No. _____

In the Supreme Court of the United States

TORINA A. COLLIS,

Petitioner,

v.

BANK OF AMERICA, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. FITZPATRICK, ESQ.*
RYAN P. CHAPLINE, ESQ.
Robert B. Fitzpatrick, PLLC
1825 Connecticut Avenue, N.W.
Suite 640
Washington, D.C. 20009-5728
(202) 588-5300 (phone)
(202) 588-5023 (fax)
fitzpatrick.law@verizon.net (email)

Counsel for Petitioner
*Counsel of Record

September 19, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The questions presented are:

1. In a case where an FLSA settlement is not supervised by the U.S. Department of Labor, when must the settlement be reviewed and approved by a District Court, and what standard of review must a District Court use when court review is required?

2. Whether, and if so under what circumstances, a District Court can seal an FLSA settlement agreement from public view and/or can allow an FLSA settlement agreement to contain a confidentiality provision?

3. Whether a District Court, without conducting an evidentiary hearing, can summarily enforce an alleged oral FLSA settlement agreement where there is a dispute as whether there is an agreement to settle?

PARTIES

The parties are listed in the caption.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Petitioner Torina A. Collis ("Ms. Collis"), through her undersigned counsel, respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals" and/or "Fourth Circuit"), entered on May 2, 2011, affirming the opinion of the United States District Court for the District of Maryland ("District Court"), entered on July 20, 2010. The Court of Appeals denied Ms. Collis' petition for panel rehearing and/or for rehearing *en banc* on June 21, 2011.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the District Court's opinion, is not published in the Federal Reporter, but is reproduced at *Collis v. Bank of Am., Nat'l Assoc.*, No. 10-1955, 2011 U.S. App. LEXIS 8988 (4th Cir. May 2, 2011), and is reprinted in the Appendix to this Petition ("App.") at 1a-2a.[1] The opinion of the Court of Appeals, denying Ms. Collis' petition for panel rehearing and/or for rehearing *en banc*, is not published in the Federal Reporter and has not been reproduced by Lexis, but is reprinted at App. 3a-4a. The District Court's opinion is not published in the Federal Supplement, but is reproduced at *Collis v.*

---

[1] In addition to the materials reprinted in the Appendix to this Petition, references are also made in this Petition to certain documents in the Docket of the Circuit Court and the District Court. References to documents in the docket of the Circuit Court shall be cited as "4th Cir. Docket [Docket / Document Number] at [Page Number]." Similarly, references to documents in the docket of the District Court shall be cited as "Dist. Docket [Docket / Document Number] at [Page Number]."

Bank of Am., N.A., No. PJM 06-1411, 2010 U.S. Dist. LEXIS 73490 (D. Md. July 20, 2010), and is reprinted at App. 5a-10a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals, denying Ms. Collis' petition for panel rehearing and/or for rehearing *en banc*, was entered on June 21, 2011. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Ms. Collis' case was brought under the Fair Labor Standards Act, 29 U.S.C.S. § 201 *et seq*. ("FLSA"), which provides in pertinent part:

> § 216. Penalties
>
> (b) Damages; right of action; attorney's fees and costs; termination of right of action, Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS § 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 15(a)(3) of this Act [29 USCS § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3) [29 USCS § 215(a)(3)], including without limitation employment, reinstatement,

promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS § 217] in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS § 206 or 207] by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3) [29 USCS § 215(a)(3)].

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of

actions. The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act [29 USCS § 206 or 207], and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 [29 USCS §§ 206 and 207] or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Administrator [Secretary] on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Administrator [Secretary], directly to the employee or employees affected.

> Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Administrator [Secretary] under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947 [29 USCS § 255(a)], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

29 U.S.C.S. § 216 (b)-(c).

STATEMENT OF THE CASE

Legal Issues

As this case demonstrates, there are substantial differences in (a) the instances in which federal courts find it necessary to review and approve settlement agreements in cases brought under the FLSA, and (b) the method in which court review and approval of such settlements, when undertaken, is conducted. These issues are of extraordinary and wide-reaching importance, as the number of FLSA lawsuits filed in federal courts has dramatically increased over the last

several years,[2] and because the vast majority of civil cases (FLSA lawsuits included) settle before they ever go to trial.[3] Thus, the case at hand is only one of many

---

[2] *Judicial Business of the United States Courts – Annual Report of the Director, James C. Duff*, Administrative Office of the United States Courts (2010), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinespdfversion.pdf (indicating that FLSA case filings increased by 62.23% from 2006 to 2010, and increased by 12.38% from 2009 to 2010 alone); Jonathan Segal, *The DOL and Smartphones: Be Smart and Take the Offensive*, Duane Morris Institute (May 17, 2011), http://blogs.duanemorrisinstitute.com/jsegal/entry/the_dol_and_smartphones_be ("The number of FLSA cases filed per year has nearly quadrupled since the late 1990's… The number of FLSA cases filed in federal district courts has more than tripled in the past few years, from 1,920 cases in 2000 to 6,754 cases in 2006."); Mark Tabakman, *Here Comes an Avalanche of FLSA Cases: Employers Be Aware, Be Proactive!*, Wage & Hour Development & Highlights (July 16, 2010), http://wagehourlaw.foxrothschild.com/2010/07/articles/class-actions/here-comes-an-avalanche-of-flsa-cases-employers-be-aware-be-proactive/ ("FLSA cases filed in federal courts rose almost 23% in the second quarter of 2010 and represents a leap of 25% from the first quarter of 2009. From January 1-June 30, 2010, there has been a total of 3,230 FLSA cases filed. That is 6% more than for the same time frame in 2009.").

