

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HELENE ORLOWSKI, MELBA J. KOCH,)
MARGARET MROZOWSKI, CAROL ANN)
SCHMALL, ALMA L. AGUIRRE, ROANN D.)
KEATY, GEORGINE ARVANITES, JANET M.)
TRIPP, and MAUREEN GLEIXNER,)
on behalf of themselves and all)
other persons similarly situated,)

Plaintiffs,)

v.)

DOMINICK'S FINER FOODS, INC.,)

Defendant.)

No. 95 C 1666

The Honorable Elaine C. Bucklo

DOCKETED

APR 05 2004

FILED

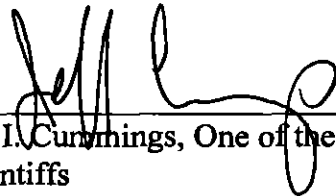
MAR 23 2004

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NOTICE OF MOTION

TO: John Lynch, Esq.
Latham & Watkins
233 South Wacker Drive
Suite 5800, Sears Tower
Chicago, IL 60606

PLEASE TAKE NOTICE that on March 31, 2004 at 9:30 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Elaine C. Bucklo, or any judge sitting in her stead in the courtroom 1725 in the Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, and shall then and there present **CLASS COUNSEL'S UNOPPOSED MOTION FOR THE ENTRY OF A SUPPLEMENTAL ORDER APPROVING THE DISTRIBUTION OF THE RESIDUAL FUNDS TO CLASS COUNSEL**, a copy of which is attached hereto.



Jeffrey I. Cummings, One of the Attorneys
for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, certifies that on March 23, 2004, a copy of the foregoing Notice of Motion and Motion were served on the above attorneys by U. S. Mail.

Susan M. Miller

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**CLASS COUNSEL'S UNOPPOSED MOTION FOR THE ENTRY
 OF A SUPPLEMENTAL ORDER APPROVING THE DISTRIBUTION
OF THE RESIDUAL FUNDS TO CLASS COUNSEL**

This is a Title VII sex discrimination class action that was settled with this Court's final approval on March 31, 2000. Following the completion of a lengthy process of distributing \$7.65 million in settlement proceeds to the over 12,000 women class members, Class Counsel (Miner, Barnhill & Galland) presented its final accounting regarding the class action settlement fund and request for the distribution of residual funds to counsel. On February 8, 2002, this Court approved the final accounting and granted Class Counsel's request for distribution of the residual funds. Class Counsel brings this motion for the entry of a supplemental order approving the distribution to counsel of residual settlement-related funds that were generated after February 2002 by virtue of unanticipated tax refunds to the class action settlement fund. The residual

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funds in question total \$15,143.37.

In Section I of this motion, Class Counsel will briefly recap (a) the underlying litigation; (b) the settlement agreement; (c) the settlement distribution process; (d) the magnitude of Class Counsel's work during the distribution process; (e) the final accounting and the Court's approval of the distribution of residual funds; (f) Class Counsel's monitoring work; and (g) tax penalty and overpayment refunds issued regarding the settlement fund's tax returns. In Section II, Class Counsel will explain why the distribution of the remaining residual funds to MBG is in accordance with the parties' Settlement Agreement and with the parties' mutual consent. *See* Exhibit A.

I. Factual Background

A. The Underlying Litigation

In 1995, plaintiffs Helene Orłowski and Melba J. Koch filed a complaint individually and on behalf of other similarly-situated women against Dominick's Finer Foods, Inc. ("Dominick's") pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. ("Title VII"). The complaint alleged that plaintiffs and similarly-situated women have been discriminated against in promotions, training, compensation, hours, transfers and job assignments. This Court certified a class of all female employees who worked in Dominick's stores during the period September 23, 1993 to the present. After years of hotly contested litigation, the parties reached a settlement which this Court approved on March 31, 2000.

