ARBITRATION BEFORE JAMS

Arbitration of

RONNY CUNNINGHAM, individually and on behalf of all others similarly situated,	)	
Claimants,	)	
v.	)	JAMS No. 1340005813 Deborah Gage Haude, Arbitrator
MENARD, INC., d/b/a MENARD'S	)	
Respondent.	)	

AWARD

On June 6, 2006, the undersigned arbitrator issued Order #5—Ruling on Motion for Conditional Approval of Settlement Agreement and Petition for Conditional Approval of Attorneys Fees and Costs. That Order ("Conditional Ruling") is attached hereto as Attachment A. It contains the procedural history of the case through that date, as well as a discussion of the Motion and Petition and certain findings and rulings. [1] The Settlement Agreement that the parties entered on April 6, 2006 is attached to the Conditional Ruling as Attachment 1.

The Conditional Ruling required the Class Administrator to prepare and send out notices to the Class, provide information to potential Class Members, compile information for the arbitrator and provide a report of the Class Administrator's compliance with the Conditional Ruling on or before September 8, 2006. The Class Administrator complied, and submitted the Declaration of Evette S. Roncone, one of its employees, and the Declaration of Robert Mellin, Director of Larkspur Design Group, the independent advertising and notification firm that had responsibility for publishing the Notice in newspapers.

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[1] After that date, the Class Administrator and Counsel requested that I approve some changes in format to the Notice Packet and some other minor changes, and I did so by Order #6 on June 16, 2006.

program or a profit sharing program, and whether the Code is applicable or, if it is, what "fault" means. The cases since *Camillo*, plus the fact that the Code does not require pro-rating for people who quit or are fired for "fault," make continued litigation risky for the Class, particularly for the 95% of the Class who might have to dispute Respondent's records. Therefore, I agree with Claimants that Respondent might have won this claim. On the other hand, a settlement of greater than 5% also is reasonable. Even if Respondent were able to prevail first on an argument that the Administrative Code should be followed, and then that its definitions of leaving by "mutual consent" or for "fault should be accepted, those victories might have resulted in a number of mini-trials that accrued a very large legal expense and contained some losses.

In the end, a settlement targeted to provide the class almost 43% of the value of the IPS claim, plus 5% simple interest, less attorneys' fees and expenses and Class Representative awards, is a reasonable compromise of this gap in possible outcomes that fairly reflects the risks and potential rewards of litigation.

As with the Vacation Pay claims, the Settlement Agreement's design also provides the possibility of larger recovery for these subclass members if not all members filed claims, although no enhanced payments would be made until after all Vacation Pay claim payments were enhanced. According to the Class Administrator, as of September 7, 2006, 902 of the potential 2171 Class Members had filed Claims. Roncone Decl. ¶10. By September 25th, the number had risen to 981, with 16 opt-outs. This is 45% of the possible number of Claims and, as with the Vacation Pay claim, suggests the possibility of higher actual payments than the targeted 43%. As with the Vacation Pay claim, more timely Claims may be filed, some of the Claims of the 53 individuals not on the Class List may be IPS claims and may be allowed, and some of the individuals excluded or for whom set-offs were ordered may have had IPS Claims. Whether the actual dollars that will be paid out by the Class Administrator equal, exceed or even were slightly lower than the Settlement Agreement's initial targeted amount, I find that the method of allocation in the Settlement Agreement is a fair, reasonable and adequate compromise of the IPS claim in light of the risks and potential rewards of litigation.

c. The Management Bonus Claims

Respondent's managers had an opportunity to earn a management bonus based in part on store profitability, which could not be determined until after year end, and in part on a performance matrix which was not completed until near the end of the fiscal year. Under documents that Respondent views as enforceable individual contracts for purposes of the IWPCA, no bonus is earned until year end, and no earned bonus is paid until some time in the following year.

Claimants argue that the approximately 1133 managers who left employment in Illinois before year end in any year in the class period should have received a *pro rata* bonus for that year if their stores made profitability targets. These individuals are the Bonus Class.

Claimants relied on *Camillo* to argue that the contractual requirement that employees be on the payroll as of December of the bonus year constituted an illegal forfeiture under the IWPCA. Respondent countered that the management contracts, unlike vacation pay, could not be definitely determined until after year end and that being employed through year end was an enforceable contract provision. Respondent also relied on the bonus provision of the Administrative Code to argue that individuals who quit or were discharged for "fault" would not have been entitled to a pro-rated bonus in any event. Respondent produced records showing that 70.2% of managers voluntarily quit and that an additional 24.7% were discharged for fault. According to that math, only 5.1% of the Bonus Class would have been eligible to argue for a bonus.

Unlike the IPS, this is clearly a bonus arrangement, so some of the arguments made about the IPS do not apply. The same pro-ration arguments and litigation risk factors do exist relating to the Code. Additionally, Respondent may have had additional arguments that these were individual contracts that had store and personal performance targets that could not be determined until year end. Therefore, the management bonus claims might have been a stronger case for Respondent and a riskier one for the Bonus Class, since the statute speaks of compensation that is owed "pursuant to" a contract and the Code, if an arbitrator or judge were to accept it, says that a claim arises when the employee "performs the requirements" for a bonus set forth in the contract. Still, as with the IPS claims, the cost of winning the management bonus claims could have been very time-consuming and expensive for Respondent.

As with the IPS claims, the management bonus claims were settled not for the proportion of the subclass that Respondent argued might have a claim (5.1%), but for approximately 43% of their estimated value, before removal of attorneys fees and costs and Class Representative payments. This translates to a net recovery to the Class Members of about 28% and 16.82% of the Net Value Fund. This is a reasonable balance between the strength of the bonus claim and the amount offered. Additionally, the fact that the Settlement Agreement provides that any excess in the Common Fund will be distributed first to the Vacation Class and, then, if there is any left, next to the IPS Class, and finally to the Bonus Class, is a reasonable reflection of the relative strengths of the bonus claim.

