

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD GODSHALL and	:	
STEVEN CUSANO, individually and	:	No. 01-CV-6539
on behalf of all other similarly situated,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE FRANKLIN MINT COMPANY et al.,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

December 1, 2004

Plaintiffs Richard Godshall and Steven Cusano filed this action against Defendants, The Franklin Mint Company, Roll International Corporation, The Administrative Committee of the Franklin Mint, John/ Jane Does 1-10, John B. Morton, Cathie Powers, Keith Ramnath, John Willie and Heather Badt (collectively, “the Mint”), challenging the Mint’s practice of designating certain on-site workers as “freelancers” or “independent contractors” and: 1) improperly excluding these workers from participating in the Mint’s pension, savings, medical, and other benefits; and 2) requiring these workers to bear the full cost of federal and state withholding taxes for Social Security, Medicare and unemployment. The Plaintiffs allege that these practices violated the Employee Retirement Income Security Act (“ERISA”),¹ the Pennsylvania Wage Payment and Collection Law (“WPCL”),² and Pennsylvania common law. On October 19, 2004, the Court held a fairness hearing to assess the parties’ Stipulation and Agreement of Settlement (the “Settlement Agreement”). Presently before the Court is Plaintiffs’ Motion for Certification of the Stipulated

¹ 29 U.S.C. § 1001 et seq.

² 43 Pa. Stat. Ann. § 260.

Settlement Class, Plaintiffs' Motion for Final Approval of the Proposed Class Action Settlement, and Plaintiffs' Petition for an award of attorney's fees and special payments to the named plaintiffs. Although the Mint has not assumed liability for Plaintiff's claims, the Mint does not oppose Plaintiff's Motions, and the Mint takes no position on the Plaintiffs' petition. For the following reasons, the Court will grant both Motions and the requests set forth in Plaintiffs' petition.

I. BACKGROUND

Plaintiffs challenge the Mint's practice of designating certain workers as "freelancers" or "independent contractors" and excluding them from participating in benefit plans provided to other workers. Plaintiffs allege that this practice principally affected those employees working in artistic and design positions, and further allege that these "freelancers" were functioning in the same manner as those individuals classified as regular Mint employees. Plaintiffs purport to bring this action on behalf of themselves and a class of persons, consisting of all those whom the Mint treated as "freelancers" or "independent contractors" and denied employee benefits. Plaintiffs have identified 112 individuals belonging to this class.

The settlement agreement requires the Mint to pay a total sum of \$1,125,000.00 to plaintiffs. Plaintiffs have petitioned the Court for attorneys' fees in the amount of \$375,000.00 and special awards to the named plaintiffs in the amount of \$20,000.00 each, to be paid from the settlement fund. The balance would be used to make cash settlement payments to the members of the settlement class. The settlement payments will be distributed according to a pro-rated formula described in the Proposed Plan of Allocation for Settlement Proceeds.³ In exchange for cash

³ Exhibit D of the Stipulation and Agreement of Settlement.

settlement, the class members will release the Mint from all claims, asserted or not, arising from the facts alleged in the Amended Complaint.

Plaintiffs identified 112 potential settlement class members,⁴ and mailed them notice of the proposed settlement agreement on or about August 20, 2004. The notice informed the class members of the existence of this action, the proposed terms of the settlement, and the class members' rights with respect to the settlement. Each class member was informed of his or her right to object to any terms of the settlement in writing or at the fairness hearing. Although the proposed attorneys' fees and the special awards are not part of the settlement terms, these were also described in the notice, and class members were informed of their right to object to these terms. Notice could not be served on four class members; one was deceased, and three were no longer at their last known addresses. No class members objected to the settlement. Only the named Plaintiffs appeared at the fairness hearing held on October 19, 2004, and they raised no objections to the Settlement Agreement.

II. CLASS CERTIFICATION

Before the Court can finally approve the settlement agreement, Plaintiffs must demonstrate that the class certification meets the requirements of Federal Rule of Civil Procedure 23.⁵ Specifically, the class must meet all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) and also fit into one of the three categories

⁴ Listed in Appendix B of the Settlement Agreement.

