IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

KRISTY WILSON, DARREN MOORE, AND KISHA ULYSSE, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	Case No. 3:13-cv-01328
v.	)	Judge Campbell Magistrate Judge Bryant
MICROS SYSTEMS INC.,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF CONSENT MOTION FOR APPROVAL OF SETTLEMENT

Plaintiffs Kristy Wilson, Darren Moore, and Kisha Ulysse, on behalf of themselves and all others similarly situated (collectively "the Plaintiffs"), with the consent of Defendant Micros Systems, Inc., ("Defendant," and together with the Plaintiffs, the "Parties"), have moved the Court for an Order Approving the FLSA settlement in the above captioned action. In support of the relief requested, the Plaintiffs state as follows:

SUMMARY OF THE CASE AND PROCEDURE

This is an opt-in collective action under §216(b) of the FLSA. The Complaint also alleged claims under California state law, but no motion for Rule 23 class certification was filed in this case. The parties have reached a settlement as to the Plaintiffs' claims and request the Court's approval of this FLSA settlement.

A. Summary of Plaintiffs' Claims

Plaintiffs brought this suit alleging overtime claims under the FLSA and wage and hour claims under California state law for work performed within the State of California. (D.E.1 ¶ 1, 2). Plaintiffs allege that Defendant suffered or permitted Plaintiffs to work in excess of 40 hours

per workweek without receiving the legally required overtime as required by the FLSA. (D.E. 1 ¶ 30). In other words, Plaintiffs claim that the Defendant misclassified all named and opt-in Plaintiffs (not based in California)[1] as exempt under the FLSA and California law. Plaintiffs were employed by Defendant as Implementation Specialists or Senior Implementation Specialists (an collectively an "IS" or "ISs"). Plaintiffs assert that when Defendant sold certain computer-based systems to commercial business customers, ISs would then install the system's hardware and/or pre-programmed software sold by Defendant at customer sites.

Plaintiffs alleged that Defendant cannot carry its burden of proving that the IS job duties fall clearly and unmistakably within any narrowly construed exemption under Section 213(a)(1) to the FLSA's mandatory overtime compensation provisions. (D.E. 18 pp 2). Plaintiffs further asserted that Defendant cannot carry its burden of proving that the job duties of an IS fall clearly and unmistakably within any narrowly construed exemption under California's wage and employment laws applicable to individuals who performed IS job duties within the State of California, and that Defendant violated California wage and employment laws as stated in the Complaint as to those employees performing such work within the State of California. (D.E. 18 pp 2). They sought recovery of overtime back pay, liquidated damages, fees and costs, and all other interest and other relief available under federal and California laws. (D.E. 1 ¶ 85).

B. Summary of Defendant's Defenses

Defendant argues that its salary-paid ISs (i.e., those not based in California) are exempt from the overtime provisions of the FLSA under 29 U.S.C. § 213(a)(1). Specifically, it claims that ISs are exempt "administrative" employees because their primary duty is the performance of non-manual work that is directly related to the management or general business operations of

[1] California-based Implementation Specialists are classified as non-exempt and paid hourly.

Defendant's customers, and this primary duty involves the exercise of discretion and independent judgment with respect to matters of significance. (D.E. 18 pp 2). Defendant contends that discovery revealed that Implementation Specialists conducted training of client personnel, worked with clients to resolve client questions, and acted as the "face" of the company during the installation process, all of which, Defendant asserts, required the exercise of independent judgment and discretion. Alternatively, Defendant argues that ISs are exempt "Computer Professional" employees because they are paid in excess of $455/week and are skilled computer workers with the primary duty of documentation, analysis, testing or modification of computer systems related to user specifications. *See* 29 C.F.R. § 541.400. (D.E. 18 pp 3).

In a second alternative, Defendant argues that ISs are exempt under the "combination exemption" because they perform a combination of exempt "administrative" and "computer" duties. S*ee* 29 C.F.R. § 541.708. (D.E. 18 pp 3). Defendant asserts that any violation of the FLSA was not willful, and that it classified ISs as exempt in good faith. (D.E. 18 pp 3).

