

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

FILED IN OPEN COURT

7-22-10

James N. Hatten, Clerk

By:

Sam McSpadden

Deputy Clerk

Shirley Williams,
Gale Pelfrey,
Bonnie Jones, and
Lora Sisson, individually
and on behalf of a class,

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 4:04-CV-0003-HLM

Mohawk Industries, Inc.,

Defendant.

ORDER

This is a class action alleging violations of the federal and Georgia Racketeer Influenced Corrupt Organizations Acts. The case is before the Court on Plaintiffs' Motion for Final Approval of the Settlement Agreement [230], Plaintiffs' Motion for Order Approving Class Service Awards for Gale

Pelfrey and Bonnie Jones [231], Plaintiffs' Motion for Order Approving an Administration, Withholding, Expense, and Attorneys' Fee Award [232], the Motion to File Out of Time Motion filed by Ronald David Cronan, Temporary Administrator of the Estate of Lora Cronan-Sisson [236],¹ and the Motion for Order of Class Service Award filed by Ronald David Cronan, Temporary Administrator of the Estate of Lora Cronan-Sisson [237].

I. Background

A. Procedural Background

On January 6, 2004, Plaintiffs filed this lawsuit. (Docket Entry No. 1.) The four original Plaintiffs were current and former hourly employees of Defendant who worked for Defendant in north Georgia. The two surviving

¹The Court grants the Motion to File Out of Time Motion. (Docket Entry No. 236.)

Plaintiffs and Class Representatives are Gale Pelfrey, a former employee of Defendant, and Bonnie Jones, who still works for Defendant.

Plaintiffs alleged that Defendant violated the federal and Georgia RICO Acts by hiring illegal aliens. Plaintiffs also alleged that Defendant harbored illegal workers who were hired and supplied by temporary employment agencies. Plaintiffs alleged that this conduct depressed the wages that they earned for their work at Defendant, beginning in January 2009.

Defendant initially responded to this lawsuit by filing a Motion to Dismiss. The Court denied that Motion with respect to Plaintiffs' federal and Georgia RICO claims, and Defendant appealed to the United States Court of Appeals for the Eleventh Circuit. The case ultimately made a trip to

the United States Supreme Court and another trip to the Eleventh Circuit before being remanded to the Court in February 2007.

Plaintiffs and Defendant diligently pursued class discovery over an eight-month period. In response to Plaintiffs' document requests, Defendant produced nearly one million pages and over twenty million electronic records. Plaintiffs also conducted depositions of Defendant's corporate representatives on a number of topics, and took discovery from several temporary employment agencies that had supplied Defendant with workers in Northwest Georgia, resulting in 10,000 pages of document discovery and depositions of seven more witnesses. Defendant, in turn, took written discovery and deposition testimony from

the Class Representatives. The parties also litigated and resolved a series of discovery-related disputes.

On December 18, 2007, Plaintiffs filed a Motion to Certify Class. On March 3, 2008, the Court denied class certification. Plaintiffs appealed to the Eleventh Circuit, which vacated the Court's decision and remanded for further class certification proceedings, including consideration of whether Plaintiffs could satisfy the predominance and superiority requirements of Federal Rule of Civil Procedure 23(b)(3). Defendant filed a petition for a writ of certiorari to the Supreme Court, which the Supreme Court denied on November 2, 2009.

On April 9, 2010, Plaintiffs filed an unopposed Motion for Preliminary Approval of Settlement, which the Court granted on April 12, 2010. (Order of Apr. 12, 2010 (Docket

Entry No. 225).) On that same day, the Court entered a second Order directing counsel for the parties to appear before the Court on July 22, 2010, for a final hearing to approve the Settlement Agreement in this case. (Order of Apr. 12, 2010 (Docket Entry No. 226).) Subject to further review at the final fairness hearing, the Court certified a Settlement Class in this action and preliminarily approved the parties' Settlement Agreement as being fair, just, reasonable, and adequate to the members of the Settlement Class. In advance of the final fairness hearing, the Court directed the Settlement Administrator to mail the Class Notice in accordance with the terms of the Settlement Agreement. The Court also set a schedule for Class Members to file any objections to, or exclusions from, the

settlement and for Plaintiffs to file their Motion for Final Approval of the settlement.

On April 29, 2010, the Court granted Plaintiffs' Motion for Preliminary Approval of Amended Settlement Agreement and Corrected Notice to the Class. (Order of Apr. 29, 2010.)

On July 8, 2010, Plaintiffs filed their Motion for Final Approval of the Settlement Agreement, their Motion for Order Approving Class Service Awards for Gale Pelfrey and Bonnie Jones, and their Motion for Order Approving an Administration, Withholding, Expense and Attorneys' Fee Award. (Docket Entry Nos. 230-32.) On July 9, 2010, Ronald David Cronan, Temporary Administrator of the Estate of Lora Cronan-Sisson ("Ms. Sisson") filed a Motion

for Order for Class Service Award to Ms. Sisson. (Docket Entry No. 237.)

On July 22, 2010, the Court held a final hearing in this case to approve the Settlement Agreement. This Order memorializes the actions taken by the Court during the July 22, 2010, hearing.

B. The Settlement Agreement

The Settlement Agreement required Defendant and its insurer, Zurich, to establish a Settlement Fund of \$18 million. (Settlement Agreement ¶ III(A).) The Settlement Agreement also requires Defendant to conduct annual training concerning verification of employment eligibility and to maintain a telephone hotline to receive reports of alleged employment eligibility violations. (*Id.* ¶ II.)

The Settlement Agreement required Defendant and Zurich to establish a Settlement Fund Account with initial deposits totaling \$12 million within seven business days after preliminary approval. The Settlement Agreement then required Zurich to deposit up to an additional \$6 million to bring the Settlement Fund Account up to \$18 million, as necessary.