As of September 7, 2006, 660 bonus Claims had been filed out of 1133 on the Class List. By September 25th, the number was 719, or over 63%. Ms. Roncone reports that there were 12 timely opt-outs. Whether these Class Members receive exactly the amount projected by the Settlement Plan's initial target, or an amount enhanced up to a net 100% of their claims, or even an amount slightly less than the Settlement Agreement's initial target, as a result of the filing of additional timely Claims, opt-outs, the 53 Claims not on the list, persons whose claims I excluded or ordered set-off, I find that the method of allocation in the Settlement Agreement is a reasonable, fair and adequate balance between the strength of the bonus claim and the amounts delivered under the Settlement Agreement.

(2) Respondent's ability to pay the settlement amount

Not only is there no evidence that Respondent can not pay the agreed upon amounts, but it has already paid the Gross Fund Value, by far the greatest cost of this settlement.

(3) Complexity, length and expense of further litigation

Further litigation would likely be complex, lengthy and expensive. Claimants' legal issues on IPS and the Bonus include issues of first impression under Illinois law, such as the interpretation of the Administrative Code. If Respondent were to prevail on the question of whether the Code governs the outcome of this case, then it is possible that an arbitrator or judge would allow Class Members to have some sort of proceedings to determine whether the were properly excluded under the Code. Since there are about 1600 timely filed IPS and Bonus claims, whatever the process were to be—submission on paper or hearings—it could take months of time and be expensive. The expense per Class Member is likely to be disproportionate to the size of any Class Member's potential recovery.

(4) Amount of opposition to the settlement

Although one Class Member felt that it was sad that a lawsuit had been filed, no Class Member, either directly or through a representative, filed an objection or requested to be heard at the Fairness Hearing, despite adequate notice and opportunity to do so.

(5) The presence of collusion in reaching a settlement

There is no evidence of collusion in reaching this settlement. This case did not settle until after numerous phone calls, exchanges of information, and four in-person mediation sessions, held at various times over a five month period. Class Counsel retained an expert who scrutinized the proffered employment and compensation information, and they conducted about 150 interviews with former employees to ensure that the data from Respondent and the calculations of damages exposures was understood and credible.

The parties were represented by experienced counsel who advocated their clients' positions vigorously. The Settlement Agreement is thorough and thoughtful. It contains mutual releases and no liquidated damages provisions. There is no evidence of collusion.

(6) The reaction of Class Members to the settlement

As previously discussed, there was only one comment, and there were no objections to the settlement. There have been only 45 opt-outs. The response of the Class, in terms of timely Claims filed, has exceeded the expectation of the Claims Administrator. As noted in the Class' Final Memorandum, a high rate of acceptance by the class is strong circumstantial evidence in favor of the settlement. F. Mem. at 15.

(7) The opinion of competent counsel

10.6 of the Settlement Agreement, and shall make the necessary withholdings and reports.

Any check sent to a Class Member will expire 180 days after issuance. If any check is not paid out for this reason, the amounts will be disbursed as set forth below.

d. If any amounts remain in the Net Value Fund after the allocations and payments ordered in c above have been made, then I award the remainder as follows:

i. Provided it has paid the costs of the Class Administrator, mediation and arbitration, I award up to $100,000 to be allocated and paid to Respondent. Then, if there are still amounts remaining in the Net Value Fund,

ii. The entire remaining amount shall be allocated to such charities as are specified by Class Counsel and the Class Representatives on one hand and Respondent on the other. The parties have agreed that each shall be able to designate one or more charitable organizations to receive up to 50% of the remainder. The parties have agreed to notify each other and the arbitrator of their choices prior to notifying the Class Administrator.

e. After all the allocations and payments have been made, and the tax reporting is completed, the Class Administrator shall submit a final report to the arbitrator and counsel, in such form as the arbitrator may require.

9. Release of all claims and covenant not to sue

As set forth in Paragraph 12.2 of the Settlement Agreement, as of the date of this Award, the Class Representatives and Class Members shall be deemed to forever release, acquit, satisfy, and discharge the Respondent from any and all manner of actions, or causes of action, accounts, agreements, bills, bonds, claims, contracts, controversies, covenants, damages, debts, demands, dues, executions, judgment liabilities, liens, promises, reckonings, specialties, suits, sums of money, trespasses, and variances whatsoever and any equitable, legal and administrative relief, whether based on federal state, or local law, statute or ordinance, regulation, contract, common law, or other source, whether known or unknown, actual or contingent, liquidated or otherwise, including without limitation, claims for attorneys' fees, litigation costs, injunction, contribution, indemnification or any other type of legal or equitable relief, that arise out of or are in any way based upon connected with, or related to any facts giving rise or allegedly giving rise to the Actions[8], including but not limited to those claims raised or asserted in the Actions, or in any similar litigation in this or any other court, jurisdiction,

[8] See Paragraph 1.1 of the Settlement Agreement for a definition of "Actions." In fact, throughout this Award, except where the Award creates a new definition, the defined terms of the Settlement Agreement have the same meaning here.

a. To Class Counsel- $1,295,587 in attorneys fees and costs of $10,496.76. Class Counsel shall furnish wiring instructions to the Class Administrator;

b. The sum of $5000 each to Class Representatives Watson, Moore, and Cunningham (for a total of $15,000), and nothing to Class Representative Gibson. These amounts are for their services as Class Representatives, not wages or amounts in lieu of wages;

c. After the above amounts have been paid, the Class Administrator shall allocate the remainder of the Common Fund (the "Net Fund Value") among the Vacation Pay, IPS and Management Bonus claims as set forth in Paragraph 10.3 of the Settlement Agreement, bearing in mind that no Class Member shall receive more than 100% of his/her total claim. These allocations also shall be subject to my prior orders regarding persons who signed releases and thereby are subject to set-offs and/or exclusions from one or more sub-class.

If there are sufficient funds in the Net Value Fund to enhance allocations for any sub-class, the Class Administrator shall first enhance the Vacation sub-class up to 100%, before making any enhancement of the other sub-classes. If there are still funds after enhancing the Vacation Class, the Class Administrator shall next enhance the IPS class up to 100% before making any enhancement to the Bonus Class.

In making the allocations and determining whether individuals are properly included in the Class, the Class Administrator will have the power to make determinations set out in Paragraph 8 and elsewhere in the Settlement Agreement.

Class Counsel and Respondent shall assist the Class Administrator as needed in gathering information relating to calculations.

Respondent shall promptly furnish copies of Orders 3 and 4 to the Class Administrator, with the list of names showing who is excluded from which class and what the amount of any ordered set-off is, so that the Class Administrator can perform the required allocations.

The parties have agreed, and I order that the allocations to the Class Members shall not be paid at the time of allocation or as set out Paragraph 10.5 of the Settlement Agreement. Instead, the Class Administrator shall prepare a report of the Class Member allocations and the status of the Net Value Fund for Class Counsel, Respondent's Counsel and the Arbitrator and present it on or before December 4, 2006. Payout to the Class will take place on or around January 26, 2007, unless a motion for vacatur has been filed or some other circumstance creating good cause for a schedule change has arisen, in which case the parties will confer and may request an amendment to the timing of the payments. The Class Administrator shall treat the allocations as set forth in Paragraph

and the relatively short time in which Class Members will receive a recovery compared to litigation.

Finally, while Class Counsel will continue to represent the class and incur fees and, possibly, costs throughout the payout period, there will be no more attorneys' fees or costs sought or awarded.

There are no objections to the amount of attorneys fees sought.

While we do not have the precise calculation of amounts that will go out to the Class, it appears likely that there will be some enhancement above the Settlement Agreement's initial target, although, according to Mr. Pentimonti's estimate at the Fairness Hearing, it is unlikely that each Class Member will receive 100% of each claim net of attorneys fees. I do not find that a basis to reduce the amount of attorneys' fees sought. In addition to the reasons supporting this award previously stated in this Award and the Conditional Ruling, a 42% recovery was a very good settlement for the IPS claim and an excellent settlement for the bonus claim, even when attorneys' fees were taken out. No greater amount is promised by the Settlement Agreement or any portion of the Notice Packet, and it is simply not unfair for litigants to be responsible for attorneys' fees.

Therefore, I conclude that the percentage of fund method of determining attorneys' fees is a fair and expeditious method for determining the attorneys' fee award in this case, in that it that reflects the economics of legal practice and equitably compensates counsel for the time, effort, and risks associated with representing the Class.

I award Class Counsel attorneys fees in the amount of $1,295,587.00 and costs of $10,496.76, to be paid out of the Common Fund in the manner prescribed in the Settlement Agreement. I do not award any interest on those amounts. Moreover, these are the only attorneys' fees and costs to which Class Counsel is entitled for its past and its continuing and future representation of the Class. There shall be no further awards of attorneys' fees or costs, and Respondent shall not be liable to pay any additional attorneys fees and costs to Class Counsel or to any other attorneys who purport to represent any Class Members in regard to this case.

8. Administration of the Common Fund and Award of Amounts from the Common Fund

The Common Fund shall continue to be administered by the Class Administrator pursuant to the Settlement Agreement, the Escrow Agreement, and this Award, including, but not limited to, making the payments and keeping the records required hereunder, until the Class Administrator is released by the Arbitrator or court order after all payouts ordered in this Award have been made, and all reports and records completed.

The Class Administrator shall make the following allocations and payments from the Common Fund:

I asked questions about the fee petition at the Fairness Hearing, and have reviewed the bill. The time is billed in tenths of an hour, not rounded up to quarter hours. The time includes the types of entries one would expect—meetings with clients, witness interviews, research, brief and pleading preparation, damages issues, court, arbitration and mediation matters, and related correspondence and communications. Phone calls are usually relatively brief, and research and drafting times are not excessive. Any lawyer's bill might have entries that someone scrutinizing it would challenge as not optimally efficient. However, I saw no items that seemed out of line, so, where, as here, the per cent of the common fund sought is typical of this practice and does not encroach on the Class' recovery, a more time-intensive line-by-line analysis and report is not warranted. Costs and expenses of $10,496.76, which includes their expert's fee, are not excessive for a case of this size.

I agree with the cases cited by Class Counsel that the common fund method is expeditious and approximates the market in cases such as this one, where (1) both these lawyers and their peers have averred that a one-third fee is customary in such cases,[6] (2) the Class Members will receive a recovery that is at the same time substantial in relation to their claims, but too small individually to attract representation by counsel, and (3) the IWPCA does not provide for fee-shifting.

Additionally, the Class Representatives agreed to pay Class Counsel a one-third contingent fee,[7] and that is what Class Counsel is petitioning to receive. In many states that have considered the question, the fee agreements of plaintiffs are not controlling. 5th A.L.R. 107. However, they show that the amount in the fee petition was not some amount recently thought up by Class Counsel, or arrived at in collusive negotiations with Respondent.

Class Counsel has been working on this case since 2004, and had 1009 hours in the case as of September 11, 2006. This is a significant time commitment for a firm of three lawyers, in a complex matter where two of the three counts bore significant risk of no or very low recovery. The amount sought is consistent with the excellent result obtained

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hourly billing, but rather by contingency fees. Exh. B, C. Here too, the affidavits of their peers support them, particularly in cases where, as here, the recovery of any one claimant does not make it economical for that claimant to retain counsel on an hourly basis. Exh. H, I, J.

[6] Fee Petition, Exh. B, C, H, I, J Decl. of J. Taren, Mem.Supp.Pet., Exh. B, ¶¶9-11; Aff. of M. Geraghty, Exh. C, ¶¶6-7; Aff. of F. Clayton,, Exh. H, ¶¶3-8; Aff. of S. Seligman, Exh. I, ¶¶2-6; Aff. of S. Saltzman, Exh. J, ¶¶2-4. Affiant Clayton not only has extensive experience of her own, but is a board member of organizations that litigate employment cases for plaintiffs and, like Mr. Taren, serves as a hearing officer with the Chicago Commission on Human Relations, and makes recommended rulings on attorneys' fees. Exh. H, ¶5. Affiant Saltzman has been co-editor or editor of West Law's Civil Rights Litigation and Attorneys Fees Annual Handbook for over 14 years. Exh. J, ¶3.

[7] Mem.Supp.Pet., Exhs. D, E, F (Affidavits of Reginald Watson, Ronny Cunningham, Acie Moore); Exh. G (Fee Agreement of Ronny Cunningham).

If an Illinois court were to add this factor to its consideration, I agree with Class Counsel that it would likely agree that there is a public interest in favor of settling class actions to avoid costly, unnecessary and uncertain litigation.

In this case, further litigation would be likely to be both lengthy and expensive. Class Members would not be likely to recover much, if anything, more than they will through this settlement. Indeed, some may recover more than they would have had they litigated. In all cases, this settlement will result in recovery much sooner than if they had litigated.

Conclusion—The Settlement Agreement is Fair, Reasonable and Adequate

Not one of the Korshak considerations raises a concern about the fairness of this settlement. Under both the Korshak factors and the JAMS Rules, this Settlement Agreement, as modified in the Preliminary Ruling and here in Paragraph 8, is a fair, reasonable and adequate compromise, and in the best interest of the parties and the public, and I approve it. This is a final ruling.

8. Petition for Attorneys Fees from the Common Fund

Class Counsel seeks an award of $1,295,587.00 in attorneys' fees, plus $10,496.76 in costs and expenses, to be awarded out of the Common Fund. Class Counsel seek this amount not only for the past services that they have performed on this case, but also, for all future fees, costs and expenses that they will incur as they continue to serve as Class Counsel until the conclusion of the case. In support of this fee petition, Class Counsel submitted legal argument in the Final Memo and attached a copy of their hours and charges through 9/11/06. Thus, the time spent at and since the Fairness Hearing is not and will not be included in the amount Class Counsel seeks to be awarded.

Pursuant to the Settlement Agreement, Respondent deposited $3,818,880 into the Common Fund. §9.1. Pursuant to the Settlement Agreement and an Escrow Agreement, the Class Administrator has been responsible for maintaining the Common Fund in an interest-bearing account. According to Ms. Roncone, the value of the Common Fund as of September 7, 2006 was approximately $3,886,763. Decl. ¶12.

Class Counsel seek an award of one-third of that Common Fund amount, or $1,295,587.00, in attorneys' fees. Class Counsel's time records indicate that if they were billing their time at $450/hour, a market rate that they established in their and other supporting affidavits to the Fee Petition submitted prior to the Conditional Ruling, they would have billed $441,571.38 in fees.[5] Therefore, if this were a fee shifting case, the multiplier would be 2.934. That is not a very big lodestar.

[5] Hourly rates of $450.00, for class action work such as this case, for two highly regarded Chicago-based employment attorneys with class action experience are supported by their affidavits and those of three peers. Mem.Supp.Pet. Exh. B, C, H, I, J. Moreover, both Mr. Taren and Ms. Geraghty aver that they have billed and collected $400/hour in individual cases that utilize hourly billing, and that their rate for class action work, on an hourly basis, is $450/hour. Exh. B at ¶¶3,5; Exh. C at ¶5. They also aver that most of their cases are not compensated by

Class Counsel point out that the more experience that class counsel has, the greater weight a court tends to attach to their opinion on fairness and adequacy. F. Mem. at 16.

Here, both the Class and Respondent were represented by experienced counsel. The Declarations of Class Counsel Jeffrey Taren and Miriam Geraghty (attached as Exhibits B and C to the Memorandum in Support of the Petition) show that they each have been licensed to practice law in Illinois since 1977, and that they have significant experience litigating employment and class action cases, including wage and hour cases under the FLSA. Additionally, other attorneys with similar practices and similar years of experience aver that Mr. Taren and Ms. Geraghty are experienced and respected members of the plaintiff employment bar. See, Mem.Supp.Pet., Exh. H, Aff. of F. Clayton, ¶9; Exh. J, Aff. of S. Saltzman, ¶6. See also F. Mem. at 16-17.

Class Counsel have concluded, as set out in both the Preliminary Memorandum and in the Final Memorandum, that it is in the best interests of the Class to settle this action on the terms set forth in the Settlement Agreement. F. Mem. at 16. In this case, it is appropriate to give weight to their opinion.

(8) The stage of proceedings and the amount of discovery

As Class Counsel points out, this factor allows the arbitrator to consider whether complainants have had access to sufficient material to evaluate their case, and, on an informed basis, to assess the adequacy of the proposed settlement in light of the case's strengths and weaknesses.

In addition to information about the programs, Respondent compiled and provided Class Counsel a database consisting of all former Illinois employees who terminated their employment during the class period, including dates of hire, earnings in the year of termination, rates of pay, and average year end bonus amounts for all manager level positions. Class Counsel retained an expert witness, who is experienced in this area, to review and validate the data. Class Counsel also worked with the Class Representatives, deposed Respondent's Chicago Head of Operations and interviewed about 150 former employees to further corroborate the information in the database.

Both parties performed and compared calculations concerning the potential recoveries on each of the three claims. Their numbers were quite consistent.

By the time of the settlement, the parties had thoroughly explored the nature of the programs and the amounts of potential recovery for the Class. Their negotiations were informed decisions, not shots in the dark. This factor weighs in favor of approving the settlement agreement.

(9) The Public Interest

or any administrative or governmental body (including any federal or state regularly commission), tribunal, arbitration panel or self-regulatory organization.

Class Representatives and Class Members shall have and are hereby deemed to have waived and relinquished, to the fullest extent permitted by law, any and all provisions, rights and benefits conferred under the Illinois Wage Payment and Collection Act ("IWPCA") or any federal or state law, rule, code, regulation or common law doctrine that is similar, comparable, equivalent, or identical to, or which has the effect of the Act.

Notwithstanding the provisions of the IWPCA and any similar provisions, rights and benefits conferred by any law, rule, code, regulation or common law doctrine of Illinois or any federal or state jurisdiction, this Release shall include claims that are not known or suspected to exist at the time these releases are effective.

From this date forward, Class Representatives and Class Members, acting individually or together, shall not and shall not seek to institute, maintain, prosecute, sue or assert in any action or proceeding, any action(s), cause(s) of action or claim on the basis of, connected with, arising out of, or substantially related to, any of the claims released by this Award, including , without limitation, any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted, descried, set forth or referred to in, or related to, the Actions, including, without limitation, the facts, events and circumstances that are the basis of the allegations raised in the Actions.

Also as of the date of this Award, Respondent shall be deemed to forever release, acquit satisfy and discharge the Class from any and all manner of actions, or causes of actions, accounts, agreements, bills, bonds, claims, contracts, controversies, covenants, damages, debts, demands, dues, executions, judgment, liabilities, liens, promises, reckonings, specialties, suits, sums of money, trespasses, and variances whatsoever and any equitable, legal and administrative relief, whether based on federal, state or local law, statute or ordinance, regulation, contract, common law, or other source, whether known or unknown, actual or contingent, liquidated or otherwise, including without limitation claims for attorneys' fees, litigation costs, injunctions, contribution, indemnification or any other type of legal or equitable relief, that arise out of or are in any way based upon, connected with, or related to any facts giving rise or allegedly giving rise to the Actions, including but not limited to those claims raised or asserted by Respondent in the Actions, or in any similar litigation in any court, jurisdiction or any administrative or governmental body (including any federal or state regulatory commission), tribunal, arbitration panel or self-regulatory organization.

Nothing in this Award shall preclude an action(s) to enforce the terms of the Settlement Agreement or this Award.

10. No Admission by Respondent

On September 11, 2006, Class Counsel submitted a Memorandum of Law in Support of Final Approval of Class Action Settlement ("Final Memo") and an up-to-date print-out of attorneys' fees and costs.

On September 13, 2006, at the time and location required by the Conditional Ruling and set out in the Notice, I held the Fairness Hearing. Counsel for the parties attended in person. Ms. Roncone and Mr. Pentimonti from the Class Administrator attended by speaker phone. No Class Members or representatives of Class Members attended, or indicated an intent to attend. Before the Fairness Hearing, I had reviewed the two declarations, the Final Memo and the fee print-out. Class Counsel made a presentation at the Fairness Hearing and I asked a number of questions of counsel and the Class Administrator. Counsel had an opportunity to make all points they desired to make.

Having considered the prior record, all the submissions, declarations, statements and responses of the parties' counsel and the Class Administrator, and done further research, I make the following findings, rulings and award:

1. **Jurisdiction.**

By stipulation of the parties, and under the Illinois Uniform Arbitration Act and any other applicable law, and the JAMS rules, I have jurisdiction over this case. The parties also have stipulated that the case is arbitrable.

2. **Definition of the Class.**

This class action case is brought on behalf of persons who were employed by Respondent in Illinois during the class period to address three types of alleged violations of the Illinois Wage Payment and Collection Act ("IWPCA"). Respondent has denied liability.

In the Conditional Ruling, I ruled that the Class consists of the following three sub-classes:

a The Vacation Class or "Subclass A"

All eligible persons employed by Menard Inc. within Illinois at any time during the period January 24, 2000 through May 1, 2006, who (1) forfeited accrued vacation pay upon separation from employment as a result of not having given two-weeks notice of their intent to leave employment, and/or (2) forfeited vacation pay that was earned and accrued in the year that they separated employment because they were not employed by Menard Inc. as of December 1st of that year.

b. The IPS Class or "Subclass B"

Neither this Award nor the Settlement Agreement not any fact contained therein or any action taken thereunder shall constitute, be construed or be admissible in evidence as an admission of the validity of any claim or of any fact alleged in the Actions or in any other pending or subsequently filed action or of any wrongdoing, fault, violation of law, or any liability of any kind on the part of Respondent arising out of or resulting from the alleged actions of inactions of Respondent.

However, nothing in this Award shall preclude an action(s) to enforce the terms of the Settlement Agreement or this Award.

11. Confidentiality

The Class Administrator shall continue to maintain the confidentiality of the information furnished to it, pursuant to Paragraph 6.2 of the Settlement Agreement.

12. Respondent's Payment Obligations.

Respondent shall timely pay the employer portion of payroll taxes owing for all payments allocated and paid to the Vacation Class, the IPS Class, and the Management Bonus Class. Respondent shall directly pay the costs of class administration, mediation and arbitration related to this case.

13. Confirmation

The rulings and awards in Paragraphs 1 – 10 of this Award are final awards. This Award is ready for confirmation as required under Paragraph 12.1 of the Settlement Agreement.