C. <u>Summary of Procedure</u>

The parties stipulated to a court supervised Rule 216(b) conditional collective action certification and notice of opportunity to opt-in for the FLSA and California state law claims. (D.E. 19). On January 31, 2014, the Court granted the Parties' Joint Motion for Court Supervised Notice, (D.E. 25), ordering that a collective action of the following individuals should be conditionally certified and notified of this lawsuit pursuant to 29 U.S.C. § 216(b):

> Any person who worked for Micros Systems Inc. as an Implementation Specialist paid by salary at any time within the period beginning three years prior to the filing date of this Stipulation through the date of judgment (the "Class"); and
>
> Any person who worked for Micros Systems, Inc. as an Implementation Specialist paid by salary and who performed any work in any Implementation Specialist position within the State of

> California (including such employees based out of state who traveled to California and performed installations or other on-site work within the State of California) at any time within the period beginning four years prior to the filing date of Plaintiffs' Complaint through the date of judgment (hereinafter the "California Subclass").

(D.E. 25 pp. 1). After Court-supervised Notice was issued, approximately 90 persons opted in to join the lawsuit. The parties exchanged discovery responses and document productions. Defendant took the depositions of six opt-in Plaintiffs: Austin Zellner, David Bushery, Thomas Ruiz, Irfan Rizwi, John Cox, and Rob Boerger. The parties attempted, at length, to mediate this case. First, the parties conducted a mediation in Nashville, TN on September 16, 2014, with the assistance of Allen Blair, a Rule 31 mediator from Memphis. Although this mediation was unsuccessful, negotiation efforts between the parties continued. The parties agreed to convene a second mediation with Robert Boston as mediator. This second mediation took place in Nashville on December 18, 2014. Again, although this second mediation resulted in agreement to some but not all final material terms, the parties continued negotiations, and eventually were able to reach a resolution which is memorialized in the Settlement Agreement that is the subject of this Motion.

The Notice issued to the collective class stated, in pertinent part for this settlement:

> **What Happens if I Join this Lawsuit?**
> If you join the Lawsuit, you will be bound by any judgment of the Court, whether it is favorable or unfavorable. If the Plaintiffs are successful in recovering a money judgment or settlement from MICROS, you will also be bound by any such judgment or settlement and will share in the amount recovered by the Plaintiffs. If you join the Lawsuit, the Plaintiffs' attorneys will represent you on a contingent fee basis. Under the fee agreement, you will not have to pay the lawyers directly – win or lose. Instead, the attorneys will be paid a portion of the amount, if any, recovered from MICROS by settlement or other payment, or as otherwise awarded by the Court.

Each and every opt-in plaintiff then conferred the Named Plaintiffs with full authority to negotiate settlement and engage counsel on their behalf, by the express language of their Court-approved Consent forms (D.E. 19-2) filed by each opt-in plaintiff in this case:

> I hereby designate the Representative Plaintiff(s) as my agent(s) to make decisions on my behalf concerning this case, including conducting this litigation, settlement negotiations, and all other matters pertaining to these claims. By filing this consent, I will be bound by the decisions made and agreements entered into by the Representative Plaintiff(s) and Class Counsel.
>
> I understand that the Representative Plaintiffs have entered into a contingency fee agreement with Fried & Bonder, LLC and Gilbert Russell McWherter, PLC ("Class Counsel"), which applies to all plaintiffs who file this consent, and by filing this consent I agree to be bound by such agreement. I understand that I may obtain a copy of the contingency fee agreement by requesting it from Class Counsel.
>
> I acknowledge that I will be bound by any judgment or any settlement reached between the Representative Plaintiff(s) and Defendant. I understand that I will be entitled to share in any class recovery, but if no monetary judgment or settlement is obtained, I will receive nothing.

STANDARD OF REVIEW

"Employees are guaranteed certain rights by the FLSA, and public policy requires that these rights not be compromised by settlement." *Crawford v. Lexington–Fayette Urban County Gov.*, 2008 WL 4724499, at *2 (E.D. Ky. Oct. 23, 2008). "The central purpose of the FLSA is to protect covered employees against labor conditions 'detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.' " *Id.* (quoting 29 U.S.C. § 202). The provisions of the FLSA are mandatory and, except in two narrow circumstances, are generally not subject to bargaining, waiver, or modification by contract or settlement. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706 (1945). The first exception is settlement agreements that are supervised by the Department of Labor, and the second

exception encompasses instances in which federal district courts approve settlement of suits brought in federal district courts pursuant to Section 16(b) of the FLSA. *See Lynn's Food Stores v. U.S.*, 679 F.2d 1350, 1354 (11th Cir.1982) (district court allowed to approve back wage settlement in order to promote the policy of encouraging settlement of litigation).

As held in *Lynn's Food Stores v. United States,*

> Settlements may be permissible in the context of a suit brought by employees under the FLSA for back wages because initiation of the action by the employees provides some assurance of an adversarial context. The employees are likely to be represented by an attorney who can protect their rights under the statute. Thus, when the parties submit a settlement to the court for approval, the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching.