The Settlement Agreement provided that the individual awards to Class Members will be based in part on each Class Member's length of service at Defendant in hourly jobs at facilities covered by the Class Definition. Consequently, the longer a Settlement Class Member worked for Defendant, the more substantial the award to that Class Member.

The parties agreed that the two surviving Class Representatives, Ms. Jones and Ms. Pelfrey, could apply for awards of up to \$25,000 each in recognition of their service to the Class. (Settlement Agreement ¶ III(D)(1).) The Settlement Agreement also contemplated that Class Counsel would apply for an award of up to one-third of the Settlement Fund, or up to \$6 million, to: (1) pay the costs of settlement administration, initially estimated at \$285,000; (2) pay employer withholding obligations on the wage portions of the awards to individual Class Members; (3) reimburse Class Counsel for the expenses they advanced and incurred to prosecute the case; and (4) pay attorneys' fees. Defendant and Zurich agreed not to oppose that application. (Id. ¶ III(B)(2).) The Settlement Agreement further provided that, in the event the costs of settlement administration and

the employer withholding obligations exceed \$500,000, a supplemental payment would be made from the Settlement Fund. (Id. ¶ III(B)(3).)

The Settlement Agreement provided that, after deduction of the foregoing items, the remainder of the Settlement Fund would be allocated 1/3 to a Wages Fund and 2/3 to a Non-Wages Fund. (Settlement Agreement ¶ III(B)(3).) The funds then would be distributed to the Class Members according to their length of service with Defendant. Specifically, the Settlement Agreement provided that each Class Member would receive a Base Award depending on the length of his or her employment with Defendant, as follows:

- Class Members with one to twenty-nine days of service would receive a base award of \$25;

- Class Members with thirty to ninety days of service would receive a base award of \$75; and
- Class Members with ninety days of service or more would receive a base award of \$150.

(Id. ¶ III(C)(1).) One-third of each Base Award was to be paid from the Wages Fund, and the remaining two-thirds was to be paid from the Non-Wages Fund.

Next, the Settlement Agreement provided that each Class Member also would be allocated an Additional Award, calculated as a pro-rata share of the Settlement Fund that remained after making the Base Awards. Those pro rata shares were to be calculated by taking each Class Member's days of service as a percentage of the total days of service for all Class Members. Thus, the longer a Class Member worked for Defendant, the higher his or her pro rata share of the remaining funds, and his or her Additional

Award, would be. One-third of each such Additional Award was to be paid from the Wage Fund, while two-thirds of the Additional Award was to be paid from the Non-Wage Fund.

The Settlement Agreement provided that each Class Member would be allocated an Individual Wages Fund Award and an Individual Non-Wages Fund Award. The Individual Wages Fund Award would consist of 1/3 of the individual's Base Award and Additional Award, while the Individual Non-Wages Fund Award would consist of 2/3 of each Class Member's Base Award and 2/3 of the Class Member's Additional Award.

The Settlement Agreement further provided that, to claim their individual awards, Class Members must complete, and timely return, a Claim Form and Release. Any awards not claimed by Class Members were to revert

to Zurich. In the event that more than fifty percent of the approximately 48,000 Class Members filed a claim, Zurich had the right, but not the obligation, to terminate the Settlement Agreement. (Settlement Agreement ¶ IV.)

The Settlement Agreement required Defendant to conduct annual training concerning the federal and Georgia laws relating to verifying employment eligibility. Additionally, Defendant agreed to maintain a hotline to allow callers to report anonymously alleged violations of federal and Georgia law relating to verification of employment eligibility at Defendant's facilities included within the Class Definition. (Settlement Agreement ¶ II.) The Settlement Agreement also required Defendant to maintain those efforts for two years after the effective date of the settlement.

On April 26, 2010, the parties agreed to a short amendment to the Settlement Agreement that would allow the duly authorized representatives of the estates of Shirley Williams and Ms. Sisson, who were both named plaintiffs in this action, an opportunity to apply to the Court for Class Service Awards. The parties also agreed to correct the Class Notice to ensure that the Class had notice that the Williams and Sisson estates, as well as Ms. Jones and Pelfrey, as the surviving Class Representatives, might seek an award from the Settlement Fund.

C. Notice Process and Responses

The Court's April 12, 2010, Order appointed Settlement Services, Inc. ("SSI") as the Claims Administrator. After determining that mailing the Class Notice was the best notice practicable under the circumstances, the Court

ordered that the Class Notice be mailed to the members of the Class.

On May 11, 2010, SSI mailed the Corrected Class Notice (the "Notice") to the Class by first class mail. (Decl. of Mark Patton ¶ 5.) SSI has extensive experience in administering class action settlements. (Id. ¶ 2.) SSI mailed the Notice to a list of 48,151 Class Members compiled from Defendant's employee databases. (Id. ¶ 5.) Before mailing the Notice, SSI updated the last-known addresses of the Class Members by using the National Change of Address system and other similar databases. (Id.)

Of the 48,151 Notices mailed on May 11, 2010, 13,164 were returned as undeliverable. (Patton Decl. ¶ 8.) For each of those returned Notices, SSI attempted to trace the

Class Member to discover an alternative address. (Id.)

Using that process, SSI identified alternative addresses and re-mailed the Notice to 11,459 of the 13,164 returned Notices. (Id.)

SSI also created, and has maintained, a website, www.williamslawsuit.com. (Patton Decl. ¶ 6 & Ex. A.) That website allows Class Members to download the entire Notice and Claim Form and Release in English or Spanish. (Id.) The website describes the settlement, the Class Members' right to participate, and the minimum award that Class Members will receive if they file valid claims with the Claims Administrator. (Id.) The website also describes the Class Members' right to opt out of, or object to, the settlement, including asserting objections to the amount of the Settlement Fund, the amount of the Class Member

Service Awards, and the amount of the Administration, Withholding, Expense, and Attorneys' Fee Award. (Id.) The website further lists significant dates and deadlines for the Class Members to exercise their rights. (Id.)