B. The Settlement Agreement

The parties' Settlement Agreement ("Agreement") resulted in the creation of a settlement fund in the amount of \$7,650,000 to satisfy and settle the claims of the named plaintiffs, class

member deponents, class member declarants, and all class member claims. See Settlement Agreement (attached hereto as Exhibit B), at 29. The Agreement provided that settlement funds which remained after the distribution process were to be deemed “unclaimed funds” and that the first \$300,000 of the unclaimed funds were to be returned to Dominick’s “for use in funding the various programs established by th[e] Agreement.” Exhibit B, at 41.

The Agreement, as preliminarily approved by this Court on December 20, 1999, further provided that Dominick’s would pay to Class Counsel \$1,900,000 (including approximately \$450,000 in costs) and that it would pay up to an additional \$225,000 to the former plaintiffs’ counsel. Exhibit C, at 2-3. After the Agreement was preliminarily approved, former plaintiffs’ counsel raised an objection to the allocation of fees. To resolve this dispute, all counsel agreed to modify the fee allocation so that former plaintiffs’ counsel would receive \$300,000; Class Counsel would receive \$1,850,000 for its fees and costs; and Class Counsel would receive up to \$25,000 from any unclaimed funds remaining after the time of that the settlement proceeds were distributed. Exhibit C, at 3. On March 31, 2000, this Court gave final approval to the Agreement and it “also approve[d] the payment of attorneys’ fees as set forth in the settlement agreement, as amended by counsel’s agreement.” Exhibit A.

C. The Distribution Of The Settlement Proceeds To The Class Members

The settlement fund proceeds were deposited into a settlement fund account where the funds generated interest during the pendency of the distribution process. The settlement proceeds were distributed in five phases between May 2000 and late 2001.

1. The Initial Distribution

In May 2000, Class Counsel distributed a total \$223,227.30 to the nine named plaintiffs,

fourteen class member deponents, and to thirty-one class member declarants. Exhibit D, ¶3. This sum included the pro rata share of the interest (in the amount of \$3,735.30) that accumulated on the settlement fund between the time the funds were deposited into the account and the first distribution. *Id.*

2. *The Classwide Distribution*

The classwide claims distribution process commenced in June 2000. Approximately 19,340 claim forms were sent to the last known addresses of all women who were members of the settlement class. Exhibit D, ¶4. Class Counsel received approximately 12,520 claim forms on or before the deadline for their submission. After 493 claims were determined to be ineligible to receive a share of the settlement proceeds because they were filed by Dominick's employees who had a job tenure of less than ninety days, Class Counsel calculated settlement shares pursuant to the Agreement's formula and mailed out 12,027 checks to the eligible class members at the end of December 2000. *Id.* All but 49 (.4%) of these class members ultimately cashed their checks and received their settlement proceeds. A total of \$7,400,617.98 was distributed from the principal in the settlement account to fund this distribution. *Id.* In addition, \$390,345.90 of interest was earned on the principal in the settlement account between the time of the first distribution and the classwide distribution. This accumulated interest was distributed as follows: \$151,764.60 was distributed to class members on a pro rata basis; \$154,708.46 was withheld to pay taxes due and owing on the accrued interest; and \$83,872.84 was used to pay expenses associated with distributing the funds to the class members. *Id.*

3. *The Replacement Check Distribution*

In April 2001, Class Counsel distributed 61 replacement checks to eligible class members

who had filed timely claims but who had not yet received their settlement checks. Every one of these replacement checks was cashed by the class member. Exhibit D, ¶5.

4. The Undeliverable Check Distribution

After the classwide distribution, Class Counsel received back from the United States Postal Service a number of checks that were deemed “undeliverable.” After obtaining updated addresses for these class member, Class Counsel mailed out an additional 156 checks of which 116 were cashed by the class members. Exhibit D, ¶6.

5. The Latecomers Check Distribution

Following the deadline for submission of timely claims, a number of class members submitted claims for relief against the settlement fund. The “latecomers” claims were divided into ten categories. At the March 31, 2001 status hearing, this Court, with some modification, approved of class counsel’s recommendations as to which of these latecomer claims should be paid. Between late April and early June 2001, class counsel wrote to each one of the class members whose claims had been denied to inform them of the basis and date of this Court’s denial of their claims. Exhibit D, ¶7. In August 2001, a total of 178 checks were mailed out to class members in this “latecomers” distribution and all but 2 of these checks were cashed by class members. *Id.*

D. Class Counsel’s Work During The Distribution Process

Class Counsel was responsible for performing the work necessary to distribute the settlement proceeds to the over 12,000 class members. The distribution process, while highly effective, proved to be far more labor intensive than Class Counsel could have reasonably anticipated. Between April 1, 2000 and December 31, 2001, MBG’s paralegals devoted

approximately 2,151 hours of work (valued at approximately \$172,080) toward the administration of the settlement. Exhibit D, ¶8. MBG paralegals fielded hundreds of calls from class members, corrected hundreds of claims forms which contained inaccurate information as to class members' dates of employment, prepared correspondence with class members, created databases, reports, and forms pertaining to the distribution, and helped generate mailings to class members, among other things. During this same time, MBG attorneys devoted at least 123 hours of work (valued at over \$33,000) toward administering the class action settlement. Exhibit D, ¶8. In sum, MBG expended over \$205,000 in billable time during the settlement distribution process.

E. This Court's Approval Of Class Counsel's Final Accounting

The distribution of the proceeds from the settlement fund was completed and all costs associated with the distribution of the proceeds were paid as of early 2002. Class Counsel presented a detailed accounting of the manner in which the settlement proceeds were paid and of the expenses that were incurred in the distribution process. On February 8, 2002, after review and discussion, this Court approved the final accounting and granted Class Counsel's request for the distribution of the then existent residual settlement funds (approximately \$15,757) to Class Counsel. Exhibit E. At this hearing, this Court noted that MBG "did have to spend an awful lot of time" on the distribution process and that it "earned" the residual funds that it sought to be paid at that time. Exhibit E, at 3.

F. Class Counsel's Monitoring Efforts

The Agreement further provided that Dominick's would pay to Class Counsel the sum of \$12,500 for their work during each year of the three year duration of the Agreement. Exhibit B,

at 6, 42. Class counsel reviewed, edited, and – in some instances – helped create manuals and other documents that Dominick’s was required by the Agreement to produce, analyzed Dominick’s employment data to monitor its compliance with the Agreement, and met with Dominick’s counsel regarding these issues. Dominick’s made three payments to Class Counsel for these monitoring duties between August 2001 and June 2003. Exhibit D, ¶9.

G. Tax Penalty Refunds And Tax Overpayments

As stated above, *supra* at 3 the settlement proceeds were deposited into an interest bearing account. The interest generated was paid out to class members on a pro rata basis after a portion the settlement fund paid taxes on the accrued interest and paid expenses associated with the distribution of funds to class members. Class Counsel (through their accountant) filed federal and state tax returns for years 2000 and 2001 for the interest generated on the settlement fund. Exhibit D, ¶10 Between July 1, 2002 and February 16, 2004, the federal and state governments issued the following repayments in connection with these tax returns:

<u>Date</u>	<u>Amount</u> ¹	<u>Source</u>	<u>Reason for payment</u>
7/1/02	\$534.07	State of Illinois	year 2000 penalty partial refund
10/10/02	\$531.41	State of Illinois	year 2000 penalty partial refund
11/18/02	\$4,529.99	United States	year 2001 loss carried back to year 2000
5/12/03	\$969.25	State of Illinois	year 2001 overpayment
5/12/03	\$811.21	State of Illinois	year 2001 loss carried back to year 2000
2/16/04	\$7,767.44	United States	year 2001 overpayment

Exhibit D, ¶10

¹ Each of the following payments includes interest.