Id. at 1354.

In reviewing a settlement of an FLSA private claim, a court should scrutinize the proposed settlement for fairness, and determine whether the settlement is a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Id.* at 1355. "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 the district court [may] approve the settlement in order to promote the policy of encouraging settlement of litigation." *Id.* at 1354. Finally, a court proceeding over FLSA suit "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

This is a collective action settlement under the FLSA. This is not a Rule 23 state law class settlement. Plaintiffs did not move for certification of a state law class action, and the Court did not enter any order certifying a state law class or ordering issuance of a Rule 23 class certification

notice.[2] "The standard for approval of an FLSA settlement is significantly lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as a Rule 23 settlement." *Flores v. One Hanover, LLC*, 2014 U.S. Dist. LEXIS 78269 (S.D.N.Y. June 9, 2014). "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement," and "approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes." *Id.* (citing *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353-54, 1353 n.8 (11th Cir. 1982)).

THE PROPOSED SETTLEMENT AGREEMENT IS FAIR

The Settlement Agreement resolves a legitimate dispute. Although Plaintiffs contend that MICROS failed to pay them for overtime hours, MICROS maintains that its pay practices are in compliance with all state and federal wage and hour laws. The cost of litigation to determine which of the parties' arguments would win the day would be extensive. The Settlement Agreement, on the other hand, provides Plaintiffs with immediate and certain recovery. Thus, the considerations of *Lynn's Food Stores v. United States* weigh in favor of approval of the Settlement Agreement. In addition, the parties have engaged in lengthy negotiations at arm's length, so there is no risk of fraud or collusion. Finally, as set forth herein, the parties and their counsel are of the opinion that the Settlement Agreement is a fair and reasonable resolution of their dispute.

A. **The Terms of the Agreement are Fair**

Under the terms of the attached Settlement Agreement, MICROS agrees to a total settlement amount of $925,000 ("Settlement Amount"), inclusive of all wages, damages, penalties, liquidated damages, interest, and other amounts payable or owed to the named Plaintiffs and opt-in Plaintiffs, and all attorneys' fees or costs.

[2] The only notice issued to putative class members was notice of rights to join a collective action lawsuit under Section 216(b) of the FLSA.

This amount is to paid by MICROS within thirty-five (35) days of approval of the Settlement Agreement, and is to be distributed as follows: Payments to Plaintiffs from the Gross Settlement Amount shall be apportioned by first, calculating the "Distribution Amount" by deducting and allocating two things from the Gross Settlement Amount: (a) the total amount of attorneys' fees and costs as approved by the Court to be paid to Gilbert Russell McWherter Scott Bobbitt PLC, and Fried & Bonder, LLC, ("Plaintiffs' Counsel"), and (b) the total service payments, if any, approved by the Court to be paid to the named Plaintiffs. Second, Plaintiffs' Counsel will calculate the number of workweeks that each Plaintiff worked in a covered position during the period beginning three years preceding the filing date of their consent in the litigation through the present to determine their individual "Covered Workweeks" and the total of all Plaintiffs' Covered Workweeks.[3] Plaintiffs' Counsel will divide the Covered Workweeks worked by the individual Plaintiff by the overall total Covered Workweeks to determine the fraction of the Distribution Amount to which that individual claimant is entitled. That fraction will be multiplied by the Distribution Amount to determine the individual Plaintiff's settlement payment amount as a pro rata percentage from the Distribution Amount.

In addition to their Participating Class Member's Payment, Plaintiffs request Court approval of service payments to the Named Plaintiffs for assisting in the litigation. Specifically, Kristy Wilson, Darren Moore, and Kisha Ulysse will receive a service payment of $5,000.00 each ($2,500.00 for each full or partial year of participation).

In exchange for payment from the Settlement Amount, each Plaintiff will release wage and hour related claims as set forth more fully in the Agreement. The Named Plaintiffs, in

[3] For any Plaintiff who filed a Consent and met the definition of an eligible participant under the Court-approved Notice in the Litigation, but who did not work within the three year period preceding the filing date of their Consent in the Litigation, that number shall be two (2) weeks.

consideration of their receipt of additional compensation as part of the Settlement, release a broader scope of claims, as set forth more fully in the Agreement.