SSI also established a telephone hotline to answer Class Members' questions concerning the settlement. (Patton Decl. ¶ 7.) The telephone hotline provided a voicemail menu to answer frequently asked questions, and also allowed Class Members to ask the Claims Administrator additional questions. (Id.) As of June 30, 2010, SSI had received 1,422 telephone calls. (Id.)

No Class Member filed a timely objection to any aspect of the settlement. (Patton Decl. ¶¶ 9-10.) Six Class Members excluded themselves from the settlement by

timely opting out of the Class and the settlement on or before June 25, 2010. (Id. & Ex. B.)

II. Motion for Final Approval of Settlement Agreement

As an initial matter, the Court observes that the Class Action Fairness Act (“CAFA”) does not apply here because Plaintiffs filed this action prior to the statute’s effective date, February 18, 2005. Tmesys, Inc. v. Eufaula Drugs, Inc., 462 F.3d 1317, 1319 (11th Cir. 2006) (observing that CAFA would not apply where case was commenced prior to CAFA’s effective date, February 18, 2005) (per curiam). In any event, the concerns addressed by CAFA are not applicable here because the proposed Settlement does not involve coupons, present the prospect of a net loss by class members, or discriminate based on geographic locations of class members. 28 U.S.C.A. §§ 1712-14.

Before the Court may grant final approval to the settlement, the Court must determine that: (1) the settlement is fair, adequate, and reasonable; and (2) the settlement is not the product of collusion between the parties. Ingram v. The Coca-Cola Co., 200 F.R.D. 685, 688 (N.D. Ga. 2001). For the reasons discussed above, the Court concludes that the proposed settlement in this case satisfies those requirements.

A. The Settlement Is Fair, Adequate, and Reasonable

In Bennett v. Behring Corporation, 737 F.2d 982 (11th Cir. 1984), the Eleventh Circuit approved a district court's reliance on the following six factors in assessing the fairness of a class action settlement: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a

settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved. 737 F.2d at 986. Additionally, the judgment of experienced counsel is relevant to approving a settlement. Ingram, 200 F.R.D. at 689 (N.D. Ga. 2001) (collecting cases). For the reasons discussed below, the Court finds that those factors strongly support approving the settlement in this case.

1. Likelihood of Success at Trial and Range of Potential Recovery

The Court first should compare the benefit the settlement provides to the class with the likely recovery for the class at trial. Ingram, 200 F.R.D. at 689. “This question implicates the first three of the Bennett factors, which are

closely related: ‘(1) the likelihood of success at trial; (2) the range of possible recovery; and (3) the point on or below the range of possible recovery at which a settlement is fair, reasonable and adequate.’” Id. (quoting Bennett, 737 F.2d at 986). “This standard often justifies approving settlements that are substantial compromises of the relief that could be obtained through litigation.” Id. For the reasons discussed below, however, the Court concludes that the results obtained under the settlement are consistent with, and, in some respects, exceed, “the relief that the class could expect to obtain at trial, while obviating the risks that further litigation entails.” Id.

Here, Plaintiffs’ claims have survived over six years of litigation and appeals, and could prove valuable, based on a potential class of 48,000 employees and an eleven-year

class period. Plaintiffs, however, still face the hurdle of obtaining class certification, an issue on which the Court previously ruled against Plaintiffs. Even if Plaintiffs obtained class certification, their claims and their alleged damages--wage depression--are difficult to prove. To litigate this case through trial, Plaintiffs and Defendant would be required to devote much more time and many more resources, and a jury ultimately might decide to award nothing to Plaintiffs. The proposed settlement eliminates those risks and expenses and substitutes a certain recovery for Class Members who do not opt out of the proposed settlement. Those factors counsel in favor of approving the proposed settlement.

The Court also has considered the reasonableness of the proposed settlement in light of the significantly less

favorable results obtained in similar cases. Plaintiffs have presented information indicating that several similar actions have been resolved with no benefit for the employee class members. (Pls.' Br. Supp. Mot. Final Approval at 9-10 & n.30-33.) Moreover, Plaintiffs also presented information indicating that several similar cases had proceeded for years, and that the employee class members in those cases had yet to recover anything. (Id. at 10-11 & n. 34-36.) Plaintiffs' information indicated that an employee class had recovered monetary relief in only one similar case, and that the recovery in that case, approximately \$1.3 million, was significantly less than the Settlement Fund in this case. (Id. at 11.) Although the \$18 million Settlement Fund in this case is less than the damages that Plaintiffs might hope to recover at trial, that fact does not present an obstacle to

approval of the settlement. In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 325 (N.D. Ga. 1993) (“That the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair.”).

Additionally, the settlement includes training and hotline requirements that benefit the Class Members by helping ensure that Defendant’s hiring and compliance processes deter the employment of illegal workers. Litigating this case through trial might potentially produce additional improvements or injunctive relief; however, as the Court previously cautioned counsel, any remedy that requires the Court to monitor Defendant’s employment practices is far from certain in this case. Consequently, the proposed settlement provides the Class Members with significant

benefits that would not be guaranteed, but instead would be greatly delayed by further litigating this case.

In sum, comparing the relief obtained to the issues presented by this case, the settlement provides the Class Members with a reasonable result with respect to the major objectives of this litigation. Indeed, “[t]he benefit of obtaining guaranteed relief, in the face of serious obstacles to successful litigation, enhances the value of the settlement to the class and strongly demonstrates its fairness.” Ingram, 200 F.R.D. at 690. The Court therefore finds that the first three Bennett factors counsel in favor of approving the proposed settlement.

2. Complexity, Expense, and Duration of Further Litigation

The fourth Bennett factor--the complexity, expense, and duration of further litigation--also favors approving the

proposed settlement. Further litigation in this case will be highly complex, expensive, and uncertain. This case has remained pending for well over six years, and the parties have vigorously litigated the case at every stage. Litigation of this case has been time-consuming and expensive. The Class Representatives have devoted significant time and attention to participating in this litigation, and Class Counsel have invested hundreds of thousands of dollars in expenses and thousands of hours of attorney time to litigate this case. Defendant likewise has made significant investments in expenses and attorneys' fees to defend this action.

As Plaintiffs point out, the parties still have much work to do before the case can proceed to trial. If the case proceeded to trial, the Court would have to resolve the class certification issue, and there is no guarantee that the Court

would grant certification. Even if the Court certified a class, Defendant doubtlessly would appeal, which would cause further delay and expense to both sides.

Further, the parties would have to devote significant time to merits and expert discovery after the class certification stage. The parties also would file motions for summary judgment and to exclude expert testimony. If Plaintiffs' claims survived, the resulting trial would require months of preparation by the parties and weeks of court time.

Taking the above considerations into account, "the likely alternative to settlement now is lengthy, burdensome, and expensive litigation." Ingram, 200 F.R.D. at 691. Given the strength of the relief offered by the settlement, "the added benefit of obtaining it now rather than years from now

makes approval of this settlement in the best interests of the class.” Id. The Court therefore finds that this factor counsels in favor of granting final approval of the proposed settlement.

3. Substance and Amount of Opposition

The fifth Bennett factor requires the Court to consider the substance of, and amount of, any opposition to the proposed settlement. Bennett, 737 F.2d at 986. Here, although thousands of Class Members returned claim forms, only six of the Class Members submitted timely requests to opt out of the settlement. (Patton Decl. ¶¶ 9-10 & Ex. B.) No Class Member, however, filed objections to any aspect of the Settlement Agreement, indicating that the terms of the settlement agreement are satisfactory to the Class Members. In re Motorsports Merch. Antitrust Litig.,

112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) (“The lack of objection to the settlements suggests that the terms are satisfactory to those affected.”). This factor therefore counsels in favor of granting final approval to the settlement.

4. Stage of Litigation at Which Settlement Was Reached

The final Bennett factor requires the Court to consider the stage of litigation at which the proposed settlement was achieved. Bennett, 737 F.2d at 986. As previously noted, the parties already have spent over six years litigating this case, including over a year of conducting discovery that was, at times, contentious. The parties have engaged in several appeals and have participated in lengthy settlement negotiations. Under those circumstances, the Court finds that the proposed settlement is reasonable in light of the

stage of the proceedings at which it was achieved.

5. Judgment of Class Counsel

Further, “[i]n a case where experienced counsel represent the class, the Court ‘absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel.’” Ingram, 200 F.R.D. at 691 (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)). In light of Class Counsel’s qualifications, which include substantial experience litigating class actions and other complex cases, the Court “has confidence in their collective judgment that the benefits of this settlement far outweigh the delay and considerable risk of proceeding to trial.” Id.

6. Summary

After taking into account the above factors, the Court concludes that the proposed settlement is fair, adequate,

and reasonable. Before granting final approval to the proposed settlement, however, the Court must determine that the proposed settlement is not the product of collusion.

B. The Settlement Is Not the Product of Collusion

The Court also must consider “whether there is any evidence that the settlement was the product of collusion, by examining the negotiating process, to determine whether the compromise was the result of arms-length bargaining between the parties.” Ingram, 200 F.R.D. at 693. The Court had the opportunity to observe the conduct of the parties and counsel during the litigation of this case, and is well aware that this case has been adversarial, involving a high level of contention between the parties throughout the litigation. The settlement negotiations in this case were lengthy, and the first efforts began in February 2007. The

most recent round of negotiations, which were conducted with the aid of Attorney Hunter Hughes, a highly experienced, talented, and independent mediator, required more than six months to complete. (Decl. of Hunter R. Hughes, III ¶¶ 4-14.) Attorney Hughes had to devote all of his considerable skill to mediating this settlement because it was so difficult to reach an agreement among the various parties. (Id. ¶¶ 13-14.) “Parties colluding in a settlement would hardly need the services of a neutral third party to broker their deal.” Ingram, 200 F.R.D. at 693. Additionally, this case does not present circumstances in which Class Counsel “will obtain a disproportionately large fee in relation to the size of the settlement and where the class will receive a limited or dubious benefit.” Id.

The Court finds that all of the facts and circumstances

in this case point to a true arms-length negotiation, and demonstrate that the proposed settlement is not the product of collusion. This factor therefore counsels in favor of granting final approval to the proposed settlement.

C. Summary

In sum, the Court finds that the proposed settlement is fair, adequate, and reasonable, and that the proposed settlement is not the product of collusion. The Court therefore grants Plaintiffs' Motion for Final Approval of the Settlement Agreement, and grants final approval to the proposed Settlement Agreement in this case.

III. Motions for Class Service Awards

Ms. Pelfrey and Ms. Jones, the two surviving Class Representatives, each have requested Class Service Awards of \$25,000, to be paid from the Settlement Fund.

The temporary administrator of Ms. Sisson's estate also has filed a request for a Class Service Award of \$25,000, to be paid from the settlement fund to Ms. Sisson's estate. Such compensation would be in addition to the compensation that Ms. Pelfrey, Ms. Jones, and Ms. Sisson's estate otherwise would receive as members of the Class from the Settlement Fund. No one has objected to the requested Class Service Awards.

"Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." In re S. Ohio Correctional Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997). "Such awards are justified when the class representatives expend considerable time and effort on the case, especially by

advising counsel, or when the representatives risk retaliation as a result of their participation.” Ingram, 200 F.R.D. at 694. Here, Ms. Pelfrey, Ms. Jones, and Ms. Sisson helped to prosecute the Class’s claims by investigating and substantiating the claims, helping to prepare the Complaint, and producing documents. (Decl. of Bonnie Jones ¶¶ 3-4, 7-9; Decl. of Gale Pelfrey ¶¶ 4-5, 7-9; Aff. of Ronald David Cronan ¶ 2.) Ms. Jones and Ms. Pelfrey also prepared for, and sat for, depositions. (Jones Decl. ¶ 9; Pelfrey Decl. ¶ 9.) Ms. Jones, Ms. Pelfrey, and Ms. Sisson also kept themselves informed about this case, and regularly communicated with Class Counsel concerning the progress of the case. (Jones Decl. ¶¶ 10-11; Pelfrey Decl. ¶¶ 10-11; Cronan Aff. ¶ 2.) Ms. Jones and Ms. Pelfrey also attempted to ensure that any settlement would

be fair to the Class Members. (Jones Decl. ¶ 11; Pelfrey Decl. ¶¶ 11.) Ms. Jones, Ms. Pelfrey, and Ms. Sisson thus conferred benefit to the Class Members.

Additionally, Ms. Jones, Ms. Pelfrey, and Ms. Sisson bore risks to represent the Class Members in this action. Ms. Jones, Ms. Pelfrey, and Ms. Sisson all were hourly workers in North Georgia. Participating in this case required those ladies to become public figures overnight, even though they had no interest in publicity or in giving media interviews. (Jones Decl. ¶ 14; Pelfrey Decl. ¶ 15; Cronan Aff. ¶ 3.) Ms. Jones, Ms. Pelfrey, and Ms. Sisson faced countless questions about the case from their friends, co-workers, and other members of the community. (Jones Decl. ¶ 15; Pelfrey Decl. ¶ 16; Cronan Aff. ¶ 3.) Given the nature of Plaintiffs' allegations and the potential impact that

this case could have on one of the region's largest employers, Ms. Jones, Ms. Pelfrey, and Ms. Sisson all faced concern that their participation in this lawsuit could have a negative effect on their lives and livelihoods. (Jones Decl. ¶ 15; Pelfrey Decl. ¶¶ 6, 13-14, 16-17; Cronan Aff. ¶ 3.) Ms. Jones and Ms. Sisson, who worked for Defendant when Plaintiffs filed this lawsuit, faced the risk that Defendant might retaliate against them for participating in this litigation. (Jones Decl. ¶¶ 12-13; Cronan Aff. ¶ 3.) Although Ms. Pelfrey was no longer employed by Defendant when Plaintiffs filed this lawsuit, she faced the risk that her service to the Class Members might result in adverse employment action at her subsequent employer, as well as the fear that her participation in this action might result in another employer's refusal to hire her or retain her. (Pelfrey

Decl. ¶¶ 2, 13-14.)

Ms. Jones, Ms. Pelfrey, and Ms. Sisson also bestowed a substantial benefit on the Class Members. As discussed supra Part II., the \$18 million Settlement Fund is an impressive and hard-fought recovery for the Class Members. The settlement also requires Defendant to take steps to improve its hiring processes, including conducting training, and to permit employees to report suspected hiring violations. Under those circumstances, Ms. Jones, Ms. Pelfrey, and Ms. Sisson have conferred significant benefits on the Class Members.

Finally, the amount of the requested Class Service Awards is reasonable, especially when compared with incentive awards approved in other cases. Here, the requested Class Service Awards are only \$25,000, as

compared with the \$300,000 awarded to each class representative in Ingram. Ingram, 200 F.R.D. at 694.

Finally, the Court considers the fact that no Class Member objected to the requested Class Service Awards. The lack of objections is particularly significant where, as here, the Notice informed the Class Members that the Class Representatives could seek Class Service Awards of up to \$25,000. The lack of objections provides strong evidence that the requested Class Service Awards are fair and reasonable.

For the reasons discussed above, the Court concludes that the requested Class Service Awards are appropriate, in light of the substantial services that Ms. Jones, Ms. Pelfrey, and Ms. Sisson provided to the Class Members. The Court therefore grants the Motions for Class Service

Awards filed on behalf of Ms. Jones, Ms. Pelfrey, and the estate of Ms. Sisson.

IV. Motion for Order Approving Administration, Withholding, Expense and Attorneys' Fee Award

Plaintiffs also seeks an Order approving an Administration, Withholding, Expense, and Attorneys' Fee Award of \$6 million. The requested award includes: (1) payment of the costs of settlement administration, currently estimated at \$285,000; (2) payment of withholding taxes on the Class Members' wage awards; (3) payment of \$363,615.00 in expenses paid by Class Counsel through May 31, 2010; and (4) payment of the balance as an attorneys' fee award to Class Counsel. Plaintiffs note that neither Defendant nor Zurich oppose such an award, and that, even though the Class Notice informed Class Members that Class Counsel would seek such an award, no

Class Member has objected to the proposed award. The Court first addresses the portion of the requested award relating to expenses, and then addresses the portion of the requested award relating to attorneys' fees.

A. Expenses

When considering a request for an award of expenses, a court must determine whether class counsel has established that the expenses requested are reasonable and necessary to the prosecution of the case. Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1298 (11th Cir. 1999). A court also must examine the costs for which reimbursement is requested, to ensure that class counsel does not obtain a secret or unintended profit. Id. For the following reasons, the Court finds that the portion of the requested award relating to expenses is fair and reasonable

to the Class Members, that the costs incurred are necessary to the prosecution of the case, and that Class Counsel are not making a secret or unintended profit.

With respect to settlement administration costs, Plaintiffs have presented evidence indicating that SSI agreed to administer the settlement in this case for a flat fee of \$285,000. (Decl. of Joshua F. Thorpe ¶ 4.) Class Counsel selected SSI to administer the settlement partly because SSI agreed to administer the settlement for a competitive price that limited the risk of cost overruns to the Class Members, and partly because Class Counsel was familiar with excellent work that SSI provided in other large class actions. (Id.) Class Counsel have indicated that they do not presently anticipate that the costs of settlement administration will exceed the \$285,000 flat fee that counsel

negotiated with SSI, and that the settlement administration expense incurred is fair and reasonable to the Class Members. The Court agrees with Class Counsel that the requested settlement administration expense in this case is fair and reasonable to the Class Members, is necessary, and does not present an opportunity for Class Counsel to obtain a secret or unintended profit.

With respect to the employer withholding tax obligations, the Settlement Agreement requires Class Counsel to pay withholding taxes on the Class Members' wage awards. (Settlement Agreement ¶¶ III(C)(5)-(6).) Class Counsel have indicated that the total amount of the employer withholding tax obligations is not yet known and cannot be determined until after the deadline for Class Members to file claims expires. (Br. Supp. Mot. Award at

8.) Class Counsel further has indicated that Defendant negotiated for this provision to prevent preserving an open-ended liability after settlement. (Id. at 8-9.) The employer withholding expenses are set by law, and the Claims Administrator will make those payments to the appropriate tax authorities. (Id. at 9.) Under those circumstances, the Court finds that the employer withholding expenses are fair and reasonable to the Class Members, are necessary, and do not present a potential secret or unintended profit for Class Counsel.

With respect to out-of-pocket expenses, Class Counsel have presented evidence indicating that they have advanced a total of \$363,615 in expenses to prosecute this case during the period from 2003 to May 31, 2010. (Decl. of John E. Floyd ¶¶ 8-9; Decl. of Howard Foster ¶¶ 12-14;

Decl. of Matthew Thames ¶ 8.) Class Counsel incurred those expenses for open records requests for information concerning possible illegal workers for Defendant, for court and court reporter fees, for document and database reproduction and analysis, for expert witness and consulting fees, for travel expenses for meetings, depositions, document review and production, for mediation fees, and for other customary expenditures. Class Counsel have indicated that the expenses incurred represent the actual out-of-pocket costs that Class Counsel paid for external expenses or the standard rates that Class Counsel charge for internal expenses, and that the expenses incurred were reasonable and necessary to the prosecution of this case. (Floyd Decl. ¶ 9; Foster Decl. ¶ 16; Thames Decl. ¶ 8.) The Court finds that the expenses sought by Class Counsel are

fair and reasonable to the Class Members, that those expenses were necessary for the prosecution of this case, and that Class Counsel is not obtaining a secret or unintended profit for those expenses.

In sum, the Court concludes that the expenses for which Class Counsel request reimbursement are fair and reasonable to the Class Members. The Court further finds that the expenses were necessary, and that Class Counsel will not obtain a secret or unintended profit from the requested expenses. The Court therefore approves the portion of the requested award relating to expenses.

B. Attorneys' Fees

Plaintiffs have moved for an Order awarding the rest of the \$6 million requested award as attorneys' fees to Class Counsel. "It is well-settled that attorneys who represent a

class and achieve a significant benefit for the class are entitled to be compensated for their services.” In re Friedman’s Inc. Secs. Litig., No. 1:03-CV-3475-WSD, 2009 WL 1456698, at *2 (N.D. Ga. May 22, 2009). The Court, however, must approve the fee award requested by counsel. Id.

“Under the ‘common benefit’ doctrine, when litigation confers substantial benefits on members of a class, courts are authorized to award attorneys’ fees to class counsel to spread the costs proportionately among class members.” In re Friedman’s, Inc. Secs. Litig., 2009 WL 1456698, at *2. In Camden I Condominium Association, Inc. v. Dunkle, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit established that attorneys’ fees in a class action should be a reasonable percentage of a common fund created for the benefit of the

class. 946 F.2d at 775. Although Camden I set a twenty-five percent recovery as an appropriate benchmark, the court indicated that the benchmark could be adjusted, depending on the circumstances of the case. Id.

When determining the amount of attorneys' fees to award, the Court should consider factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) preclusion of other employment by counsel caused by accepting the case; (5) the customary fee in similar cases; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the

professional relationship with the client; and (12) awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), overruled on other grounds, Blanchard v. Bergeron, 489 U.S. 87 (1989). Additionally, the Court should consider the following factors when evaluating an attorneys' fee award in a common fund case: (1) whether the settlement confers a non-monetary benefit on the class; (2) whether there are any substantial objections to the settlement terms or the fees request; (3) the economics involved in prosecuting a class action; (4) the time required to reach a settlement; and (5) any additional relevant factors that are unique to a particular case. Camden I, 946 F.2d at 775.

