

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

03-220
JRH

JOHN McCOURT, et al.,

Plaintiffs,

v.

INTERSTATE BRANDS CORPORATION,

Defendant.

CIVIL ACTION NO.: 03-220 (FLW)
[CONSOLIDATED]

EDWARD RUZICKA, et al., For and on
behalf of themselves and others similarly
situated,

Plaintiffs,

v.

INTERSTATE BRANDS CORPORATION,
JOHN DOES (1-10 fictitious defendants),
ABC Corp., XYZ Corp. (Fictitious
defendants),

Defendants.

**AGREEMENT REGARDING
SETTLEMENT OF ALL CLAIMS
INCLUDING CLASS ACTION CLAIMS**

I. INTRODUCTION

This Agreement Regarding Settlement of All Claims, Including Class Action Claims (“Settlement” or “Agreement”) is made and entered into by **Named Plaintiffs** (Exhibit 1 is a list of the Named Plaintiffs) on behalf of themselves and the other “**Settlement Class Members**” as defined herein, on the one hand, and the defendant, Interstate Brands Corporation (“**IBC**”), on the other, (collectively referred to as the “**Parties**”) in the consolidated action in the United States District Court for the District of New Jersey (“**District Court**”), Case No. 3-220 (FLW)(“**Action**”), and subject to the approval of both (i) the District Court and (ii) the United

States Bankruptcy Court for the Western District of Missouri (“**Bankruptcy Court**”) in IBC’s bankruptcy proceedings.

II. CLASS CERTIFICATION

In the Action, Named Plaintiffs have alleged that Named Plaintiffs bring the Action on behalf of Named Plaintiffs and others, under one or more procedural rules allowing for representative actions.

A. Prior to the administrative dismissal order due to the automatic stay under the bankruptcy law, the Parties were considering, and preparing to argue, their respective positions as to whether the Action could be certified as a class action. The Parties have agreed to forego litigation of this issue as part of the full compromise embodied in this Agreement.

B. For the purpose of this Settlement, “**Settlement Class**” is defined as all of the Company’s regular and relief route sales persons for the period of time in which they performed the majority of their job duties in New Jersey on and between January 17, 2001, and the Effective Date, as defined in paragraph IX(A) below (each person within the Settlement Class is referred to as a “**Settlement Class Member**”).

C. A listing of the Settlement Class Members, as of May 31, 2009, is attached hereto as **Exhibit 2** (“**Settlement Class List**”). The number of Settlement Class Members is approximately 750 as of May 31, 2009.

III. PROCEDURAL HISTORY

A. The McCourt litigation was originally filed in the United States District Court for the District of New Jersey on January 17, 2003, Case No. 03-220(MLC). IBC filed its answer, denying liability and asserting numerous affirmative defenses.

B. The Ruzicka litigation was originally filed in the Superior Court of New Jersey County of Ocean on April 15, 2003, Case No. OCN-L-106403. On June 18, 2003, IBC removed the Ruzicka litigation to the United States District Court for the District of New Jersey in which the case was consolidated with the McCourt litigation. IBC filed its answer, denying liability and asserting numerous affirmative defenses.

C. The claim asserted in the Action is that, in violation of New Jersey and Federal law, IBC failed to pay overtime pay to the Settlement Class Members.

D. On September 22, 2004, IBC filed its petition for relief under Chapter 11 of the Bankruptcy Code. On September 24, 2004, IBC filed Suggestions of Bankruptcy and Notice of Operation of Stay in the Action. On September 28, 2004, the District Court entered its Order of Administrative Termination Without Prejudice.

E. As part of the Settlement herein, the Parties agree that i) IBC denies all allegations in the Action of violations of any legal obligation by IBC and any alleged liability; and ii) that IBC is deemed to have asserted each and every applicable affirmative defense.

F. Prior to the Order of Administrative Termination, the parties had engaged in active discovery by voluntarily exchanging information regarding the issues in dispute in the Action. The Parties had also engaged in settlement mediation.

G. IBC will file a motion in the Bankruptcy Court requesting that the Bankruptcy Court lift the stay for the limited purpose of obtaining approval of this Settlement.

IV. RESEARCH AND INVESTIGATION REGARDING THE ACTION

A. The Parties have conducted significant investigation of the facts and law during the prosecution of the Action including the period following the September 28, 2004, Order of Administrative Termination. Such investigations have included, inter alia, the exchange of information pursuant to informal discovery, numerous meetings and conferences between representatives of the Parties, and interviews of numerous potential witnesses. Counsel for the Parties have further researched the applicable law as applied to the facts discovered regarding the alleged claims in the Action and potential defenses thereto, and the damages claimed by the Settlement Class.

B. After investigation and research, counsel for the Settlement Class (“**Class Counsel**”) continues to believe that each of the claims asserted in the Action has merit and that the Settlement Class Members are entitled to recovery from IBC in a certified class or other representative action.

C. After investigation and research, IBC believes that, with respect to all Settlement Class Members, IBC has complied with all applicable laws and that none of the Settlement Class Members is legally entitled to any monetary or other relief. Other than for purposes of administering this Settlement, IBC further believes that class certification or other representative status would have been inappropriate in the Action.