[3] *Judicial Business of the United States Courts – Annual Report of the Director, James C. Duff*, Administrative Office of the United States Courts (2010), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinespdfversion.pdf (showing that while over 280,000 civil cases were filed in U.S. District Courts in 2010, there were only 5,360 total civil trials in U.S. District Courts in the same year, as compared to over 20,000 settlement conferences which were conducted by U.S. Magistrate Judges in the same year); Pat Vaughan Tremmel, *Much Celebrated American Trial is Dying in Real Life*, Northwestern University NewsCenter (March 31, 2009), http://www.northwestern.edu/newscenter/stories/2009/03/burns

thousands of cases nationwide that would benefit from the Court's review of the questions presented in this Petition. Review by this Court would help to ensure that the multitude of court-approved settlements of FLSA matters nationwide are conducted with consistency and predictability, according to appropriate legal standards, and in accordance with the FLSA's remedial provisions.

In the case at hand, an action brought by Ms. Collis under the FLSA against Respondent Bank of America, N.A. ("BoA"), the District Court dismissed Ms. Collis' case on the grounds that the parties had purportedly entered into a so-called settlement agreement.[4] App. 5a-10a. The District Court never expressly approved the purported agreement, never conducted an analysis as to whether the purported agreement was fair and reasonable, and never indicated that it had even

---

trial.html ("Overall, for all areas of the law, federal civil trials have declined 60 percent since the mid-1980s. In 2002, less than 2 percent of those cases ended in a trial – down from 12 percent in 1962 and 20 percent in the 1920s."); Patricia Lee Refo, *The Vanishing Trial*, Litigation Online – The Journal of the Section of Litigation – American Bar Association, Volume 30, No. 2 (Winter 2004), http://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf (*"[O]ur federal courts actually tried fewer cases in 2002 than they did in 1962,* despite a fivefold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame. In 1962, 11.5 percent of federal civil cases were disposed of by trial. By 2002, that figure had plummeted to 1.8 percent.").

[4] As is explained in more detail throughout this brief, Ms. Collis disputes that she ever agreed to the purported terms of settlement of this matter.

closely reviewed the purported agreement. As is shown in more detail below, federal courts are currently divided as to when District Courts must review and approve FLSA settlements. Furthermore, even when such reviews are conducted, the appropriate standard of review is unclear under the current state of federal jurisprudence. This confusion leads to divergent and unpredictable results in the process of court-reviewed approval of disputes under the FLSA.

The District Court also sealed the purported agreement from public view, and allowed it to contain a confidentiality clause. *Id*. These facts demonstrate another disparity in the handling of FLSA settlements nationwide, as federal courts are currently divided as to whether, and if so under what circumstances, FLSA settlement agreements may be sealed from public view and/or contain confidentiality provisions. This case squarely presents this Court with the opportunity to resolve this confusion on an issue of fundamental importance to the settlement of claims brought under the FLSA. As is set forth more fully below, the fact that some courts have allowed FLSA settlement agreements to be sealed and/or to contain confidentiality provisions conflicts with the public informational goals set forth in the FLSA, as well as the public rights which the statute was enacted to protect.

Finally, the District Court did not conduct an evidentiary hearing to determine whether the parties had even agreed to settle the matter – not even after Ms. Collis made it clear to the District Court on more than one occasion that she had never agreed to BoA's purported settlement agreement. *See, e.g.*, Dist. Docket

74. (After the District Court had dismissed the case without prejudice with leave to move to reopen the case if settlement was not consummated, Ms. Collis moved to reopen the case, indicating unequivocally that she had not agreed to settle the matter); 4th Cir. Docket 18-2 at 24 (Letter from Ms. Collis to the District Court, also clearly indicating that she had not agreed to settle the matter). As is set forth more fully below, this is contrary to the practice of many other federal courts (for example, courts in the Fourth, Fifth, Sixth, and Federal Circuits), which require evidentiary hearings to resolve disputes over the existence of an agreement on settlement terms. This case thus presents this Court with the opportunity to decide, where there is a dispute over whether FLSA claims have been settled, whether an evidentiary hearing should be held to resolve that dispute. As is made clear by Section 216 of the FLSA, and as is further articulated in the various authorities cited throughout this petition, settlements of FLSA claims are not to be approved or enforced lightly, as such settlements implicate not only the rights of the individual employee(s) involved, but also of the American working public at large. Evidentiary hearings in this context would do a great deal to ensure that those rights are observed and protected.

Ms. Collis respectfully files this Petition so that the Court, by ruling on the issues presented in this case, may ensure greater uniformity in the process by which federal courts review and approve FLSA settlements, and thereby better serve the public and private remedial interests which the FLSA was enacted to address.

The Proceedings Below

Ms. Collis filed suit against BoA under the FLSA in the District Court, alleging that she had been improperly classified by BoA as an exempt employee when, in fact, she was a non-exempt employee, and was therefore entitled to overtime pay. Dist. Docket 1.

