD 274.03;

- ii. whether the named plaintiffs and members of the class are exempt from overtime compensation under Wisconsin Law;
 - iii. the nature and amount of the allegedly compensable work performed by the named plaintiffs and members of the class;
 - iv. whether defendant employed the named plaintiffs and members of the class within the meaning of Wisconsin law; and
 - v. the proper measure of damages, if any, sustained by the named plaintiffs and members of the class.
- c) the named plaintiffs' claims arise from the same factual and legal circumstances as the class members;
 - d) class counsel are qualified, experienced, and able to conduct the litigation; and
 - e) the named plaintiffs' interests are not antagonistic to the class members' interests.

7. The Rule 23 Class satisfies Fed. R. Civ. P. 23(b)(3) because common factual allegations and a common legal theory predominate over any factual or legal variations among class members. Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually.

8. For settlement purposes only, the court certifies the following collective action pursuant to 29 U.S.C. § 216(b) (the "FLSA Collective Action"):

All Customer Service Representatives, Customer Care Representatives, and/or Customer Care Coordinators

(including such position titles that began with the terms “Senior” and/or “Lead Key Account”) (collective, the “Class Positions”) who (a) worked for Defendant in Wisconsin at any time from October 3, 2010, through the date on which the Court preliminarily approves the settlement, and (b) were paid as salaried, exempt employees during any portion of that time period while holding one or more of the Class Positions.

(Joint Stip. (dkt. #134) ¶ 1.)

9. The named plaintiffs are similarly situated to other employees to support a collective action under the FLSA.

III. Appointment of Plaintiff’s Counsel as Class Counsel and the Named Plaintiff as Class Representative.

10. The court appoints Hawks Quindel, S.C. as class counsel because it meets all of the requirements of Fed. R. Civ. P. 23(g).

11. Class counsel did substantial work identifying, investigating, prosecuting, and settling FLSA and the Rule 23 Class members’ claims.

12. Class counsel’s attorneys have substantial experience prosecuting and settling employment class actions, including wage-and-hour class actions, and are well-versed in class action and wage-and-hour law. The Western and Eastern Districts of Wisconsin have both found class counsel adequate in employment law class actions in the past.

13. The work that class counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the class’s interests.

14. The court appoints plaintiffs Donna Bates, Catherine Steffa and Caren Christensen as the class representatives of the Rule 23 Class and of the FLSA Collective Action.

IV. Class Notice and Settlement Procedure

15. The court approves the Proposed Notice of Settlement attached to the first amendment to addendum to settlement agreement and the proposed letters to class members accompanying the settlement checks. (Dkt. ##142-1, 142-2, 142-3.) The court directs the distribution of the Notice.

16. Pursuant to Fed. R. Civ. P. 23(c)(2)(B), a notice must provide:

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

17. The Notice satisfies each of these requirements and adequately puts the Rule 23 class members and FLSA collective action members on notice of the proposed settlement.

18. The court approves the following settlement procedure and timeline:

- a) no later than November 8, 2013, class counsel will mail the Notice of Settlement to the class members;
- b) class members will have 40 days from the date of the mailing to review the terms of the Notice and submit a request to be excluded or any objections;

- a) no later than December 19, 2013, class counsel shall file a petition for attorneys' fees and costs;
- b) any supplemental briefing on the parties' motion for final approval of the settlement and any objection to class counsel's fee petition are due on or before January 2, 2014; and
- c) the court will hold a fairness hearing on January 9, 2014, at 1:00 p.m.

Entered this 30th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge