UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

ANITA F. ADAMS, Plaintiff, v. AZTAR INDIANA GAMING COMPANY, LLC, d/b/a TROPICANA EVANSVILLE, Defendant.	))))))))))	No. 3:20-cv-00143-MPB-RLY

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND DIRECTING CLASS NOTICE

Plaintiff, Anita Adams, has agreed to settle her wage and hour class and collective action claims against her employer, Aztar Indiana Gaming Company LLC, d/b/a Tropicana Evansville. She now moves, unopposed, for preliminary approval of the class action settlement. The parties have consented to the Magistrate Judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. (Docket No. 125). For the reasons explained below, the court **GRANTS** preliminary approval.

I. Background

A more comprehensive discussion of the facts of this case are contained in the court's Entry Granting Plaintiff's Motion for Certification (Docket No. 80). The basics are as follows.

Anita Adams works as a table games dealer at the Tropicana Evansville casino. She sued on behalf of herself and similarly situated employees, alleging that Tropicana violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and Indiana Wage Payment Statute ("IWPS"), Ind. Code §§ 22-2-5-1 *et seq.*, by: (1) failing to properly inform its tipped employees of the required tip-credit provisions of the FLSA prior to paying such employees less than

minimum wage; (2) implementing a timeclock rounding policy that resulted, over a period of time, in failure to pay for all compensable time worked; (3) deducting costs for employees' gaming licenses from their pay, thereby reducing their compensation below the required minimum wage; and (4) miscalculating its tipped employees' regular rate of pay for overtime purposes by paying one and one half times the sub-minimum direct cash wage, which resulted in unpaid overtime compensation.

After the court denied Tropicana's motion to dismiss, the parties engaged in significant discovery. Based on that discovery and the extensive briefs of the parties, the court then granted conditional certification of four FLSA collectives and certification of three IWPS classes. Tropicana then sought interlocutory appeal under Rule 23(f), which was denied by the Seventh Circuit. Thereafter, the parties engaged in arms-length negotiations by way of a judicial settlement conference.

During the settlement process, the parties were ordered to submit confidential settlement statements, which included a detailed request for specific wage and hour data from Tropicana for the purpose of preparing a damage model for all claims. (Docket No. 123, Ricke Decl. ¶ 12). On November 3, 2022, the parties ultimately accepted a double-blind "mediator's proposal" proposed by the Court after hours of negotiations. (*Id.* ¶ 17). Since then, the parties have worked diligently to draft the formal settlement agreement now before the court.

II. Legal Standard

Federal Rule of Civil Procedure 23(e) requires court approval of a class action settlement. This is not a mere "judicial rubber stamp." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). Because most of the Rule 23 requirements are "designed to protect absentees by blocking unwarranted or overbroad class definitions," the court must still conduct an independent

class certification analysis even when the parties have stipulated that a class should be certified. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619–22 (1997). When, as here, the court has already granted class certification, "the only information ordinarily necessary is whether the proposed settlement calls for any change in the class to be certified, or of the claims, defenses, or issues regarding which certification was granted." Fed. R. Civ. P. 23(e)(1), Advisory Committee Notes.

Additionally, in order to preliminarily approve a settlement, the court must determine that the settlement proposal is "within the range of possible approval." *Armstrong v. Bd. of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). At this stage, Plaintiff need show only that final approval is likely, not that it is certain. *See* Fed. R. Civ. P. 23(e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal."). Nonetheless, a court considering a request for preliminary approval of a class settlement must be vigilant to ensure that the interests of the class are well served by the settlement. *See In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 588 (N.D. Ill. 2016).

Once preliminary approval is granted, the court authorizes notice to be sent to class members—who are given the opportunity to object. *Burnett v. Conseco Life Ins. Co.*, No. 1:18-cv-00200-JPH-DML, 2020 WL 4207787, at *4 (S.D. Ind. July 22, 2020). Then, the court holds a fairness hearing to determine whether the proposed settlement is "fair, reasonable, and adequate." *Id.* (quoting Fed. R. Civ. P. 23(e)(2)).