Ms. Collis, represented by counsel, attended settlement conferences with BoA, represented by McGuireWoods, LLP, on November 21, 2006, and on January 7, 2009, and did not agree to terms of settlement of this matter in either of those conferences. Dist. Docket 11, 62. On or about June 18, 2009, Ms. Collis, then proceeding *pro se*, and BoA, still represented by McGuireWoods, LLP, participated in a settlement conference with then Magistrate Judge Day. Dist. Docket 70. Judge Day, at the conclusion of the settlement conference, made no docket entry in the trial record below, and most particularly, made no docket entry suggesting that the parties had agreed to settle the matter. While BoA provided Ms. Collis, on June 25, 2009, with a document containing the terms which it stated had been agreed to at the settlement conference, Ms. Collis never signed or otherwise endorsed that document, and asserted that she did not agree to its terms. App. 6a-7a. At the conclusion of the settlement conference, the parties did not execute or initial any document memorializing an agreement on the essential terms of a settlement. *Id*.

On September 15, 2009, two days prior to a scheduled pretrial conference, the District Court entered a "Rule 111 Order" stating, in pertinent part, that "[t]he parties have advised the Court that the above action *is settling*…" Dist. Docket 73 (emphasis

added). The Rule 111 Order then dismissed the civil action without prejudice "to the right of a party to move for good cause within thirty (30) days to reopen this action if settlement *is not consummated*." *Id.* (emphasis added).

On October 15, 2009, the thirtieth day following the Rule 111 Order, Ms. Collis filed a motion to reopen and reverse the Rule 111 Order, stating unequivocally that she had not agreed to BoA's proposed settlement of the matter. Dist. Docket 74. Ms. Collis also separately noted in several places in the District Court record that she had been subjected to coercion and intimidation in connection with settlement negotiations. *See, e.g.*, 4th Cir. Docket 18-2 at 24 (Oct. 16, 2009 Letter from Ms. Collis to the District Court). Thereafter, on November 16, 2009, BoA, through counsel, filed a motion to file details of the so-called settlement agreement under seal, a motion to approve and enforce settlement, an opposition to Ms. Collis' motion to reopen, and a memorandum in support of its motion to approve and enforce the so-called settlement. Dist. Docket 75-77. Ms. Collis opposed BoA's motion to approve and enforce the so-called settlement, and filed a motion to file details of the settlement conference under seal.[5] Dist. Docket 79-81.

---

[5] It is important to note the distinction between Ms. Collis' motion to file the details of the settlement conference under seal, Dist. Docket 81, versus the District Court's decision to seal the purported settlement agreement between Ms. Collis and BoA. Ms. Collis filed the details of the settlement conference with the District Court to demonstrate the fact that she had never agreed to BoA's proposed settlement of the matter. As the details of the settlement *negotiations* between Ms. Collis and BoA were confidential, Ms. Collis was required to file the details of that

Despite the fact that Ms. Collis disputed that she had ever agreed to the terms of the so-called settlement agreement, the District Court never convened an evidentiary hearing to resolve the matter, did not hear oral argument on the matter, and did not receive or solicit affidavits on the matter. Rather, it simply issued a memorandum opinion and an order enforcing the so-called settlement agreement tendered by BoA, sealed the so-called settlement agreement from public view, and allowed it to contain a confidentiality provision. App. 5a-10a. The memorandum opinion contained no discussion of whether the settlement was fair and reasonable, and never even explicitly stated that the District Court approved the so-called settlement agreement. *Id*.

Ms. Collis' appeal to the Circuit Court followed. After informal briefing, with Ms. Collis still proceeding *pro se*, a panel of the Circuit Court entered judgment for Appellee BoA, affirming for the reasons set forth in the District Court's memorandum opinion. App. 1a-2a. Ms. Collis, then represented by counsel, filed a petition for panel rehearing and/or for rehearing *en banc*, but the Circuit Court denied that petition. App. 3a-4a.

---

conference under seal. This is altogether different from the District Court's ultimate decision to dismiss Ms. Collis' case based on the purported settlement of the matter, and then to seal the so-called settlement agreement from public view.

REASONS FOR GRANTING THE WRIT

I. FEDERAL COURTS ARE DIVIDED AS TO WHEN COURT REVIEW AND APPROVAL OF FLSA SETTLEMENT AGREEMENTS IS REQUIRED

This Court has long held that employees may not compromise their rights under Section 216 of the FLSA or release their employers from paying the full amount due under that section. *See, e.g., Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.") (internal quotations and citations omitted).

One question which was left unanswered by this Court's early FLSA jurisprudence was whether settlement of FLSA claims is appropriate where there is a bona fide dispute over issues of law and fact as to liability. For example, one such decision by this Court pointed out that:

> Our decision of the issues raised [in liquidated damages waiver cases] has not necessitated a determination of what limitation, if any Section 216(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement.

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 714 (1945). See also *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 113 n.8, 116 (1946) (holding that "neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage," but drawing a distinction in dicta between a settlement agreement and a stipulated judgment entered in the adversarial context of an employee's suit for FLSA wages).

More recent federal court decisions have regularly held that settlement of FLSA claims is permissible in the context of such bona fide disputes. *See, e.g., Jarrard v. Se. Shipbuilding Corp.*, 163 F.2d 960, 961 (5th Cir. 1947) (holding that the Supreme Court's decisions in *O'Neil* and *Schulte* regarding settlements did not prohibit approval of a "solemn and binding stipulated judgment entered upon disputed issues of both law and fact" in an FLSA suit brought by employees); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.") (citing *Schulte*, 328 U.S. at 113 n.8; *Jarrard*, 163 F.2d at 961).

However, federal courts have come to different conclusions on the question of *when* a federal court must review and approve such a settlement. The case which is most often cited on this topic, *Lynn's Food Stores* from the Eleventh Circuit, states in pertinent part:

> There are only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees. First, under section 216(c), the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them. An employee who accepts such a payment supervised by the Secretary thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages.
>
> The only other route for compromise of FLSA claims is provided in the context of suits brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations. When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness. *See Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S. Ct. 925, 928 n.8, 90 L. Ed. 1114; *Jarrard v. Southeastern Shipbuilding Corporation*, 163 F.2d 960, 961 (5th Cir. 1947).

679 F.2d at 1352-53 (footnotes omitted). As noted above, the holding in *Lynn's Food Stores* relies on the language of the FLSA itself and footnote 8 of this Court's opinion in *Schulte*, both of which indicate that there are two routes to resolving disputes under the FLSA: (1) approval by the DOL, or (2) resolution of a lawsuit through "judicial scrutiny." 29 U.S.C.S. § 216(b)-(c); *Schulte*, 328 U.S. at 113 n.8. *See also Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 371-74

(4th Cir. 2005), *vacated*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006), *reaff'd and reinstated on reh'g*, 493 F.3d 454 (4th Cir. 2007)[6] (Noting that "[t]he rights guaranteed by the FLSA cannot be waived or settled without prior DOL or court approval," and that "[t]he Supreme Court has consistently held that the rights guaranteed by the FLSA cannot be waived by private agreement between employer and employee [but that such claims] can, of course, be settled when the settlement is supervised by the DOL or a court.") (citing *Barrentine*, 450 U.S. at 740, 745; *Schulte*, 328 U.S. at 114-16).

On the other hand, some federal courts, based on a strict textualist approach to statutory interpretation, have held that not all FLSA settlements require court or DOL approval. *See, e.g., Martinez v. Bohls Equip. Co.*, 361 F. Supp. 2d 608, 631-32 (W.D. Tex. 2005), *reconsideration denied*, No. SA-04-CA-0120-XR, 2005 U.S. Dist. LEXIS 14721 (W.D. Tex. July 18, 2005) (after undertaking a detailed historical analysis of the FLSA, its amendments, and relevant case law, concluding that "parties may reach private compromises as to FLSA claims where there is a bona fide dispute as to the amount of hours worked or compensation due," that "[a] release of a party's rights under the FLSA is enforceable under such

---

[6] While the *Taylor* decision primarily interprets certain provisions of the Family and Medical Leave Act ("FMLA") and related regulations, and while one of the FMLA regulations which was interpreted by the *Taylor* decision has since been amended by the DOL, *see Whiting v. Johns Hopkins Hosp.*, 416 Fed. Appx. 312 (4th Cir. 2011), the *Taylor* decision is cited here solely in connection with its discussion of the settlement of matters brought under the FLSA.

circumstances," and that the release need not even mention the FLSA in order for the release to apply to FLSA claims because "'the remedy sought and settled [is] the precise remedy sought' in the litigation.") (quoting *Strozier v. Gen. Motors Corp.*, 635 F.2d 424, 426 (5th Cir. 1981)). *See also Martin v. Spring Break '83 Prod.*, LLC, No. 09-7520 Section: "C" (4), 2011 U.S. Dist. LEXIS 67826, at *28-*29 (E.D. La. June 24, 2011) (adopting the holding of the Western District of Texas in *Martinez*, and thus holding that the parties could privately settle an FLSA claim that included a dispute over whether the plaintiff worked on the days for which he sought unpaid wages); *Dorner v. Polsinelli, White, Vardeman, & Shalton, P.C.*, 856 F. Supp. 1483 (D. Kan. 1994) (holding that an action for retaliatory discharge under Section 215(a)(3) of the FLSA does not have to be supervised by the Secretary of Labor, and thus may be settled and released by the claimant without the DOL's approval). *But see Sims v. Hous. Auth. of El Paso*, No. EP-10-CV-109-KC, 2011 U.S. Dist LEXIS 98809, at *15-*17 (W.D. Tex. Sept. 1, 2011) (stating that the holding in the *Martinez* line of cases, allowing private compromises of FLSA claims, appears to go against "the greater weight of authority").

Indeed, this debate can be traced as far back as the Supreme Court's opinion in 1945 in *O'Neil*, in which Chief Justice Stone, in a concurring and dissenting opinion which was joined by Justices Roberts and Frankfurter, stated that he would have held that the right to liquidated damages was a private claim that could be released. 324 U.S. 697 at 717 (Stone, C.J., concurring in part and dissenting in part). Similarly, in Justice Frankfurter's dissent in *Schulte*, which was joined by Justice Burton, Justice Frankfurter noted that there was no indication that Congress would have

banned private settlements involving bona fide disputes. *Schulte*, 328 U.S. at 122 (Frankfurter, J., dissenting). He placed upon Congress the onus for discouraging or outlawing private settlements: "To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left to Congress." *Id*.