⁵ In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d. 283, 308 (3d Cir. 1998).

of class actions set forth in Rule 23(b).⁶

A. Rule 23(a):

As discussed infra, the Court finds that the class meets all the requirements of Rule 23(a).

1. Numerosity

To establish numerosity, the Court must find that the proposed class is so numerous that joinder of all class members is impracticable.⁷ The parties in this case have established that the proposed class consists of 112 members. This class size is sufficiently large that joinder of all members would be impracticable.⁸ Accordingly, this class satisfies the numerosity requirement.

2. Commonality

Commonality requires the existence of at least one question of law and/or fact common to the class members.⁹ Generally this requirement is satisfied when the defendant has engaged in the same conduct towards members of the proposed class. In the instant employee classification case, the Mint is alleged to have misclassified each member of the proposed class as an independent contractor rather than as a regular employee. It is further alleged that all members of the proposed class were illegally denied benefit plans because of their employment classification. Therefore, the Court finds questions of fact and law common to the proposed class.

⁶ In re LifeUSA Holding, Inc., 242 F.3d 136, 143 (3d Cir. 2001).

⁷ Fed. R. Civ. Pro. 23(a)(1).

⁸ Stewart v. Abraham, 275 F.3d 220, 227 (3d Cir. 2001) (finding that numerosity is generally established where the potential number of plaintiffs exceeds 40).

⁹ Fed. R. Civ. P. 23(a)(2); Stewart, 275 F.3d at 227.

3. Typicality

To establish typicality, the claims of the named plaintiffs must be typical of the claims of the class. The Court must discern whether the named plaintiffs and the other members of the class are challenging the same unlawful conduct.¹⁰ Here, Plaintiffs claim that the Mint's practice of classifying certain employees as freelancers or independent contractors has resulted in the illegal denial of benefits. Each named plaintiff was allegedly classified in this way, as were the members of the proposed class, and all were allegedly denied benefits as a result. All class members, including the named plaintiffs, would rely upon the same legal theory to establish liability. Accordingly, the proposed class satisfies the typicality requirement.

4. Adequacy of Representation

Class representatives are adequate if they are competent to conduct a class action and do not have interests antagonistic to the class's interests. To analyze the competency requirement, the Court looks at whether: 1) the named plaintiffs have the ability and incentive to represent the claims of the class vigorously; and 2) the plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation.¹¹ The named plaintiffs in this case have actively engaged in advancing the interests of the class members for several years. Plaintiffs' counsel report that they have extensive experience in class action litigation.¹² There is no apparent conflict between the interests of the named plaintiffs and the claims asserted on behalf of the class. Therefore, the Court finds that the named plaintiffs adequately represent the interests of the class.

¹⁰ Stewart, 275 F.3d at 227-228.

¹¹ Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988).

¹² See Affidavits of Alan M. Sandals and Nancy O'Mara Ezold, counsel for Plaintiffs.

B. Rule 23(b)(1)(B)

The Court finds that the class can be certified under 23(b)(1)(B). Under this provision, class certification is appropriate when adjudication of separate, individual actions might be dispositive of the interests of class members who are not parties to the action. When a breach of fiduciary duty is at issue, any individual adjudication regarding the breach would necessarily affect the interests of others.¹³ Here, where Plaintiffs allege that the Mint breached fiduciary duties to 112 employees under ERISA and other laws, any decision with respect to one employee would necessarily affect the interests of the other 111 employees. Therefore, it is appropriate to certify the class pursuant to Rule 23(b)(1)(B).

III. FAIRNESS OF THE SETTLEMENT AGREEMENT

Rule 23(e)(1)(A) requires the Court to approve all class action settlements. Before approving a class action settlement, the Court must direct notice to all class members who would be bound by the class settlement,¹⁴ hold a hearing,¹⁵ and find that the settlement is fair, adequate and reasonable.¹⁶ As stated above, the class members were notified, and the court held a hearing, so the Court's only remaining obligation is to determine whether the settlement is fair, adequate and reasonable. The Third Circuit has delineated nine factors relevant to this determination: The factors are: 1) the complexity, expense and likely duration of litigation; 2) the reaction of the class to the

¹³ Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386 (E.D. Pa. 2001).