III. Discussion

A. Class Certification and Proposed Changes

Plaintiff asks the Court to certify for settlement purposes three settlement classes and one settlement collective of employees at Tropicana, consistent with those previously certified in the Court's Order dated February 25, 2022. (Docket No. 80):

> **Tip Credit Notice Class**: All hourly, non-exempt employees of Tropicana who were paid a direct hourly wage that was less than $7.25 per hour and for whom a tip credit was claimed at any time from June 18, 2018, to December 31, 2020, and who either: (1) currently work for Tropicana; or (2) voluntarily terminated their employment with Tropicana.
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> **Timeclock Rounding Class**: All hourly, non-exempt Table Games Dealers of Tropicana who clocked in and clocked out using ADP timekeeping software at any time from June 18, 2018, through June 30, 2021, and who either: (1) currently work for Tropicana; or (2) voluntarily terminated their employment with Tropicana.
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> **Miscalculated Regular Rate Class**: All hourly, non-exempt employees of Tropicana who were paid a direct hourly wage that was less than $7.25 per hour and worked more than 40 hours in any workweek from June 18, 2018, through April 20, 2022, and who either: (1) currently work for Tropicana; or (2) voluntarily terminated their employment with Tropicana.
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> **Gaming License Collective**: All hourly, non-exempt employees of Tropicana who were paid a direct hourly wage equal to or less than $7.25 per hour and had a gaming license fee deducted from their wages at any time from June 18, 2017, through April 9, 2021, and who filed a Consent to Join form in the Litigation.

(Docket No. 122-1, Settlement Agreement, ¶¶ 19, 22, 41, and 42). Plaintiff does not request any change to the definition of the Tip Credit Notice Class; and requests only one minor change to the certified class definitions of the Timeclock Rounding Class and Miscalculated Rate Class-that they both have appropriate end dates, as defined above, instead of "to the present." This change does not alter the reasoning underlying the Court's prior Order granting class

certification. *See*, *e.g.*, *Youth Just. Coalitions v. City of Los Angeles*, 2020 WL 9312377, at *2 (C.D. Cal. Nov. 17, 2020) (approving settlement class definition which expanded and clarified who was in the class because the "change does not alter the reasoning underlying its earlier decision to grant class certification pursuant to Rule 23(b)(2).").

The classes satisfy Rule 23(e) because the settlement classes are identical to the ones previously certified with the addition of an appropriate end date and will be preliminary approved for settlement purposes.

B. Whether the Settlement Is Within the Range of Possible Approval

Because the proposed settlement would be binding on class members, the court may only approve the settlement after finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, Federal Rule of Civil Procedure 23(e)(2) requires the Court to consider whether (1) the class representatives and class counsel have adequately represented the class, (2) the proposal was negotiated at arm's length, (3) the proposal treats class members equitably relative to each other, and (4) the relief provided by the settlement is adequate.

Courts also consider the following five factors: (1) the strength of the plaintiffs' case compared against the amount of the defendants' settlement offer; (2) the complexity, length, and expense of continued litigation; (3) the amount of opposition to the settlement; (4) the opinion of experienced counsel; and (5) the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (internal citation omitted).

1. Adequacy of representation of the class

As explained above, Plaintiffs and Class Counsel have adequately represented the Class, notably obtaining a common fund that represents more than make-whole relief of the unpaid wages at issue in this case. (Docket No. 123, Ricke Decl., ¶ 24).

2. The Settlement Agreement was negotiated at arm's length

The Settlement Agreement was negotiated at arm's length. As explained in detail in Plaintiff's memorandum, the Settlement Agreement is the product of years of litigation and was achieved only after hours of arm's-length negotiations during a judicial settlement conference. (Docket No. 122 at ECF p. 27; Docket No. 123, Ricke Decl., ¶¶ 16-17).

3. The Settlement Agreement treats class members equitably relative to each other

The Settlement Agreement treats Class members equitably relative to each other. The Net Settlement Amount is to be allocated: 90% to the Tip Credit Notice Class, 3% to the Timeclock Rounding Class, 1% to the Miscalculated Regular Rate Class, and 6% to the Gaming License Collective. (Docket No. 122-1, Settlement Agreement, ¶ 43). These percentages are in proportion with the class-wide damages attributable to each claim. (Docket No. 123, Ricke Decl., ¶ 24). And, within each class and collective, members will receive their *pro rata* portion of the allocation based on their individual damage figured compared to the total damage amount. (Docket No. 122-1, Settlement Agreement, ¶¶ 43(a)-(e)). Any portion of the Net Settlement Amount not claimed by Class Members or Collective Members will escheat to the State of Indiana's unclaimed property fund to be held by the State of Indiana for the benefit of the Class Member or Collective Member. (*Id.*, ¶ 69).