Furthermore, even in cases where courts have required court review and approval of FLSA settlements, it is not entirely clear what standard should be followed in conducting such a review. Some courts have held that District Courts may enter a stipulated judgment approving the settlement of FLSA claims only after the court has scrutinized the settlement for fairness and reasonableness, and has expressly approved the settlement as fair and reasonable. *See, e.g., Lynn's Food Stores*, 679 F.2d at 1353-55 ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.") (citing *Schulte,* 328 U.S. at 113 n.8; *Jarrard,* 163 F.2d at 961). *See also Mosquera v. Masada Auto Sales, Ltd.*, No. 09-CV-4925 (NGG), 2011 U.S. Dist. LEXIS 7476, at *2-*3 (E.D.N.Y. Jan 25, 2011) (requiring an evaluation of FLSA settlements for fairness and reasonableness); *Lee v. Timberland Co.*, No. C 07-2367 JF, 2008 U.S. Dist. LEXIS 108098, at *4-*5 (N.D. Cal. June 19, 2008) (same); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 605 n.2 (E.D. Va. 1999) ("Because the FLSA was enacted to protect workers from sub-standard wages or oppressive working conditions, employees cannot waive their right to overtime wages unless such a settlement is overseen by the Department of Labor or

approved for fairness and reasonableness by a district court.") (citing *Lynn's Food Stores*, 679 F.2d at 1355).

Some courts have further defined this fairness test by setting forth a list of factors that courts should consider. For example, the United States District Court for the Eastern District of Virginia has held that:

> To determine whether a proposed settlement is fair and reasonable under the FLSA, courts should consider: "(1) the extent of discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiffs; . . . and ([5]) the probability of plaintiffs' success on the merits and the amount of the settlement in relation to the potential recovery."

Belcher v. Cha Cos., Inc., No. 3:10cv420, 2011 U.S. Dist. LEXIS 39063, at *2 (E.D. Va. Mar. 16, 2011) (quoting *Lomascolo v. Parsons Brinckerhoff, Inc.*, No. I:08cv1310 (AJT/JFA), 2009 U.S. Dist. LEXIS 89129, at *10 (E.D. Va. Sept. 28, 2009)).

Ms. Collis respectfully submits that the *Lynn's Food Store* line of cases articulates the correct standard – that, at least insofar as District Courts are required, or otherwise undertake, to review and approve FLSA settlements that are not supervised by the DOL, courts should apply a reasonableness and fairness test when conducting that review. *See, e.g.*, *Lynn's Food Stores*, 679 F.2d at 1355. The *Lynn's Food*

Store line of cases, as well as Section 216 of the FLSA, demonstrate that the FLSA is written so as to ensure that employees do not lightly waive their right to full relief under the FLSA. To quote a recent District Court decision, courts should not approve such settlements unless the court is "presented with sufficient evidence in order to determine 'whether the settlement agreement represents a fair and reasonable resolution of [the] disputes.'" *Mosquera*, No. 09-CV-4925 (NGG), 2011 U.S. Dist. LEXIS 7476, at *2-*3 (E.D.N.Y. Jan 25, 2011). As literally thousands of FLSA cases are settled every year, ensuring the proper review standard for such settlements is of paramount importance. And as this review standard was not followed in the case at hand, this issue is squarely presented for the Court's review.

As to the question of *when* District Courts should be required to review and approve FLSA settlements in the first place, review of this matter by this Court will assist federal courts in striking the correct balance between important countervailing interests. On the one hand, as has been noted above, the *Lynn's Food Store* line of cases stresses the importance of court review in ensuring that FLSA settlements are fair and reasonable, and that employees are not unduly influenced by their employers to waive their rights under the statute. On the other hand, as was stated succinctly by Justice Jackson in his concurring opinion in *Walling v. Portland Terminal Co.*:

> This Court has foreclosed every means by which any claim, however dubious, under [the FLSA] or under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final

> judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697; *cf. D. A. Schulte, Inc*. v. *Gangi*, 328 U.S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp*. v. *United Mine Workers*, 325 U.S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions.

330 U.S. 148, 155 (1947) (Jackson, J., concurring).

Without the Court's review of these critical issues, uncertainty will linger, as was aptly summarized in a recent opinion by District Judge Presnell of the Middle District of Florida:

> [T]here is a significant question as to whether *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S. Ct. 925, 90 L. Ed. 1114 (1946) and *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945) -- the bedrocks upon which *Lynn's Food* and *Silva* rest -- are still apposite in light of various amendments to the FLSA in the last sixty-plus years.

Bonetti v. Embarq Mgmt. Co., 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) (citing *Martinez*, 361 F. Supp. 2d 608). This case presents this Court with the opportunity to review that "significant question."

II. FEDERAL COURTS ARE DIVIDED AS TO WHETHER, AND IF SO UNDER WHAT CIRCUMSTANCES, SETTLEMENT AGREEMENTS IN FLSA CASES MAY BE SEALED FROM PUBLIC VIEW AND/OR CONTAIN CONFIDENTIALITY PROVISIONS

A. There is a Division Amongst Federal Courts As To Whether, and If So Under What Circumstances, FLSA Settlement Agreements May Be Sealed from Public View

There is also a division amongst federal courts as to whether, and if so to what extent, FLSA settlement agreements may be sealed from public view. Many courts have rejected motions to seal FLSA settlements, on the grounds that to do so would frustrate the statutory purposes of the FLSA. For example, in denying a joint motion to seal an FLSA settlement agreement, Judge Morgan of the Eastern District of Virginia recently noted that:

> As this Court previously held in *Boone v. City of Suffolk, Va.*, the common law right of access to judicial records and documents is implicated in a motion to file an FLSA settlement agreement under seal. *See* 79 F. Supp. 2d at 608 ("This right of access has been grounded in the democratic process itself and in a 'citizen's desire to keep a watchful eye on the workings of public agencies.'") (quoting *Nixon v. Warner Comm'n, Inc*., 435 U.S. 589, 598, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)). It is undisputed that an FLSA settlement agreement, submitted to a

> court for judicial approval, is a judicial record that triggers the common law right of public access. Put simply, the public has an interest in determining whether the Court is properly fulfilling its duties when it approves an FLSA settlement agreement. *Boone*, 79 F. Supp. 2d at 609; *see also Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986) (recognizing that a "court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate"); *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003) ("Absent some compelling reason, the sealing from public scrutiny of FLSA agreements between employees and employers would thwart the public's independent interest in assuring that employees' wages are fair and thus do not endanger 'the national health and well-being.'") (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07, 65 S. Ct. 895, 89 L. Ed. 1296 (1945)).

Baker v. Dolgencorp, Inc., No. 2:10cv199, 2011 U.S. Dist. LEXIS 5208, at *6-*7 (E.D. Va. Jan. 19, 2011). *See also Joo v. Kitchen Table, Inc.*, 763 F. Supp. 2d 643 (S.D.N.Y. 2011) (in denying a joint request to approve a settlement without prejudice, holding that an FLSA settlement agreement cannot be sealed absent some showing that overcomes the presumption of public access, and inviting the parties to negotiate a settlement agreement that did not require sealing the agreement); *Miles v. Ruby Tuesday, Inc.*, No. 1:11cv135, 2011 U.S. Dist. LEXIS 79004 (E.D. Va. July 20, 2011) (denying a motion to seal an FLSA settlement agreement, on the grounds that sealing

such an agreement would defeat the legislative purposes of the statute); *McCaffrey v. Mortg. Sources, Corp.*, No. 08-2660-KHV, 2010 U.S. Dist. LEXIS 109508 (D. Kan Oct. 13, 2010) (denying motion to file FLSA settlement under seal).

However, some other federal courts, including the District Court in the case at hand, have more freely permitted the sealing of FLSA settlement agreements. *See, e.g., Medley v. Am. Cancer Soc'y*, No. 10 Civ. 3214, 2010 U.S. Dist. LEXIS 75098, at *1-*2 n.1 (S.D.N.Y. July 23, 2010) (in judicially approving an FLSA settlement agreement, holding that "[b]ecause the terms of the settlement agreement are confidential, it will be filed under seal"); *Almodova v. City and Cnty. of Honolulu,* No. 07-00378 DAE-LEK, 2010 U.S. Dist. LEXIS 33199 (D. Haw. Mar. 31, 2010) (recommending judicial approval of an FLSA settlement in which the list of plaintiffs who signed a settlement agreement and the amount offered them were filed under seal); *King v. Wells Fargo Home Mortg.,* No. 2:08-cv-307-FtM-29SPC, 2009 U.S. Dist. LEXIS 129054 (M.D. Fla. July 15, 2009) (approving a settlement agreement in an FLSA matter, where the agreement was filed with the court under seal); *Trinh v. JPMorgan Chase & Co.,* No. 07-CV-01666 W (WMC), 2009 U.S. Dist. LEXIS 16477 (S.D. Cal. Mar. 3, 2009) (same); *Freyre v. Tin Wai Hui DMD, P.A.,* No. 08-22810-CIV-Moore/Simonton, 2009 U.S. Dist. LEXIS 1932 (S.D. Fla. Jan. 13, 2009) (same); *Goudie v. Cable Commc'ns, Inc.,* No. 08-507-AC, 2009 U.S. Dist. LEXIS 1907 (D. Or. Jan. 12, 2009) (same).

The Southern District of New York's opinion in *Joo* contains a particularly detailed consideration of the split between federal courts in dealing with this issue,

and the various interests on both sides of the dispute. In denying the parties' motions to seal the FLSA settlement agreement in that case, the Court noted that:

> *Hens v. ClientLogic Operating Corp.*, No. 05-CV-381S, 2010 U.S. Dist. LEXIS 116635, 2010 WL 4340919 (W.D.N.Y. Nov. 2, 2010), contains a lengthier discussion of the topic. There, the parties sought to seal the settlement agreement. The court noted that "[i]n most cases, a settlement agreement is not a judicial document. . . . But FLSA cases are different." *Hens*, 2010 U.S. Dist. LEXIS 116635, 2010 WL 4340919, at *2. The court noted two rationales in the case law supporting public access to settlement agreements in FLSA cases. "First is the general public interest in the content of documents upon which a court's decision is based, including a determination of whether to approve a settlement." *Id*. (citing *Jessup v. Luther*, 277 F.3d 926, 929-30 (7th Cir. 2002)). "Second is the 'private-public character' of employee rights under the FLSA, whereby the public has an 'independent interest in assuring that employees wages are fair and thus do not endanger the national health and wellbeing.'" *Id*. (citing *Stalnaker v. Novar Corp*., 293 F. Supp. 2d 1260, 1263-64 (M.D. Ala. 2003)). The *Hens* court then balanced the "strong presumption of public access" against the three interests that the parties had asserted in sealing the agreement: "(1) confidentiality is a material condition of the settlement agreement without which settlement will not be feasible, (2) public disclosure of the terms of the