¹⁴ Fed. R. Civ. Pro. 23(e)(1)(B).

¹⁵ Fed. R. Civ. Pro. 23(e)(1)(C).

¹⁶ Id.

settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; and 9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.¹⁷ With the exception the fifth factor, all of the factors favor approving the settlement agreement in this case. Accordingly, the Court concludes that the settlement agreement between the class members and the Mint is fair, adequate, and reasonable.

1. The complexity, expense and likely duration of litigation

The proposed settlement agreement resolves complex liability issues that would take years to adjudicate. Absent settlement, the parties would need to prepare for trial, incurring significant expense and delaying resolution, and an appeal by either party would delay resolution further. Settlement provides immediate benefits to both sides with less cost.

2. Reaction of the class to the settlement

The named plaintiffs mailed notices to all class members, advising them of the terms of the settlement agreement, proposed attorneys' fees and special awards, and their right to object to the terms of the settlement in writing or at a hearing before the Court. Plaintiffs sent 112 notices, and only four notices were returned marked as undeliverable.¹⁸ Neither the Plaintiffs nor the Court received any objections or requests to opt out of the settlement from the 108 noticed class members. Only the named plaintiffs appeared at the fairness hearing, and they did not state any objections to the settlement agreement. These facts support approval of the settlement.

¹⁷ Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).

¹⁸ One of the intended recipients of a returned notice was deceased.

3. The stage of the proceedings and the amount of discovery completed

The parties arrived at this agreement after extensive briefing on a contested class certification motion and a contested motion for partial summary judgment.¹⁹ The parties conducted discovery, Plaintiffs' counsel reviewed thousands of pages of the Mint's records, and the Mint deposed the named Plaintiffs. The parties also engaged in two lengthy settlement conferences and ongoing settlement discussions with Magistrate Judge Carol Sandra Moore Wells. Clearly, the proposed settlement agreement was reached only after the parties had developed a clear view of the strengths and weaknesses of their cases.²⁰ Accordingly, the Court finds that this factor favors approval of the settlement.

4. The risk of establishing liability

The Plaintiffs recognize that even if the Court accepts Plaintiffs' position on the legal issues presented, which is far from certain in this unsettled area of law, each class member will be required to prove that he or she is entitled to relief. Therefore, there is an obvious risk of failure both to the class and to the individual members if the settlement is not accepted.

5. The risk of establishing damages

The damages in this case would be fairly and clearly established if Plaintiffs received a fully favorable outcome, as Plaintiffs are able to calculate the value of the benefits they were denied. According to Plaintiffs' counsel, the actual damages would exceed the damages available through the settlement (see factor 8). This factor weighs against approving the settlement agreement.

¹⁹ The Court denied the latter Motion. See Memorandum Opinion and Order dated September 24, 2003 [Doc. # 36].

²⁰ Orloff v. Syndicated Office Sys., Inc., No. 00-CV-5355, 2004 WL 870691 at *6 (E.D. Pa. Apr. 22, 2004).

6. The risk of maintaining the class action through trial

Before the parties stipulated to certification of the class for settlement purposes, Plaintiffs' motion for class certification had been contested by the Mint, and the parties had briefed the issue. At the request of the Court, the Plaintiffs' withdrew their motion for class certification without prejudice, pending the resolution of the motion for summary judgment. Therefore, the Court had not yet ruled on class certification at the time of settlement, and the Mint had leave to renew its opposition to class certification had the case moved forward to trial. Because certification of the class was not assured, the settlement agreement affords relief to class members who, without class certification, would receive nothing. This weighs in favor of approving the settlement.