4. The relief provided by the Settlement Agreement is adequate

The relief is adequate. Rule 23(e) charges the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(c)(i)-(iv). The $2,100,000 common fund represents over 160% of the actual damages alleged in this case, based on Tropicana's casino-wide wage and hour data. This settlement compares favorably to similar casino wage and hour matters. (*See* Docket No. 122 at ECF p. 29 (collecting cases)). In order to obtain benefits in excess of those provided by the proposed settlement, Plaintiff would be required to defeat motions for class and collective decertification, motions for summary judgment, prevail at trial, and prevail on appeal. This process would be long and costly. The relief is adequate when considering the effectiveness of distributing relief to the class. Class members are not required to file claim forms to receive a settlement payout, every covered individual will get a notice form that explains the settlement and specifies his or her anticipated settlement payment. Third, the relief is adequate considering the terms of the proposed award of attorneys' fees. It is likely that the amount and timing of the proposed attorneys' fees will support final approval because courts in this district and around the Seventh Circuit routinely award one-third of the common fund. (*Id.* at ECF p. 31 (collecting cases)). Finally, the Settlement Agreement is the only agreement between the parties.

5. The strength of Plaintiffs' case compared against the amount of Tropicana's settlement offer

The most important factor relevant to the fairness of a class action settlement is the strength of the plaintiff's case on the merits balanced against the amount offered in the

settlement. *Synfuel Techs., Inc.*, 463 F.3d at 653. As discussed previously, continued litigation presents significant risks and costs for Plaintiff. The most obvious risk is if Plaintiff is not successful on her claims. Even if successful on the merits at some future time, a future victory is not as valuable as a present victory. *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002)). And, as explained above, the total consideration to be paid by Tropicana of $2,100,000 represents over 160% of the actual damages in this case.

6. The likely complexity, length, and expense of continued litigation

This case was settled only after the briefing of a motion to dismiss, completion of Phase 1 discovery, which included comprehensive sets of discovery, wage and hour data and payroll information for approximately 731 employees, and multiple depositions, briefing on conditional and class certification, briefing on a petition for permission to appeal to the Seventh Circuit Court of Appeals, and a Rule 16 judicial settlement conference. Continuing to litigate this case will require vast expense and a great deal of time, on top of that already expanded.

7. Opposition to the Settlement Agreement

The parties have not yet sent the notice, so it is premature to assess this factor.

8. The opinion of experienced counsel

The opinion of counsel weighs heavily in favor of the fairness, reasonableness, and adequacy of the Settlement Agreement. Courts are "'entitled to rely heavily on the opinion of competent counsel,'" *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong*, 616 F.2d at 325). Counsel for the parties are experienced and highly competent. Over the past six years, Class Counsel has litigated over 20 wage and hour claims against casino operators and have obtained key rulings relevant to and that have informed the settlement value

in this case. (Docket No. 122 at ECF p. 26, n. 4 (collecting cases)). There is no indication that the Settlement Agreement is the victim of collusion. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). Class counsel will apply for approval of attorneys' fees not to exceed $700,000, one-third of the Settlement Fund, plus reasonable costs and expenses. (Docket No. 122-1, Settlement Agreement, ¶ 49).

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

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325. As discussed, the claims presented and settlement demand have been developed over years of litigation, with extensive Phase 1 discovery. (Docket No. 123, Ricke Decl., ¶ 8). There is no indication that the Settlement Agreement would have benefited from additional discovery. This factor weighs in favor of the fairness, reasonableness, and adequacy of the Settlement Agreement.