> settlement may harm Defendant by encouraging other lawsuits, and (3) sealing will minimize the possibility of manipulation of the settlement process." 2010 U.S. Dist. LEXIS 116635, [WL] at *3. It found that none outweighed the presumption and therefore denied the motion to seal. *Id*.
>
> In their letter to the Court, the parties assert that a "litany of precedent" shows that courts routinely approve settlements where the settlement agreement is reviewed *in camera* or filed under seal. All of the cases constituting this "litany," however, appear to be ones that do not address the question of whether the presumption of public access applies to FLSA settlements…
>
> Therefore, this Court joins the overwhelming consensus of district courts that have considered the issue to hold that an FLSA settlement cannot be sealed absent some showing that overcomes the presumption of public access.

763 F. Supp. 2d at 645-47 (internal footnotes omitted).

Thus, this case gives this Court the opportunity to resolve this conflict in federal jurisprudence by mandating that, for the reasons stated in the *Baker* line of cases, FLSA settlement agreements should not be sealed from public view absent extraordinary circumstances. Put simply, it is a rare case in which the reasons for sealing such settlement agreements will outweigh "'the public's independent interest in assuring that employees' wages are fair and thus do

not endanger 'the national health and well-being.'") *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003) (quoting *O'Neil*, 324 U.S. at 706-07). The approach set forth by Judge Holwell in *Joo* is well reasoned and should be adopted as the standard in the settlement of FLSA disputes.

B. There is a Division Amongst Federal Courts As To Whether FLSA Settlement Agreements May Contain Confidentiality Clauses

Federal courts have also come to differing conclusions on the question of whether settlement agreements in FLSA cases may contain confidentiality provisions. As with the issue of sealing FLSA settlements, a number of courts have rejected proposed FLSA settlement agreements containing confidentiality provisions, on the grounds that such provisions conflict with the remedial purposes behind the FLSA. For example, in a recent opinion for the Middle District of Florida, the Court reasoned that:

> [A] confidentiality provision [in an FLSA settlement] furthers resolution of no bona fide dispute between the parties; rather, compelled silence unreasonably frustrates implementation of the "private—public" rights granted by the FLSA and thwarts Congress's intent to ensure widespread compliance with the statute… By including a confidentiality provision, the employer thwarts the informational objective of the notice requirement by silencing the employee who has vindicated a disputed FLSA right.

Furthermore, Section 15(a)(3) of the FLSA proscribes an employer's retaliating against an employee for asserting rights under the FLSA. If an employee covered by a confidentiality agreement discusses the FLSA with fellow employees or otherwise asserts FLSA rights, the employer might sue the employee for breach of contract. The employer's most proximate damages from the employee's breach are the unpaid FLSA wages due other employees who learned of their FLSA rights from the employee who breached the confidentiality agreement. A confidentiality agreement, if enforced, (1) empowers an employer to retaliate against an employee for exercising FLSA rights, (2) effects a judicial confiscation of the employee's right to be free from retaliation for asserting FLSA rights, and (3) transfers to the wronged employee a duty to pay his fellow employees for the FLSA wages unlawfully withheld by the employer. This unseemly prospect vividly displays the inherent impropriety of a confidentiality agreement in settlement of an FLSA dispute.

A confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights. "The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered the national health and

> efficiency and as a result the free movement of goods in interstate commerce." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-07, 65 S. Ct. 895, 89 L. Ed. 1296 (1945). The district court should reject as unreasonable a compromise that contains a confidentiality provision, which is unenforceable and operates in contravention of the FLSA.

Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1242-43 (M.D. Fla. 2010) (internal footnotes omitted). *See also Moreno v. Regions Bank*, 729 F. Supp. 2d 1346 (M.D. Fla. 2010) (denying as unreasonable a proposed FLSA settlement as unfair, because it contained a "pervasive" release of claims with "unbounded scope," and also noting that the court had previously rejected the parties' initial proposed settlement agreement because it contained "an unenforceable 'confidentiality' agreement").

Similarly, Judge Moon, writing for the Western District of Virginia, in refusing to approve an FLSA settlement with a confidentiality provision, and in a case in which he had also denied a motion to seal the settlement agreement, recently held that:

> The Court cannot approve these [confidentiality] terms of the Settlement Agreement. The provision that "confidentiality is a material term of [the] Agreement" is in conflict with the Court's [past] opinions… which held that the parties had not identified significant interests to outweigh the public interest in access to judicial records, and required the proposed Settlement Agreement be made publicly available on the docket.

> Furthermore, a confidentiality provision in an FLSA settlement agreement undermines the purposes of the Act, for the same reasons that compelled the Court to deny the parties' motion to seal their Settlement Agreement. *See e.g.*, *Valdez v. T.A.S.O. Prop., Inc.*, No. 8:09-cv-2250, 2010 U.S. Dist. LEXIS 47952, 2010 WL 1730700, at *1 (M.D. Fla. Apr. 28, 2010)… The Court cannot approve of a settlement agreement which includes these terms.