V. BENEFITS OF SETTLEMENT TO THE SETTLEMENT CLASS MEMBERS

Class Counsel and Named Plaintiffs recognize the expense and length of continued proceedings necessary to continue the litigation against IBC through trial and through any possible appeals. Class Counsel and Named Plaintiffs have also considered the uncertainty and risk of the unfavorable outcome of further litigation, the difficulties and delays inherent in such litigation, the delay in recovery even in the event of a favorable liability determination, and the current financial status of IBC. Class Counsel and Named Plaintiffs are also aware of the burdens of proof necessary to establish liability for the claims asserted in the Action (the “**Claims**”), IBC’s defenses, and the difficulties in establishing damages for the Settlement Class. Based on the foregoing, Class Counsel and Named Plaintiffs have determined that the Settlement under this Agreement is a fair, adequate, and reasonable settlement, and is in the best interests of the Settlement Class.

VI. IBC’S REASONS FOR SETTLEMENT

IBC has concluded that further defense of this litigation would be protracted and expensive for all Parties. Substantial amounts of time, energy and resources of IBC have been and, unless this Settlement is made, will continue to be devoted to the defense of the Claims. IBC is also aware of the burdens of proof necessary to establish its defenses to the Claims. To end the litigation and extinguish all possible overtime and related claims, IBC has, therefore, agreed to settle under the terms of this Agreement.

VII. IBC’S DENIALS OF WRONGDOING

IBC has denied and continues to deny each of the Claims and contentions alleged by the Settlement Class in the Action. IBC has repeatedly asserted and continues to assert defenses,

and has expressly denied and continues to deny any violation of any legal obligation and legal liability under any of the laws upon which Named Plaintiffs, the Settlement Class, and their attorneys have relied to any extent in the Action. IBC also continues to maintain that, except for purposes of administering this Agreement, class certification or other representative status would be inappropriate in this Action.

VIII. NO ADMISSION OR CONCESSION OF LIABILITY BY IBC

This Agreement and all documents referred to or contemplated or resulting from this Agreement, and all acts and communications to carry out this Agreement, may not be alleged, construed, used by any person or entity or found to constitute an admission, concession or other basis for liability of IBC or any other Released Party (as defined below) of any violation of any legal obligation or of any liability for monetary or other relief.

IX. AGREEMENT AND STIPULATION

THEREFORE, IT IS AGREED AND STIPULATED, by and among the Named Plaintiffs on behalf of themselves and the Settlement Class, and by the Settlement Class, and by IBC, and subject to the final approvals of the Bankruptcy Court and the District Court, that the Action is compromised and settled pursuant to the terms and conditions of this Agreement.

A. Effective Date: As used in this Settlement, "**EFFECTIVE DATE**" means the date when the District Court's Judgment of Dismissal with Prejudice ("Judgment") becomes final. The District Court's Judgment shall become final as follows: (i) if an appeal or review is not sought from the Judgment, the court's Judgment shall become final 31 days after the notice of entry of the Judgment is served on counsel for the Parties; and (ii) if an unsuccessful appeal or review is sought from the Judgment, the Court's Judgment shall become final 5 days after notice of remittitur following full affirmance and all possible further appeals are no longer timely.

B. Release By All Settlement Class Members:

1. As of the Effective Date, all Settlement Class Members, including the Named Plaintiffs, who have not properly excluded themselves as provided for herein (the "**Settlement Award Class**" or "**Settlement Award Class Members**"), on behalf of themselves

and their agents, assigns and related entities or persons, release IBC, Interstate Bakeries Corporation and all related persons and entities, including, without limitation, all of their collective and respective past or present parents, subsidiaries, affiliates, benefit plans, assigns, officers, directors, shareholders, creditors, members, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and successors and predecessors in interest, and attorneys, whether those persons are known or unknown, (the “**Released Parties**”). The Released Parties are released from all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, known or unknown, whether at law or equity in tort, contract, or for violation of any state or federal constitution, statute, rule or regulation, including state and federal wage and hour laws, whether for economic damages, non-economic damages, restitution, penalties, attorneys’ fees, or liquidated damages, arising out of, relating to, or in connection with the following for any and all periods through the Effective Date (the “**Released Claims**”):

- (a) any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions or failures to act which are or could be the basis of claims that the Released Parties did not comply with all federal and/or state wage and hour laws, including claims that the Released Parties did not pay the Settlement Award Class Members all amounts due for work that was performed by the Settlement Award Class Members for the Released Parties, prior to the Effective Date (whether based on New Jersey or any other state wage and hour law, federal wage and hour law, contract, or otherwise); and/or
- (b) the causes of action asserted in the Action including but not limited to, any and all claims for failure to pay overtime and/or willful failure to do so under federal law, including the Fair Labor Standards Act and its regulations, and any New Jersey statutes or regulations, including but not limited to New Jersey Wage and Hour Laws, N.J.S. § 34:11-56a, *et. seq.*; and/or
- (c) any claims under any benefit plan arising before the Effective Date that the benefits should be higher for any reason related to the Released Claims or this settlement; and/or
- (d) any claims which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or

without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.

2. Settlement Award Class Members will not receive anything under this Settlement unless they have not assigned or otherwise transferred to any other person or entity any claims, demands, or causes of action that were or could have been the subject matter of any Released Claim and so certify as part of the settlement process under this Agreement.

3. The Settlement Award Class Members may hereafter discover facts in addition to or different from those they now know or believe to be true with respect to the subject matter of the Released Claims. However, upon the Effective Date, the Settlement Award Class Members shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled and released any and all of the Released Claims, whether known or unknown, suspected or unsuspected, contingent or non-contingent, regardless of whether the Released Claims are unknown due to any intentional or unintentional act, communication, or omission.

4. The Settlement Award Class Members agree not to sue on behalf of themselves or others, or otherwise make a claim against any of the Released Parties in connection with a Released Claim.

5. As of the Effective Date, each of the Settlement Award Class Members' proofs of claim filed in the Bankruptcy Court shall be deemed to have been withdrawn, with prejudice, except to the extent that such proofs of claim relate to matters other than the Released Claims.

C. General Release by Named Plaintiffs Only: In addition to the releases made by each of the Settlement Award Class Members, as set forth in paragraph IX(B) above, the Named Plaintiffs, as of the date that their attorneys sign this Agreement on their behalf, make the additional following general release of all claims, known or unknown:

1. Named Plaintiffs release the Released Parties from all claims, demands, rights, liabilities and causes of action of every nature and description whatsoever arising, in whole or in part, before the date upon which Named Plaintiffs, through their attorneys, execute

this Agreement, known or unknown, asserted or that might have been asserted, whether in tort, contract, or for violation of any state or federal constitution, statute, rule or regulation arising out of, relating to or in connection with any act, communication, or omission by or on the behalf of the Released Parties committed or omitted prior to the date upon which Named Plaintiffs, through their attorneys, execute this Agreement. This General Release includes, without limitation, any claims under any benefit plan or law that Named Plaintiffs' benefits should be higher for any reason related to the Released Claims or this Settlement. By way of example and not in limitation of the foregoing, the claims released by Named Plaintiffs shall include any claims arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, all New Jersey and federal statutes, rules, and case decisions, as well as any claims asserting wrongful termination, harassment, breach of contract, breach of the covenant of good faith and fair dealing, negligent or intentional interference with contract on prospective economic advantage, defamation, invasion of privacy and claims related to disability. This General Release does not extend to any retirement benefits to which Named Plaintiffs are otherwise entitled. (This release set forth in this IX(C) shall be referred to hereinafter as the "**General Release.**")

2. Pursuant to the Older Workers' Benefit Protection Act (the "OWBPA"), Named Plaintiffs acknowledges that they have been provided at least twenty-one (21) calendar days to review and consider the terms of this Agreement and have been advised to seek the advice of counsel prior to the execution of this Agreement. For seven (7) calendar days following execution of this Agreement, Named Plaintiffs may revoke this Agreement by written notice to IBC's Counsel that Counsel must physically receive within the seven day period. The revocation will apply to claims arising only under the Age Discrimination in Employment Act, 29 U.S.C. 621, et. seq.

3. Named Plaintiffs represent that they have not assigned or otherwise transferred to any person or entity any claims, demands or causes of action that were or could have been the subject matter of any claim released in this Agreement.

4. Named Plaintiffs may hereafter discover facts in addition to or different from those he now knows or believes to be true with respect to the subject matter of the General Release. However, upon the Effective Date, Named Plaintiffs shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever settled and released any and all of the claims released pursuant to the General Release whether known or unknown, suspected or unsuspected, contingent or non-contingent, regardless of whether the claims are unknown due to any intentional or unintentional act, communication, or omission. Released Claims include claims which now exist, or heretofore have existed upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct that is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts.

D. Settlement Does Not Constitute Retaliation or Discrimination: Neither this Agreement, nor any document referenced herein, attached hereto, or used to implement this Agreement, nor any lawful action taken by any Party pursuant to this Agreement or to implement its terms (whether before or after the Effective Date), is, may be construed as, or may be used as evidence of, retaliation or discrimination by the Released Parties, against any member of the Settlement Class or any person or entity.

E. Settlement – General Unsecured Bankruptcy Claim: As hereinafter described, the Parties agree to a total settlement amount of \$2,000,000 (Two Million Dollars) (collectively referred to as the “**Settlement Funds**”), which is only an allowed general, pre-petition, unsecured claim in the liquidated claim in IBC’s bankruptcy proceedings. Before distribution of any Settlement Award is made, IBC shall deduct from the Settlement Funds (1) the Fees Award and Costs Award as provided in paragraph IX(H)(1) below; and (2) Class Counsel’s out-of-pocket costs as provided in paragraph IX(H)(2) below. The balance remaining after those deductions shall be defined as the “**Net Settlement Fund.**” All amounts of attorneys’ fees and/or costs not approved by the District Court shall be included in the calculation of the Net Settlement Award.