7. The ability of Defendants to withstand greater judgment

The Mint is still in business, but it has recently downsized its workforce. The significant costs it would incur during continued litigation could further erode its financial condition. The Mint's insurers have raised defenses to coverage for this matter. If the Mint's finances were to decline, and its insurance companies did not provide coverage, the class could face difficulty collecting any judgment. The settlement fund has already been set aside by the Mint, and will be available to the class members if the settlement is approved by the Court. Thus, this factor weighs in favor of approving the settlement agreement.

8. The range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risk of litigation

Class counsel estimate the best possible recovery for the class would be 100% of the base amount, plus interest, attorneys' fees and litigation costs. This would total just under \$2 million for the class members, and \$445,000 for their attorneys. The gross amount of the proposed

settlement recovers approximately 46% of this best possible outcome for the class members. Under the Proposed Plan of Allocation set forth in the Settlement Agreement, the median settlement payment to class members will be \$5,590.00. The largest payment will be \$24,717.00, and the smallest payment will be \$564.00. Of the 112 class members, 94 will receive payments in excess of \$2000.00. Of those 94, 36 class members will receive payments between \$5,000 and \$10,000, and 22 class members will receive more than \$10,000. While this represents only 46% of their best possible recovery, the best recovery could only be obtained with a fully favorable final judgment as to each class member. In the Court's view, the reduced damages represent a reasonable compromise, considering the risks inherent in proceeding to trial, since they guarantee some recovery to every class member.

IV. AWARDS OF ATTORNEYS' FEES AND CLASS REPRESENTATIVE AWARDS

A. Attorneys' Fees and Costs

Plaintiffs ask the Court to award their counsel one-third (1/3) of the settlement fund (\$375,000.00) for attorneys' fees and costs. When counsel recover a common settlement fund for a class, it is appropriate to award attorneys' fees from the common fund itself.²¹ The Third Circuit favors a percentage-of-fund based fee rather than a lodestar based fee when the fee is paid from a common fund.²²

To determine whether counsel have requested fair compensation in this case, the Court must consider the size of the settlement fund, any objections to the fee request, counsel's skill,

²¹ Brytus v. Spang & Co., 203 F.3d 238, 243 (3d Cir. 2000); In re Prudential Ins. Co., 148 F.3d at 333.

²² In re Prudential Ins. Co., 148 F.3d at 333.

the complexity of the litigation and the amount of time counsel spent on it, the risk of nonpayment, and awards in similar cases. As noted above, this is a fairly small fund, but it will provide a reasonable benefit to the 112 class members, even after payment of the proposed attorneys' fees. Neither the Court nor counsel have heard any opposition to the fee request. Counsel are experienced in class action litigation. They engaged in this complex ERISA case, involving unsettled questions of law, on a contingency fee basis. This representation involved a high risk of non-payment, since Plaintiffs' attorneys would not have received any fees or reimbursement for costs had the litigation failed. Counsel expended great sums of time on the case over a nearly four year period. In fact, based on the lodestar calculation, the fee request represents a small discount from their typical rates.²³ The requested percentage is in line with percentages awarded in other cases.²⁴ Class counsel has achieved significant benefit for the class members, and the Court finds that the requested fee amount is fair and reasonable.

B. Special Awards to Class Representatives

The two named plaintiffs, Richard Godshall and Steven Cusano, have requested a special award of \$20,000 each for their work as class representatives. Factors to consider when assessing incentive awards are: (a) the risk to the plaintiff in commencing suit, both financially and

²³ It is sensible for the court to use the lodestar method of fee calculation as a cross check on the fairness of the percentage fee. Id. Counsel estimate that their work would be valued at \$435,957.00 using the lodestar method. They have incurred an additional \$9748.70 in costs. The amount requested, therefore, represents a 16% discount from counsels' usual fees. The Court has reviewed counsels' time and hourly rates, set forth in their affidavits. Counsel have adopted reasonable hourly rates, and have spent a reasonable number of hours on this case, given that they investigated business records for hundreds of potential class members, engaged in extensive briefing on procedural and legal issues, and carried out other tasks to advance the case.