14. Limited jurisdiction retained

The parties have asked the arbitrator to retain limited jurisdiction to deal with matters that may arise as the Class Administrator carries out the terms of the Settlement Agreement and this Award, and I will do so. Jurisdiction is not being retained to consider, determine, reconsider or re-determine or re-open any of the above rulings or findings regarding the fairness and approval of the Settlement Agreement, the approval of the Fee Petition, or any of the awards from the Common Fund or the Net Value Fund, or related substantive rulings.

Deborah Gage Haude
Arbitrator

Dated: September 19, 2006

All eligible persons employed by Respondent within Illinois at any time during the period January 24, 2000 through May 1, 2006, who did not receive a *pro rata* bonus after separating from employment because (s)he was not employed by Respondent on December 15th in the W-2 year in which the bonus was earned. Ineligible persons include, but are not limited to, those persons who did not receive an IPS bonus for any other reason.

c. The Management Bonus Class or "Subclass C"

All eligible persons employed by Respondent within Illinois at any time during the period January 24, 2000 through May 1, 2006, who did not receive a *pro rata* share of a management bonus after separating from employment because (s)he was not employed by Menards for the entire fiscal year for which the management bonus was payable. Ineligible persons are those who did not receive a management bonus for any other reason.

To the extent that a larger class had been originally certified, the following subclasses were decertified in the Conditional Ruling: (a) a class of persons who worked for Respondent within Illinois and who did not get paid IPS because they were not on the payroll when IPS was paid out (called "IPS Bonus Class 2A" in the parties' Stipulation on Class Certification), and (b) a class of persons employed in Illinois by Respondent as a Manager who did not receive a management bonus because they were not on the payroll when it was paid out (called "Management Bonus Class 3A" in the Stipulation for Settlement).

3. **Class Representatives.**

In the Conditional Ruling, Prentis Gibson, Reginald Watson, Acie Moore and Ronny Cunningham, in their individual capacities and as representatives of the Class, were approved as Class Representatives.

4. **Class Counsel.**

For the reasons discussed in the Conditional Ruling, Jeffrey Taren and Miriam Geraghty were approved as Class Counsel.

5. **Class Administrator.**

For the reasons discussed in the Conditional Ruling, Gilardi & Company, LLC ("Gilardi") was approved as Class Administrator.

At the time of the Conditional Ruling, I had sufficient information to make rulings 1- 5 above. No Class Member objected to any of the Rulings set forth in paragraphs 1 – 5 above, or submitted any comments thereon, or offered any additional or contrary information. Those rulings are final.

6. **Notice of the Settlement and Fairness Hearing Was Reasonable and The Class Administrator Distributed the Notice in A Reasonable Manner.**

a. Content of the Notice

As discussed in the Conditional Ruling, the Notice Packet contains clear and thorough information. It clearly gives Class Members the right to request exclusion from the Class, even if they had a prior opportunity to do so.

I found that the contents of the notice to the Class, including each portion of the Notice Packet, were reasonable. No Class Member objected to that finding and I did not need any additional information. That ruling is final.

b. Time for the Class to Receive and Respond to Notice

The following deadlines were set in the Conditional Ruling: June 22, 2006 for Gilardi to review employment data furnished by Respondent, mail Notice Packets, set up an 800# for Class Members to call, and have the Notice Packet available on its website; August 22, 2006 for any Class Member who wished to opt-out, object to or comment about the settlement or challenge the employment data on his/her Claim Form to do so; September 6, 2006 for any Class Member or representative to notify the Class Administrator of their intent to attend the Fairness Hearing; and September 22, 2006 to file a Claim.

I found in the Conditional Ruling that the time for sending and responding to notice was reasonable. It gave Class Members time to learn about the case by one or more methods of communication, to check employment data for accuracy, to decide whether to participate in the case, and to file a Claim if they wished to do so.

No Class Member objected to the timing relating to notice, and no further information is needed. That ruling is final.

c. Methods of distribution of notice

The agreed method of distribution of the Notice to the Class -- by mail, newspaper posting in relevant newspapers and website posting—was designed to reach any person who might be a member of the Class, and I found it reasonable in the Conditional Ruling. See, Conditional Ruling at pp. 18, 25-26.

No Class Member objected to the method of distributing notice.

Robert Mellin, in his Declaration, and Evette Roncone, a Gilardi employee, in her Declaration and in response to questions at the Fairness Hearing, averred that the Class

Administrator carried out the requirements of the Conditional Ruling for distributing the notice.

As to mailing the notice, Ms. Roncone averred that, on or before June 22, 2006, Gilardi received names and addresses of all possible class members (the "Class List"), formatted the list for mailing purposes, processed the names and addresses through the National Change of Address Database and caused the Notice Packet to be printed and mailed to the 6230 names of the Class List. Decl. 2, 3. Gilardi re-mailed 125 returned Notice Packets that the Postal Service returned with updated addresses. Decl. 4. Gilardi received 1444 Notice Packets back from the Postal Service as undeliverable. Through a third party locator, Gilardi was able to successfully re-mail 1075 of those. Decl 5. Mr. Pentimonti and Ms. Roncone stated at the Fairness Hearing that 369 non-deliverable notices in a potential class of 6230 was not a bad result, and that there was not an economically reasonable method of further search, particularly in light of the newspaper publications being made.

As to newspaper notice, Mr. Mellin averred that he had over 25 years experience in the advertising and communications industry and designs and directs Larkspur Design Group's legal notice campaigns, including class actions. Decl. 1, 4. Mr. Mellin has designed and implemented over 1000 advertising and notification campaigns. Decl. 7. In this case, as ordered, the notice was published once a week for three consecutive weeks in each of 40 newspapers serving communities wherein a Menards store is located, and twice in the Chicago Tribune in two consecutive weeks. Decl. 8, 9. The notice was in a reasonable size type, designed to be seen by potential Class Members, and was not placed in the classified or legal publication section of the newspapers. Decl. 8. Mr. Mellin included an exhibit showing all the papers and the dates of publications in June and early July 2006, and averred that he has affidavits of publication and tear sheets from each newspaper as evidence of their publication. Decl. 10, Exh. A.

Ms. Roncone averred that, as ordered, on June 22, 2006, Gilardi caused a copy of the Notice Packet and Frequently Asked Questions to be posted on its website. From that site, class members could view and print copies of the documents. Decl. 6.

Also as ordered, Gilardi established a toll free telephone number that class members could call and listen to Frequently Asked Questions, request a Notice packet or ask to speak with a live operator. Decl. 8.

Gilardi received 53 requests for Claim Forms from individuals not on the original Class List, mailed Claims Forms to those individuals, and has received some completed Claims Forms back. Decl. 7, 9.

Ms. Roncone reported that the Class Administrator received 45 opt-out forms postmarked on or before the August 22, 2006 deadline set in the Conditional Ruling and clearly noted in the notice. Decl. 11. On September 25, 2006, Ms. Roncone informed the arbitrator and counsel for the parties that there have been 2 late filed opt-out forms.

made in February of the next year. Deposition testimony indicated that, except for one store in Illinois that did not meet profit requirements, IPS had been paid at the highest level during the period in question here.

There are approximately 2171 former Illinois employees who, if they met the other eligibility requirements of the program, would have qualified for an IPS payment but for the fact that they left employment before December 15th of their final year of employment. They are the IPS Class.

Based on the language of the statute, Claimants argued that the IPS is a bonus, subject to the IWPCA provisions, and had to be pro-rated in the same manner as vacation pay. Claimants also relied on an Illinois case, *Camillo v. Wal-Mart Stores, Inc.*, 221 Ill.App.3d 614 (1991), *app. denied*, 144 Ill.2d 631 (1992), which held that, despite Wal-Mart's bonus plan's requirement that employees had to be on the payroll at the end of the year to receive a bonus, an employee Wal-Mart had discharged without cause shortly before year end had to receive a pro-rated bonus.

Respondent argued that IPS is not a bonus, but, rather is a discretionary profit-sharing program, not subject to any *pro rata* requirement. Additionally, Respondent argued that the facts here are distinguishable from those in *Camillo*. Respondent also argued that even if the IPS had been a bonus plan, Section 300.500 of the Administrative Code only requires *pro rata* payment of bonuses when employment terminates either by mutual consent of the parties or by an act of the employer through no fault of the former employee. According to Respondent, this Administrative Code provision is consistent with the facts and holding in *Camillo*. Respondent produced statistics to Claimants allegedly showing that the vast majority of potential class members resigned (65.2%) or were discharged for reasons Respondent considered fault (30.2%). Therefore, Respondent argued, even if the IPS were a bonus and the amounts were subject to pro-ration, only 4.6% of the subclass could hope to recover.

Claimants countered that no court has ruled that the Administrative Code is entitled to any weight and that, even if it were, there could be litigation over the meaning of "terminated by mutual consent" and "fault," and, then, literally hundreds of mini-trials to determine whether employees really left voluntarily or were really terminated for "fault."

As noted in the Memorandum in Support, cases since *Camillo* have construed that case narrowly. For example, in *Galietta v. Comdisco Holding Company*, 2003 WL 685645 (N.D. Ill. 2003), the court distinguished that case from *Camillo* because the Comdisco bonus plan had no unequivocal statement that employees would receive a bonus, the plan did have a disclaimer, and the employer did nothing to cause the employees to terminate employment. The court in *Dabertin v. HCR Manor Care, Inc.*, 177 F.Supp.2d 829, 859 (N.D.Ill. 2001) also distinguished *Camillo* and refused to order pro-ration of a bonus where the employee had quit.

In this case, there were some facts helpful to both sides about the program document's language. There also was a lot for lawyers to argue about, such as whether IPS is a bonus

In November 2005, without admitting liability, but producing for the future the exact result the Class sought, Respondent amended its vacation policy in regard to Illinois employees to comply with the *Golden Bear* interpretation.

There are approximately 4409 members of the Vacation Class. If they all filed timely Claims, the Settlement Agreement is designed to pay each of them a gross amount of 100% of their unpaid vacation for their termination year, plus simple interest of 5% from 2 weeks after their separation date until April 21, 2006. From this gross amount, the Settlement Agreement proposes to allocate one-third of the amount to Class Counsel as attorneys' fees, plus a proportional portion of Class Counsel's costs and the payment to the Class Representatives of $15,000.[4] If there are additional amounts of money in the Gross Common Value Fund ("Common Fund") at the time of distribution because of interest the Common Fund has been accruing, or because some Class Members opted out, or because some Class Members who did not opt out did not file timely Claims Forms, or for some other reason, then the allocation to each Vacation Class member could be increased to up to 100% of his/her total vacation claim.

The Class Administrator informed us on September 25, 2006 that 36 individuals who had Vacation Pay claims have filed timely opt-out forms. As of September 7, 2006, 1523 Claims for Vacation Pay had been received by the Class Administrator. Roncone Decl., ¶10. This number increased to 1652. This is about 37% of the Vacation Class. That number suggests that, even if all 39 of the individuals not on the Class List who requested and filed Claims have valid Vacation Pay claims, this sub-class is likely to recover more than the initial amount targeted by the Settlement Agreement. However, Mr. Pentimonti indicated at the Fairness Hearing that accurate calculations of payments will not be known for weeks. I have considered these possibilities, and do not find that they render the Settlement Agreement unfair, unreasonable, or inadequate, or that there is a need to wait for calculations to approve the Settlement Agreement. Instead, I find that the Settlement Agreement clearly did not promise that any Class Member would receive any specific amount or any specific percentage of recovery. Therefore, I find that the method of allocation of payment in the Settlement Agreement, as designed, is a fair and reasonable balance of the strength of the Vacation Pay claim versus the likely reward of litigation, and contains a fair and reasonable method for allocating the Common Fund among the Class Members.

b. The IPS Claim

Respondent maintains an Instant Profit Sharing Program ("IPS") under which full and part time employees who work at least 1000 hours in a year, and are on the payroll on or after December 15th of that year, receive an amount based on their store's annual profit and their length of service. The amount payable under the IPS can range from 2 ½ to 15 per cent of W-2 earnings, depending on length of service. IPS payments generally are

[4] Additionally, the Settlement Agreement provides that the payments to the subclasses should be treated as wages for tax purposes. Because they are in lieu of pay, I believe that that is the correct treatment, and approve it.