With respect to the first Johnson factor, the time and labor invested by Class Counsel, Class Counsel have

presented evidence indicating that counsel have spent more than 9,500 hours prosecuting this case over a seven-year period. (Floyd Decl. ¶ 5; Foster Decl. ¶ 6; Thames Decl. ¶ 6.) Class Counsel spent significant time during 2003 investigating the background facts, interviewing witnesses, and conducting research before filing this action. (Floyd Decl. ¶¶ 4-7; Foster Decl. ¶¶ 5-11; Thames Decl. ¶¶ 5-7; Decl. of Bobby Lee Cook ¶¶ 5-6.) Class Counsel also spent significant time and effort to oppose Defendant's Motion to Dismiss this action, both in this Court and on appeal. After the case was remanded to the Court, Class Counsel had to conduct a massive discovery effort to support Plaintiffs' request for class certification. (Floyd Decl. ¶ 4; Foster Decl. ¶ 5; Cook Decl. ¶ 6; Thames Decl. ¶ 5.) The discovery process was difficult, and, at times, contentious, requiring

counsel to resolve discovery disputes. (Floyd Decl. ¶¶ 4-6; Foster Decl. ¶¶ 5-9; Thames Decl. ¶¶ 5-6.) Class Counsel also had to analyze and extract information from databases that Defendant produced to attempt to answer questions concerning the potential Class Members. Additionally, Class Counsel had to work with experts to analyze complicated legal and economic issues. Class Counsel then briefed the issue of class certification, pursued an appeal after the Court denied class certification, and opposed Defendant's petition for a writ of certiorari following the Eleventh Circuit's Order vacating the Court's denial of class certification. Class Counsel further devoted significant time to preparing for, and participating in, lengthy settlement negotiations, as well as to negotiating and drafting the terms of the Settlement Agreement. (Floyd Decl. ¶ 4(j); Foster

Decl. ¶ 5; Cook Decl. ¶ 7; Thames Decl. ¶ 5(h).) The Court finds that this factor certainly counsels in favor of granting the requested attorneys' fee award.

As for the second Johnson factor--the complexity and difficulty of the issues involved--this case presented novel questions involving the federal and Georgia RICO statutes, which are two highly complex statutes. Defendant responded to the Complaint by filing a Motion to Dismiss, which the Court denied as to Plaintiffs' federal and Georgia RICO claims. A series of appeals to the Eleventh Circuit and the Supreme Court followed, taking nearly three years to complete. The case was made more difficult by the fact that Plaintiffs sought to represent a class. In light of those circumstances, the Court concludes that the difficult and complex nature of the case counsels in favor of granting the

requested fee award.

The third Johnson factor, the skill required to perform the legal services to obtain the settlement, and the ninth Johnson factor, the attorneys' expertise, reputation, and ability, also support awarding the requested fees. Class Counsel are highly experienced in complex class actions, and have significant experience with the federal and Georgia RICO statutes. As previously noted, Class Counsel litigated this highly complex and difficult case for over seven years, ultimately negotiating an \$18 million settlement that, to date, is the highest award that employees ever have received in a RICO case seeking to hold an employer liable for illegal hiring. Class Counsel also faced opposition from extremely able, prominent, and nationally-known counsel. Under those circumstances, the

Court finds that the third and ninth Johnson factors counsel in favor of granting the requested attorneys' fees award.

The fourth Johnson factor, preclusion of other employment, also counsels in favor of awarding the requested fees. As previously noted, this case was complex, demanding, and time-intensive, requiring Class Counsel to devote over 9,500 hours of work over a nearly-seven year period. Once Class Counsel undertook to represent Plaintiffs in this action, they were not free to use their time for other purposes. This factor therefore counsels in favor of granting the requested fees.

The fifth Johnson factor, the customary fee, also supports approving the requested award in this case. The customary fee in a class action is a contingent fee. Here, the maximum potential attorneys' fee award in this case is

29.7 percent of the common fund, and the minimum potential award is 28.6 percent. (Pls.' Br. Supp. Mot. Award at 11-12.) Both of those percentages fall well within the percentage range of attorneys' fees commonly awarded in class actions. In re Friedman's, Inc. Secs. Litig., 2009 WL 1456698, at *2 (collecting cases). The attorneys' fee award sought also is relatively consistent with the total recorded lodestar in this case, which is \$3,969,944 at current rates. (Floyd Decl. ¶ 5; Foster Decl. ¶ 6; Thames Decl. ¶ 6.)² This factor therefore counsels in favor of granting Plaintiffs' requested attorneys' fee award.

²The lodestar in this case is understated, because the Cook & Connelly law firm did not keep time records for this action. (Cook Decl. ¶ 8.) Moreover, Class Counsel also reduced the lodestar by applying the same billing judgment and reductions that they would make in any case in which the client received hourly statements and paid for fees and expenses on a monthly basis. (Floyd Decl. ¶¶ 5-6; Foster Decl. ¶¶ 6-9; Thames Decl. ¶¶ 6-7.)

The sixth Johnson factor, whether the fee is fixed or contingent, also counsels in favor of awarding the fees requested. Class Counsel prosecuted this action on an entirely contingent fee basis, and, as such, assumed a significant risk of nonpayment or underpayment for all the work that Class Counsel have performed over the past seven years. This factor therefore counsels in favor of granting the attorneys' fee award requested.

Under the seventh Johnson factor, the time limitations imposed by the circumstances, a higher fee may be appropriate if class counsel must provide services on an accelerated schedule. Counsel have not litigated this case on an expedited basis, and this factor therefore neither counsels for nor against granting the requested attorneys' fees award.

The eighth Johnson factor, the amount involved and the results obtained, also supports awarding the amount of fees requested. As previously noted, the proposed settlement provides for a Settlement Fund of \$18 million, and this result far surpasses the result in any other case asserting a similar theory. Moreover, the Settlement Agreement requires Defendant to take steps to improve its hiring process, including providing training, and to establish a hotline that allows reports of future violations of the immigration laws. The Court therefore concludes that this factor counsels in favor of granting the attorneys' fees award requested.

The tenth Johnson factor, the undesirability of the case, also weighs in favor of granting the requested attorneys' fees award. As previously discussed, this case involved

complex and novel questions of federal and Georgia RICO law, and few attorneys would consider undertaking such litigation against a company with Defendant's resources and influence in the area. The case also required thousands of hours of attorney time and required counsel to advance hundreds of thousands of dollars in out-of-pocket expenses. Class Counsel, however, faced a significant risk of failing to obtain any settlement or judgment at all in this case. Few lawyers would be willing to accept this case under those circumstances. Consequently, this factor counsels in favor of awarding the attorneys' fees requested.