²⁴ See e.g., In re Corel Corp. Inc. Sec. Litig., 293 F. Supp. 2d 484, 495-497 (E.D. Pa. 2003) (approving 33.3% award from \$7 million settlement); In re Neoware Sys. Inc. Sec. Litig., No. Civ. A. 98-2582, 2000 WL 1100871 at *3-4 (E.D. Pa. July 27, 2000)(approving 33.3% award from \$1 million settlement); Blackman v. O'Brien Envtl. Energy, Inc., No. Civ. A. 94-5686, 1999 WL 397389 (E.D. Pa. May 12, 1999) (awarding 35% from \$875,000 settlement fund).

otherwise; (b) the notoriety and/or personal difficulties encountered by the representative plaintiff; (c) the extent of the plaintiff's personal involvement in the suit in terms of discovery responsibilities and/or testimony at depositions or trial; (d) the duration of the litigation; and (e) the plaintiff's personal benefit (or lack thereof) purely in his capacity as a member of the class.²⁵ Plaintiffs' counsel attest that Mr. Godshall and Mr. Cusano helped counsel formulate factual and legal theories for the case, assisted in identifying class members and other witnesses, responded to interrogatories and depositions, attended settlement conferences, monitored negotiations, and assumed responsibility for safeguarding the interests of other class members. These tasks consumed a significant amount of their personal time over approximately four years. The named plaintiffs would otherwise be entitled to only their pro rata share of the settlement fund, which represents 46% of their best possible recovery.

The requested award would reduce the payment to other class members by approximately 5%. The class members were notified of this proposed special payment, and voiced no objections. These two individuals' efforts have conferred benefits on all class members, and they should earn special compensation for this work.²⁶ The Court finds the proposed awards to the named plaintiffs are reasonable given their efforts in bringing this action and the benefits they conferred to the class.

An appropriate order follows.

²⁵ In re Plastic Tableware Antitrust Litig., No. 94-CV-3564, 1995 WL 723175, *2 (E.D.Pa. Dec. 4, 1995).

²⁶ Id.

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RICHARD GODSHALL and	:	
STEVEN CUSANO, individually and	:	No. 01-CV-6539
on behalf of all other similarly situated,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE FRANKLIN MINT COMPANY et al.,	:	
Defendants	:	

ORDER AND FINAL JUDGMENT APPROVING SETTLEMENT

AND NOW, this 22nd day of November, 2004, after a fairness hearing and upon consideration of the Stipulation and Agreement of Settlement and the exhibits annexed thereto, all dated August 5, 2004 (“the Settlement Agreement”)(Appendix A of this Order), the Motion for Certification of Stipulated Settlement Class [Doc. #44], the Motion for Final Approval of Proposed Class Action Settlement [Doc. #42], Plaintiffs’ unopposed Petition for an Award of Attorneys’ Fees and for Award of Special Payments to the Two Named Plaintiffs [Doc. #43], and all papers filed in support thereof, and hearing no opposition in writing or at the fairness hearing, the Court finds that:

1. One hundred eight of the 112 members of the proposed settlement class (as that term is defined in the Settlement Agreement), whose interests are affected by the proposed settlement, were given due notice of the proposed settlement and the settlement hearing in accordance with the Revised Order dated August 10, 2004. The Notice of Proposed Settlement of Class Action and Settlement Hearing was mailed by first class mail on or about August 20, 2004, in accordance with the Order dated August 10, 2004, to all members of the proposed Settlement Class at their last known addresses;

2. Members of the proposed settlement class were given due notice of and an opportunity to present their legal and factual arguments in opposition to approval of the Settlement Agreement and proposed plan of allocation, and the request of class counsel for an award of attorneys' fees and special payments to the class representatives;
3. Members of the proposed settlement class were given full opportunity to participate in the hearing held on October 19, 2004;
4. No objections to the class settlement or the requested awards have been filed or heard; and
5. The Settlement Agreement constitutes a fair, reasonable and adequate resolution of the disputed legal matter for the members of the class.