Designed to help determine whether the settlement is in the best interest of the parties, the Korshak factors test the balance between the terms of settlement and the likely rewards of litigation. These factors are: (1) the strength of the case for plaintiffs/Claimants on the merits, balanced against the money offered in settlement; (2) the defendant's /Respondent's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed.[3] The federal district courts in Illinois have added a ninth factor: the public interest. See, e.g., *Hispanics United of DuPage County*, 988 F. Supp. 1130 (N.D.Ill. 1997).

(1) The Strength of the Claims Balanced Against the Amount Offered in Settlement

This is the most significant of the *Korshak* factors, and I performed an extensive analysis in the Conditional Ruling. I have reproduced most of that analysis here because of its significance. Class Counsel's Final Memorandum supports this analysis. No objections have been received that challenge any portion of it. On reviewing it and further reflection, I have not seen any new cases nor have any other reason to change the analysis regarding the strength of the claims that I performed in the Preliminary Approval. I did consider, and discuss in this Award, whether the actual number of Claims that have been filed should impact on my analysis of the amount offered in settlement. As discussed below, I have concluded that it does not.

a. The Vacation Claims

Claimants alleged that Respondent's vacation pay policy's acknowledged failure to pay *pro rata* vacation pay to employees whose employment terminated before year end violated the IWPCA because the policy provided that employees earn and accrue vacation days throughout the year based on number of weeks worked, and, therefore, is an "earn in arrears" policy. Claimants also claimed that Respondent's policy of not paying vacation to employees who would otherwise have been eligible, but who resigned without giving 2 weeks notice, violated the anti-forfeiture provisions of the IWPCA. 820 ILCS 115/5.

While the wage laws of other states may permit the practices complained of, Illinois courts have interpreted the IWPCA as requiring payment of *pro rata* vacation pay. *Golden Bear v. Kilroy*, 144 Ill.App. 3d (1986). This interpretation has been adopted in the Administrative Code as a requirement that, under any contract or policy in Illinois that provides for paid vacations earned by length of service, the vacation time is earned *pro rata*. Section 300.520.

[3] *See also, GMAC Mortgage v. Stapleton*, 236 Ill.App.3d 486 (1st Dist. 1992), *appeal den. GMAC Mortgage v. Stapelton*, 148 Ill.2d 641 (1993); *Steinberg v. System Software Associates, Inc.*, 306 Ill.App.3d 157 (1st Dist. 1999).

Both Ms. Roncone and Mr. Pentimonti agreed in response to questioning at the Fairness Hearing that a Claims filed rate of 2047 out of 6230, nine days before the close of the Claim filing period, which they reported was the case here, was higher than their experience had led them to expect and indicated to them a successful notice campaign. On September 25, 2006, Ms. Roncone reported that 2168 Claim Forms have been received. It is possible that there will be some additional Claims with a September 22, 2006 post-mark.

I find that the manner in which the notice was distributed was reasonable. This is a final ruling.

7. The Settlement Agreement is Adequate, Reasonable and Fair.

The parties submitted the Settlement Agreement to me for review. I reviewed it and the Memorandum of Law in Support ("Preliminary Memo")[2], and questioned the parties in our teleconference of May 9, 2006. As a result of that review and the information supplied, I preliminarily approved the Settlement Agreement, subject to notice and further consideration at the Fairness Hearing.

As discussed in paragraph 6 above, I have found that the notice was in all aspects reasonable. While one Class Member commented that it seemed unfortunate that anyone would have sued Menard's, no Class Member or representative of a Class Member objected to the fairness, adequacy or reasonableness of any aspect of the Settlement Agreement. No Class Member or representative of any Class Member expressed an intent to attend the Fairness Hearing or, in fact, attended.

Class Counsel submitted a legal memorandum before the Fairness Hearing ("Final Memo"), which I reviewed. I also had questions for counsel for the parties and for the Class Administrator at the Fairness Hearing.

Under the JAMS Class Action Procedures, the arbitrator must direct that notice be provided in a reasonable manner to all class members who would be bound by the settlement (Rule 6(a)(2)). The notice must permit individual class members to request exclusion from case, even if they had prior opportunity to request exclusion. Rule 6(c). Thereafter, the arbitrator may approve a settlement only after a hearing and a finding that the settlement is fair, reasonable and adequate (Rule 6(a) (3)).

At the Fairness Hearing, counsel agreed that the Korshak factors are the appropriate standard to be used in this case to test the reasonableness and fairness of the Settlement Agreement. *City of Chicago v. Korshak*, 206 Ill.App.3d 968, 971-72 (1st Dist. 1990), *appeal den., City of Chicago v. Korshak,* 139 Ill.2d 594 (1991), *cert.denied, Ryan v. City of Chicago*, 503 U.S. 918 (1992).

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[2] The Conditional Ruling contains a summary of the Settlement Agreement's terms at pages 3-9. I have reviewed that summary and re-reviewed the Settlement Agreement, and, except for the section on the releases by the parties, which I will discuss later in this Award, that summary is adequate for purposes of this Award.