C. Whether the Release of the FLSA Claims Should be Approved as a Fair and Reasonable Resolution of a *Bona Fide* Dispute

For the same reasons that the settlement is fair, reasonable, and adequate under Rule 23(e)(1), the settlement likewise is a fair and reasonable resolution of a *bona fide* dispute such that the Court can approve the FLSA release for class members who negotiate their settlement checks or claim their settled payments from the State of Indiana's unclaimed property funds. To determine the fairness of an FLSA settlement, "[t]he Court must consider 'whether the agreement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching.'" *Schneider v. Union Hosp., Inc.*, No. 2:15-cv-00204-JMS-DKL, Docket No. 126 at *2 (S.D. Ind. May 9, 2017) (quoting *Burkholder v. City of Fort Wayne*, 750 F. Supp. 2d 990, 995 (N.D. Ind. 2010)). As explained above, the parties

vigorously disputed the FLSA claims at issue in this case, *i.e.*, whether Tropicana provided adequate notice of the FLSA's tip credit requirements and whether the gaming license costs deducted from employees' wages primarily benefitted the casino or workers. (Docket No. 77). The settlement was the result of an arm's length judicial settlement conference. Further, only those class members who sign and negotiate their settlement checks, thereby evidencing their intent to participate will release their FLSA claims. (Docket No. 122-1, Settlement Agreement, ¶ 51). The release of FLSA claims under these circumstances is a fair and reasonable resolution of a *bona fide* dispute.

D. Class Counsel

Plaintiff's Counsel meets all of the criteria outlined in Fed. R. Civ. P. 23(g)(1)(A) and (B) and were previously found to be adequate representatives of the class in the Court's Order granting class certification. (Docket No. 80 at ECF p. 21) ("[Adams'] counsel also appears experienced, qualified, and generally able to conduct the litigation—especially since her counsel is experienced in wage and hour class actions against casinos."). Further, Class Counsel have been appointed class counsel in wage and hour class actions many times before. (Docket No. 123, Ricke Decl., ¶¶ 35-38).

E. Class Notice

For notice under Rule 23(e)(1) to a class proposed to be certified for the purposes of settlement under Rule 23(b)(3), the Federal Rules require the court to direct to class members:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and

> manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). And Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." As explained above, the parties have shown that the court will likely be able to approve the proposal under Rule 23(e)(2) and certify the class for purposes of judgment on the proposal.

The proposed notice submitted by the parties fulfills the requirements of Rule 23. It states the nature of the action and the claims; defines the class; explains that each class member may enter an appearance through an attorney if the member so desires and that members can opt-out; provides information about the date of the fairness hearing; and notifies the class that the effect of a class judgment is binding on class members. Accordingly, the court approves the proposed notice.

IV. Conclusion

Plaintiffs' Motion for Preliminary Approval of Class and Collective Action Settlement (Docket No. 122) is **GRANTED** and the Court hereby finds and orders as follows:

1. Unless otherwise defined herein, all terms used in this Order (the "Preliminary Approval Order") will have the same meaning as defined in the Settlement Agreement.

2. The Court finds on a preliminary basis that the settlement memorialized in the Settlement Agreement, and filed with the Court, falls within the range of reasonableness and, therefore, meets the requirements for preliminary approval as required by Federal Rule of Civil Procedure 23(e).

3. The Court grants preliminary approval of the parties' Settlement Agreement.

4. The Court certifies, for settlement purposes only, the following Settlement Classes pursuant to the Settlement Agreement and Fed. R. Civ. P. 23:

a. **Tip Credit Notice Class:** All current hourly, non-exempt employees at Tropicana Evansville, or former non-exempt employees who voluntarily separated, who were paid a direct hourly wage that was less than $7.25 per hour and for whom a tip credit was claimed at any time from June 18, 2018, to December 31, 2020.

b. **Timeclock Rounding Class:** All current hourly, non-exempt Table Games Dealers at Tropicana Evansville, or former non-exempt Table Games Dealers who voluntarily separated who clocked in and clocked out using ADP timekeeping software at any time from June 18, 2018, through June 30, 2021, and who received a Class Notice Form in the Litigation.

c. **Miscalculated Regular Rate Class:** All current hourly, non-exempt employees at Tropicana Evansville, or former non-exempt employees who voluntarily separated, who were paid a direct hourly wage that was less than $7.25 per hour and worked more than 40 hours in any workweek from June 18, 2018, through April 20, 2022, and who received a Class Notice Form in the Litigation.