The Rule 23(e) Class Action Claims are to be dismissed without prejudice. The parties agree that there shall be no claim preclusion effect for claims not released in this case arising out of the filing or release of released claims in this case. They also agree that while the filing of this lawsuit stayed the statute of limitations for any claim under Federal Rule of Civil Procedure 23 or analogous state class action rules asserted in the Complaint or any previously filed amendment thereto from the date of filing through the date of dismissal with prejudice, with whatever tolling effect arises therefrom under the law of American Pipe and its progeny, the filing of this lawsuit did not act to stay the statute of limitations for any claim not asserted in the Complaint or any previously filed amendment thereto

Finally, under the terms of the Settlement Agreement, Plaintiffs' Counsel will be compensated for their attorneys' fees in an amount equal to 35% of the Settlement Amount, or three hundred, twenty-three thousand, seven hundred and fifty dollars ($323,750), in addition to reimbursement of advanced litigation costs of $15,066.95.

B. <u>The Amount To Be Awarded As Attorneys' Fees And Costs Is Reasonable.</u>

The requested fees and costs are fair compensation for undertaking complex, expensive, and time-consuming litigation solely on a contingency basis, which has resulted in substantial benefits to the potential Class Members. Plaintiffs expended approximately ten thousand dollars on transcript and other costs for the six depositions of opt-in plaintiffs alone, in addition to other costs including filing and service fees, and therefore request compensation from the Settlement Amount for $15,066.95 in costs.

The district court "must make sure that [class] counsel is fairly compensated for the amount of work done as well as for the results achieved" and "the percentage of the fund method more accurately reflects the results achieved". *Rawlings v. Prudential Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). Plaintiffs contend, and Defendant does not oppose, that the results achieved for the Plaintiffs strongly support the requested fee approval.[4]

Courts have long utilized the common-fund-doctrine in awarding attorneys' fees to counsel pursuing claims on behalf of a class, particularly "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum [settlement] on his behalf." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As the Manual for Complex Litigation recognizes, "one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual for Complex Litigation (4th) § 14.121. The litigation expenses sought to be reimbursed are proper and reasonable. All such expenses were incurred in the course of these actions for the purpose of preserving, proving, and presenting the claims of the Representative Plaintiffs and other, similarly-situated employees.

"The preferred method in common fund cases has been to award a reasonable percentage of the fund, with the percentage awarded typically ranging from 20 to 50% of the common fund." *Chesher v. Neyer*, 2007 U.S. Dist. LEXIS 93210 (S.D. Ohio Dec. 19, 2007) (citing *Bowling v. Pfizer*, 922 F. Supp. 1261, 1278-79 (S.D. Ohio 1996), *aff'd*, 102 F.3d 777 (6th Cir. 1996)). The 35% of the total Settlement Amount for attorney's fees and costs to be awarded to Plaintiffs' Counsel is within the 20% to 50% range, and closely approximates the percentage of total

[4] *See, e.g., Dillworth v. Case Farms Processing, Inc.*, 2010 WL 776933 (N.D. Ohio Mar. 8, 2010)(awarding counsel's fees using the common fund method at one-third (33 1/3%) of the total settlement fund in FLSA collective action, holding results were "exceptional" where "[t]he Individual Payments to participants represent approximately *one-third* of claimed unpaid wages, *before* deduction of attorneys' fees and expenses[, which] is well above the 7 % to 11 % average result achieved for class members.") (emphasis added).

maximum possible fund amounts approved by courts in similar FLSA settlements. *See, e.g.*, *Pendergrass v. City Gear, LLC,* No. 3:12-cv-01287 [Dkt. 142] (M.D. Tenn. Mar. 14, 2014) (Campbell, J.) (awarding attorneys' fees in FLSA and Rule 23 hybrid action at one-third (33 1/3%) of the total possible Maximum Payment settlement amount); *Dillworth*, 2010 WL 776933 (N.D. Ohio Mar. 8, 2010)(awarding counsel's fees using the common fund method at one-third (33 1/3%) of the total FLSA settlement fund). Although Plaintiffs' Counsel's engagement agreement allows for a contingency fee recovery of 40% of the Settlement Amount plus reimbursement of costs, Plaintiffs' Counsel limits their request for fees to 35% of the Settlement Amount plus reimbursement of costs.

Although this Court has previously approved common fund awards at close to the same percentages of total possible settlement amount in *Pendergrass* (33 1/3% of the total Maximum Participation amount in a claims-made reversionary FLSA/Rule 23 hybrid case), and the percentage of the fund here is even more easily supported because it is based on a non-reversionary fund guaranteed to be paid in full, if the Court requires additional briefing or information on the attorney's fees and costs requested herein, Plaintiffs request the opportunity to provide any such briefing or information requested in support of this requested award.