Accordingly, it is hereby **ORDERED, ADJUDGED AND DECREED** that:

1. To the extent defined in the Settlement Agreement, the terms in this Order shall have the meanings set forth therein;
2. Upon consideration of the Motion for Certification of Settlement Class, and consistent with the analysis set forth in the attached Memorandum Opinion, the proposed settlement class is hereby certified pursuant to Federal Rule of Civil Procedure 23. Consistent with this form of certification, all members of the Settlement Class are mandatory members and they may not opt-out of or exclude themselves from the Settlement Class;
3. The Court finds that this action may proceed as a class action for settlement purposes,

with the class consisting of the following individuals:

All persons who, at any time during the period of January 1, 1994, through December 18, 2001 (a) provided personal services to Franklin Mint Company (“the Mint”), (b) worked 1,000 hours or more in any given year, and (c) whom the Mint classified or designated as “freelancers” or “independent contractors,” but excluding any individuals who provided services on a project basis and/or primarily on premises other than the premises of the Mint, or who were in fact independent contractors at law.

The parties agree that, following a careful investigation, they have identified 112 individuals who satisfy the above class definition and their identities are listed in Exhibit B to the Settlement Agreement;

4. Named Plaintiffs Richard Godshall and Steven Cusano are hereby appointed as the representatives of the Settlement Class. Attorneys Alan M. Sandals and Nancy O’Mara Ezold are hereby appointed as counsel for the Settlement Class pursuant to Rule 23(g)(1);
5. Pursuant to Rule 23(e), and for the reasons set forth in the attached Memorandum Opinion, the Settlement Agreement and the proposed Plan of Allocation and the terms thereof are approved and confirmed as being fair, reasonable and adequate as to all members of the Settlement Class;
6. The parties are hereby directed to proceed with and to implement the Settlement Agreement in accordance with its terms. The award of attorneys’ fees and expenses and the special payments to the named Plaintiffs, as approved in the paragraph below, and the settlement payments to the named Plaintiffs and the members of the settlement class shall be disbursed upon the occurrence of the effective date as

promptly as administratively feasible;

7. The Court, having considered the petition of counsel for Plaintiffs for an award of attorneys' fees and reimbursement of expenses out of the settlement fund, and finding the requested award fair and reasonable, hereby grants the petition and awards to Class Counsel out of the settlement fund attorneys' fees and expenses in the aggregate amount of \$375,000.00. This award of fees and expenses shall be paid from the settlement fund at the time and in the manner provided in the Settlement Agreement. The Court also hereby approves and awards to each of the two named Plaintiffs, Richard Godshall and Steven Cusano, a special payment of \$20,000 each in consideration of their efforts benefitting all class members. These payments shall be in addition to the sums that each Plaintiff is entitled to receive under the terms of the Plan of Allocation;
8. The Court hereby approves of the establishment of the settlement fund described in paragraph 5(a) of the Settlement Agreement and, in particular, approves of its treatment as a "qualified settlement fund" within the meaning of Section 1.468B-1(a) of the Treasury Regulations;
9. As of the effective date, all members of the settlement class shall be deemed to release and discharge the released persons from all of the released claims, as defined in the Settlement Agreement.
10. The Court shall retain continuing jurisdiction of this matter for the purposes of consummating, implementing, and enforcing the Settlement Agreement and the terms of this Order and Final Judgment, including satisfaction of the requirements of

Treasury Regulation § 1.468B-1(c)(1), and entry of any further orders as may be necessary and appropriate;

11. The Clerk of the Court is directed to enter this Order and Final Judgment as a final judgment, this case is **DISMISSED WITH PREJUDICE** with respect to each Plaintiff and each member of the Settlement Class pursuant to Federal Rule of Civil Procedure 41(a)(2). The Court's reservation of continuing jurisdiction pursuant to the preceding paragraph shall not affect in any way the finality of this Order and Final Judgment.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe
CYNTHIA M. RUFÉ, J.