The eleventh Johnson factor, the nature and length of the professional relationship between counsel and client, also weighs in favor of granting the relief requested. Although Attorney Matthew Thames previously had

represented Ms. Jones and Ms. Sisson in connection with workers' compensation matters before filing this lawsuit, those individual matters were of a very different nature than the instant lawsuit, and Attorney Thames has never expected Ms. Jones or Ms. Sisson to be a recurring client of the type who might warrant a reduced fee arrangement. (Thames Decl. ¶ 4.) None of the other Class Counsel had any professional relationship with Plaintiffs before filing this action. Consequently, neither Plaintiffs nor Class Counsel had an expectation that a pre-existing relationship might warrant a reduced fee. Class Counsel also has no reason to expect that they will represent Plaintiffs in any future matters. Under those circumstances, this factor counsels in favor of approving the requested attorneys' fees award.

The twelfth Johnson factor, awards in similar cases,

also supports granting the requested attorneys' fees award. As previously noted, the percentage award requested in this case is consistent with the percentage fee awards approved in similar cases. This factor therefore counsels in favor of approving the requested attorneys' fees award.

Camden I also allows the Court to consider the time required to reach the settlement. As discussed previously, the parties reached a settlement in this case only after more than six years of contentious litigation, two rounds of interlocutory appeals, and months of mediation with Attorney Hughes. This factor therefore counsels in favor of awarding the fees requested.

Camden I also provides that courts may consider the amount and substance of any objections to a requested fee award. Here, as previously noted, no Class Members

objected to the requested attorneys' fees award. This factor consequently counsels in favor of approving the requested attorneys' fees award.

Camden I also allowed courts to consider any non-monetary benefits of the settlement. As noted above, the Settlement Agreement requires Defendant to take steps to improve its hiring process, including providing annual training sessions and establishing a hotline to report hiring violations. Those non-monetary requirements will benefit the Class Members, and the Court therefore finds that this factor counsels in favor of approving the requested attorneys' fees award.

Finally, Camden I permits courts to consider the economics of prosecuting a class action. As previously discussed, prosecuting this case required Class Counsel to

make significant investments of time and money, with a very high risk of obtaining no return on those investments. This factor therefore counsels in favor of granting the requested attorneys' fees award.

In sum, the Court finds that the Camden and Johnson factors counsel in favor of approving the requested attorneys' fees award in this case. The Court therefore grants the portion of the Motion pertaining to the attorneys' fees award. The Court approves an Administration, Withholding, Expense, and Attorneys' Fee Award of \$6 million, which includes: (1) payment of the costs of settlement administration, currently estimated at \$285,000; (2) payment of withholding taxes on the Class Members' wage awards; (3) payment of \$363,615.00 in expenses paid by Class Counsel through May 31, 2010; and (4) payment

of the balance as an attorneys' fees award to Class Counsel.

V. Conclusion

ACCORDINGLY, the Court **GRANTS** Plaintiffs' Motion for Final Approval of the Settlement Agreement [230], and grants **FINAL APPROVAL** to the proposed settlement agreement in this case. The Court **GRANTS** Plaintiffs' Motion for Order Approving Class Service Awards for Gale Pelfrey and Bonnie Jones [231], **GRANTS** the Motion to File Out of Time Motion filed by Ronald David Cronan, Temporary Administrator of the Estate of Lora Cronan-Sisson [236], and **GRANTS** the Motion for Order of Class Service Award filed by Ronald David Cronan, Temporary Administrator of the Estate of Lora Cronan-Sisson [237], and **ORDERS** that Gale Pelfrey, Bonnie Jones, and the

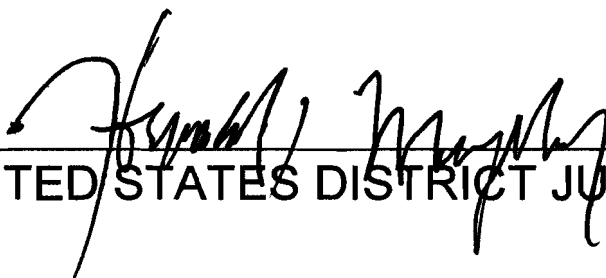
estate of Lora Cronan-Sisson receive \$25,000 each, for services as class representatives, to be paid from the settlement fund in this case. This \$25,000 award shall be in addition to the amount that Ms. Jones, Ms. Pelfrey, and the estate of Ms. Cronan-Sisson otherwise will obtain based on membership in the settlement class.

Finally, the Court **GRANTS** Plaintiffs' Motion for Order Approving an Administration, Withholding, Expense, and Attorneys' Fee Award [232], and **APPROVES** an Administration, Withholding, Expense, and Attorneys' Fee Award of \$6 million, which includes: (1) payment of the costs of settlement administration, currently estimated at \$285,000; (2) payment of withholding taxes on the Class Members' wage awards; (3) payment of \$363,615.00 in expenses paid by Class Counsel through May 31, 2010;

and (4) payment of the balance as an attorneys' fee award to Class Counsel.

The Court **DIRECTS** the Clerk to **ADMINISTRATIVELY CLOSE** this case. The Court will defer directing the Clerk to enter a judgment in this case until after the conclusion of the claims process and until either Defendant's insurance carrier's option to terminate the settlement expires or the parties inform the Court that the conditions required to trigger the action have not occurred. The Court **DIRECTS** counsel to notify the Court promptly once either of those events has occurred.

IT IS SO ORDERED, this the ¹⁸~~22~~ day of July, 2010.


UNITED STATES DISTRICT JUDGE