C. <u>The Amounts Requested To Be Approved As Service Payments Are Reasonable.</u>

The amounts of $2,500 per whole or partial year of service (i.e., $5,000 to each of three Named Plaintiffs) are within the range awarded by district courts in this Circuit, and in wage and hour actions in other jurisdictions. *See e.g.*, *Swigart v. Fifth Third Bank*, 2014 U.S. Dist. LEXIS 94450 (S.D. Ohio July 11, 2014) (approving "modest class representative award" requests of $10,000 to each of the class representatives in FLSA/Rule 23 Hybrid); *Fosbinder-Bittorf v. SSM Health Care of Wisconsin, Inc.*, 2013 U.S. Dist. LEXIS 152087 (W.D. Wis. Oct. 23, 2013)

(approving service payments between $5,000 and $15,000 to named and participating plaintiffs in FLSA/Rule 23 Hybrid); *Henry v. Little Mint, Inc.*, 2014 U.S. Dist. LEXIS 72574 (S.D.N.Y. May 23, 2014) (approving $10,000 service awards to named plaintiffs in FLSA/Rule 23 Hybrid).

DISMISSAL WITHOUT PREJUDICE OF RULE 23(e) CLAIMS

This action was originally brought as both an FLSA collective action under 29 U.S.C. § 216(B), and a potential but uncertified class action under F.R.C.P. 23. Under the terms of the Settlement Agreement, the Rule 23 class claims are dismissed without prejudice. Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e). However, like the majority of courts, the Sixth Circuit has held that notice in a pre-certification context is only required when putative class members are likely to be prejudiced by the settlement. *Doe v. Lexington-Fayette Urban County Gov't*, 407 F.3d 755, 762 (6th Cir. 2005).

> "[R]ather than setting down an absolute rule[,] we choose to place discretion in the district court to assess the prejudice to absent class members caused by the settlement, the institutional costs of notice and a certification hearing, as well as other factors relevant to this determination."

Id. (quoting *Simer v. Rios*, 661 F.2d 655, 666 (7th Cir. 1981)).

Because there is no prejudice to the potential California law class in the instant case, notice is not necessary. There will be no prejudice to absent class members resulting from this settlement for the following reasons. First, the hours worked by non-California-based employees within California are largely the same hours (i.e., hours over 40 in a week) that are already being compensated by this FLSA settlement. The opt-in Plaintiffs are receiving compensation in

accordance with the FLSA. The only amounts that are ultimately not being compensated are those that required by California state law provisions that go beyond the FLSA overtime provisions.[5]

Second, Oracle Corporation announced its agreement to acquire Micros Systems, Inc. in approximately June, 2014, and completed the acquisition in approximately September, 2014. Thus, all then-current Micros Systems ISs who transitioned to employment with Oracle are now subject to Oracle's pay policies and, Defendant represents that Oracle Implementation Specialists who work in California, regardless of whether they are based in California, will be paid by the hour on a non-exempt basis in accordance with California law for their hours worked within the State of California. Accordingly, the main practice complained of in this lawsuit arising under California law – failing to pay non-California based ISs on a non-exempt, hourly basis for the hours they work within the State of California – should no longer be an ongoing issue for the absent class members now that Oracle has acquired Micros Systems.

Finally, there is no prejudice to the absent class members. The Agreement provides that class claims are tolled from the original filing date through dismissal, and are being dismissed without prejudice. There was no Rule 23(e) certification, and therefore no absent class members received notice of the lawsuit as a class action, or could thereby have relied on the outcome of the lawsuit as affecting their class rights. Any absent class member with a timely claim is and remains free to bring an individual claim (or individually filed class action claim) should they so choose. There is no prejudice to the opt-in Plaintiffs, or the absent class members resulting from the Settlement Agreement, and the Court should therefore approve the Agreement without notice.

[5] The parties disputed whether opt-in Plaintiff Christina Clay was converted to a CA-based pay code and permitted to record her overtime hours worked upon moving to CA and becoming a CA-based Implementation Specialist with Micros, but settled that dispute by crediting 60% of opt-in Plaintiff Clay's weeks during her CA-based employment as Implementation Specialist weeks covered by the settlement allocation formula.

CONCLUSION

Plaintiffs believe they have meritorious claims. Defendant denies liability or wrongdoing of any kind associated with Plaintiffs' claims. Although the Parties do not abandon the positions they took in this action, they believe that continued litigation would be protracted, expensive, uncertain, and that the settlement reached in this case is therefore in their best interests.

For all of these reasons, the proposed Settlement Agreement is well within the range of what may ultimately be found to be fair, reasonable, and adequate, and the Court should therefore approve the Settlement Agreement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing was forwarded by electronic means through the Court's ECF System on May 6, 2015, to the following:

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