5. The Court appoints, for settlement purposes only, Anita F. Adams as the Class Representative of the Settlement Class.

6. The Court appoints, for settlement purposes only, the law firms of Stueve Siegel Hanson LLP and McClelland Law Firm, P.C. as Class Counsel for purposes of settlement, and the releases and other obligations therein.

7. This Court orders the parties to select a Settlement Administrator to perform duties in accordance with the terms of the Settlement Agreement.

8. The proposed Notice packet to be provided as set forth in the Settlement Agreement is hereby found to be the best practicable means of providing notice under the circumstances and, when completed, shall constitute due and sufficient notice of the proposed class settlement and the Final Approval Hearing to all persons and entities affected by and/or entitled to participate in the settlement, in full compliance with the notice requirements of Fed.

R. Civ. P. 23, due process, the Constitution of the United States, the laws of the State of Indiana, and all other applicable laws. The Notice is accurate, objective, and informative, and provides members of the Settlement Classes with all of the information necessary to make an informed decision regarding their participation in the settlement and its fairness.

9. The Notice of Proposed Settlement of Class and Collective Action, attached to the Settlement Agreement as Exhibit A, including the Change of Name and/or Address Information Form (Form B), are approved. The Settlement Administrator is authorized to mail those documents to the Class Employees as provided in the Settlement Agreement.

10. Class Employees who wish to opt out of the Settlement must submit a timely request for exclusion from the settlement to the Settlement Administrator no later than (a) forty-five (45) days from the date the Settlement Administrator first mails the Proposed Settlement Notice to Class Employees, or (b) (30) days from the date the Settlement Administrator mails the Proposed Settlement Notice to a Class Employee's additional address, whichever date is later, provided that under no circumstances will any Class Employee be permitted to submit his or her request for exclusion from the settlement more than seventy-five (75) days from the date the Settlement Administrator first mails the Proposed Settlement Notice to Class Employees.

11. Any written objection to the Settlement must be submitted to the Court no later than forty-five (45) days after the Proposed Settlement Notices are mailed to the Class Employees.

12. The Court further preliminarily certifies, for settlement purposes only, the following Settlement Collective pursuant to the Settlement Agreement and 29 U.S.C. § 216(b):

a. **Gaming License Collective:** All hourly, non-exempt employees at Tropicana Evansville who were paid a direct hourly wage equal to or less than $7.25 per hour and had a gaming license fee deducted from their wages

at any time from June 18, 2017, through April 9, 2021, and who filed a Consent to Join form in the Litigation.

13. For the same reasons that the Court preliminary finds the Settlement Agreement is fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2), the Court likewise finds on a preliminary basis that the resolution of the Fair Labor Standards Act claim represents a fair and reasonable resolution of a *bona fide* dispute.

14. Pending the Court's decision on final approval of the settlement, this matter is stayed other than as set out in this Order.

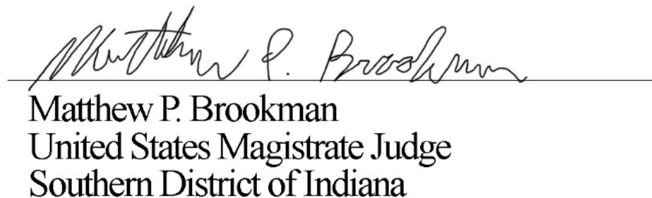
15. The Named Plaintiff and Defendant are ordered to carry out the settlement according to the terms of the Settlement Agreement.

16. The Court will conduct a Final Approval Hearing on **June 13, 2023**, at 10:00 a.m. Evansville time (CDT), in room #301, United States Courthouse, 101 Northwest MLK Boulevard, Evansville, Indiana before Magistrate Judge Matthew P. Brookman.

17. The Named Plaintiff shall file her motion for approval of the settlement, and Class Counsel shall file their motion for attorneys' fees, costs and expenses, and the Named Plaintiff Service Payment on or before April 28, 2023.

SO ORDERED.

Dated: 2/24/2023



Matthew P. Brookman
United States Magistrate Judge
Southern District of Indiana

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