When the first five payments (which collectively total \$7,375.93) were received by MBG, MBG's bookkeeping staff inadvertently treated the payments as though they were reimbursements of MBG's costs. Exhibit D, ¶11. These payments were reflected as such on the internal accounting reports that are distributed to MBG's partners. *Id.* The receipt of these payments did not draw notice from counsel because MBG was periodically receiving payments for its monitoring work during the time. *Id.* In or about February 16, 2004, MBG's bookkeeper brought to the undersigned counsel's attention that MBG was due to receive a check from the U.S. Treasury for a \$7,767 tax refund in connection with the *Orlowski v. Dominick's* case. Exhibit D, ¶12. Counsel immediately began an investigation to determine the reason that this payment was being made and he thereafter discovered that the first five tax repayments had been received by MBG. Exhibit D, ¶12. MBG has deposited the final refund check into its client trust account pending the disposition of this motion. Exhibit D, ¶12.

II. Distribution of the remaining residual funds to MBG is fair, equitable, and in accord with Class Counsel and Dominick's exercise of their legal rights under the Settlement Agreement as approved by this Court

Pursuant to the Agreement as amended by counsel's agreement and approved by this Court at the fairness hearing on March 31, 2000, Class Counsel has a legal right to claim up to \$25,000 from any unclaimed funds remaining after the time that the settlement proceeds are distributed. *Supra*, at 3. *Cf. Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811-12 (5th Cir. 1989)(finding that neither class counsel nor the defendant employer had a "legal right" to unclaimed residual funds where the court-approved consent decree did not provide them with a right to make a claim to residual funds). The Agreement further provides that Dominick's would have the legal right to claim any unclaimed funds to the extent that the unclaimed funds exceeded

\$25,000 (and were less than \$300,000). *Supra*, at 3. Furthermore, both Class Counsel and Dominick's have an equitable right to make a claim to the remaining residual funds. *See, e.g., Wilson*, 880 F.2d at 813-16;² *In re: Neoware Systems, Inc. Securities Litigation*, 2001 WL 849727 at *1 (E.D.Pa. 2001).

To recap, there is a total of \$30,900.37 in unclaimed funds. The first \$15,757 of this sum was distributed to MBG per this Court's order of February 8, 2002. This leaves the present sum of \$15,143.37 in unclaimed funds. Per the Agreement as approved, MBG would be entitled to receive \$9,243 of the remaining funds (which would bring MBG to a total of \$25,000) and Dominick's would be entitled to the remaining \$5,900.37 of the funds. Dominick's has agreed that MBG should receive the portion of the unclaimed funds to which Dominick's would otherwise be entitled. Exhibit D, ¶13. Such a distribution to MBG would be fair and equitable given the unexpectedly substantial effort that MBG exerted to during the settlement distribution process (*supra*, at 5-6); the highly successful rate at which the settlement proceeds were distributed to eligible class members (*supra*, at 3-5); and the role of MBG in securing the multi-million dollar settlement in the first place. *See Wilson*, 880 F.2d at 815-16.

Where – as here – the parties have agreed to the distribution of unclaimed funds and the agreed distribution is equitable, courts defer to the parties' agreed distribution. *See, e.g., Wilson*, 880 F.2d at 815-16 (reversing district court for refusing to accept the parties' agreed equitable distribution of unclaimed funds); *Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D.Ill.

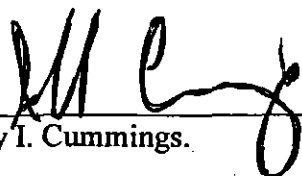
² The Fifth Circuit found, on the other hand, that nonclaiming class members had no equitable right to the residual funds because the class was provided with reasonable notice and a fair opportunity to assert claims. *Wilson*, 880 F.2d at 812-13, 816. As in *Wilson*, there is no question that the class members in this case received reasonable notice and a fair opportunity to assert their claims. *Supra*, at 3-5.

2001)("where parties agreed to distribution of unclaimed class fund, and agreed distribution is equitable, the court will defer to such agreement"). There is no reason as to why the parties' agreed disposition of the remaining unclaimed funds should not be honored in this case.

Conclusion

For all of the above reasons, Class Counsel respectfully requests that this Court enter an order approving the distribution of the remaining residual funds (\$15,143.37) to Miner, Barnhill & Galland.

Respectfully submitted,



Jeffrey I. Cummings.

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**SEE CASE
FILE FOR
EXHIBITS**