Poulin v. Gen. Dynamics Shared Res., Inc., No. 3:09-cv-00058, 2010 U.S. Dist. LEXIS 47511, at *5-*7 (W.D. Va. May 5, 2010) (citing *Dees*, 706 F. Supp. 2d at 1242). *See also Glass v. Krishna Krupa*, LLC, No. 10-mc-00027-CG-B, 2010 U.S. Dist. LEXIS 110139, at *2-*4 (S.D. Ala. Oct. 15, 2010) (citing *Dees* in rejecting an FLSA settlement agreement as unreasonable because it contained a confidentiality provision); *Scott v. Memory Co.*, LLC, No. 3:09cv290-SRW, 2010 U.S. Dist. LEXIS 119832 (D. Ala. Nov. 10, 2010) (striking confidentiality provision from FLSA settlement agreement).

On the other hand, several other federal courts have freely allowed FLSA settlement agreements to contain confidentiality provisions – as did the District Court in the instant case. *See, e.g., Medley*, No. 10 Civ. 3214, 2010 U.S. Dist. LEXIS 75098 (S.D.N.Y. July 23, 2010) (approving an FLSA settlement agreement containing a confidentiality clause); *King,* No. 2:08-cv-307-FtM-29SPC, 2009 U.S. Dist. LEXIS 129054 (M.D. Fla. July 15, 2009) (same); *Trinh,* No. 07-CV-01666 W (WMC), 2009 U.S. Dist. LEXIS 16477 (S.D. Cal. Mar. 3, 2009) (same); *Freyre,* No. 08-22810-CIV-Moore/Simonton, 2009 U.S. Dist. LEXIS 1932 (S.D.

Fla. Jan. 13, 2009) (same); *Goudie,* No. 08-507-AC, 2009 U.S. Dist. LEXIS 1907 (D. Or. Jan. 12, 2009) (same); *Perez v. Carey Int'l, Inc.,* No. 06-22225-CIV-Seitz/O'Sullivan, 2008 U.S. Dist. LEXIS 110612 (S.D. Fla. Sept. 26, 2008), *aff'd*, No. 08-16115, 2010 U.S. App. LEXIS 7384 (11th Cir. Apr. 9, 2010) (same).

This Court now has the opportunity to resolve this conflict by holding that, for the reasons stated in the *Dees* line of cases, FLSA settlement agreements should not be allowed to contain confidentiality provisions. As was noted in *Dees*, "a confidentiality provision in an FLSA settlement agreement both contravenes the legislative purpose of the FLSA and undermines the Department of Labor's regulatory effort to notify employees of their FLSA rights." 706 F. Supp. 2d at 1242. And, as the District Court allowed a confidentiality clause in the so-called settlement agreement in Ms. Collis' matter, App. 6a n.1, this issue is squarely presented in the case at hand.

C. Absent Extraordinary Circumstances, District Courts Should Not Allow FLSA Settlement Agreements To Be Sealed from Public View, and Should Not Allow Such Agreements to Contain Confidentiality Provisions

As noted above, Ms. Collis respectfully submits that the better line of thinking on these issues is articulated in the *Baker* and *Dees* line of cases. That is, for the reasons articulated in those and similar opinions, sealing FLSA settlements from public view, as well as allowing such settlements to contain confidentiality provisions, frustrates the remedial purposes of the FLSA, and thus should only be allowed

in extraordinary circumstances. This Petition should be granted so that the Court may review these issues, which are of exceptional importance to the disposition of the multitude of FLSA settlements nationwide and the enforcement of the FLSA's provisions. *See, e.g.*, Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 Chi.-Kent L. Rev. 375, 390 (2006) (arguing that in certain cases, including FLSA cases, "[t]he public arguably has a 'special' interest in knowing how . . . these cases were resolved because the cases involve accusations that private actors had violated federal statutes intended to protect workers and minorities" because "[w]ithout access, the public is unable to evaluate or monitor judges' decisions to approve these settlements and agree to enforce their terms").

III. WHERE THERE IS A DISPUTE AS TO WHETHER PARTIES HAVE AGREED ON THE TERMS OF SETTLEMENT OF FLSA CLAIMS, DISTRICT COURTS SHOULD BE REQUIRED TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER SUCH AN AGREEMENT EXISTS.

The District Court in the case at hand upheld the so-called settlement of Ms. Collis' FLSA claims despite the fact that Ms. Collis adamantly maintained throughout the District Court proceedings that she had never agreed to BoA's proposed settlement agreement. In doing so, the District Court did not conduct an evidentiary hearing to resolve the question of whether a settlement had been agreed upon.

In this regard, the District Court's actions again differed from the practice of many other courts in reviewing and approving settlement agreements. *See, e.g., Williams v. Prof'l Transp., Inc.*, 388 F.3d 127, 132 (4th Cir. 2004) ("[D]istrict courts are not to enforce settlement agreements summarily, but must conduct a plenary hearing and make findings on" genuine disputes over settlement terms.); *Hensley v. Alcon Labs.*, 277 F.3d 535, 541 (4th Cir. 2002) (same); *Core-vent Corp. v. Implant Innovations*, 53 F.3d 1252 (Fed. Cir. 1995) (same); *Millner v. Norfolk & W.R. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981) (same); *Wood v. Va. Hauling Co.*, 528 F.2d 423, 425 (4th Cir.1975) (same); *Kukla v. Nat'l Distillers Prods. Co.*, 483 F.2d 619 (6th Cir. 1973) (same); *Mass. Cas. Ins. v. Forman*, 469 F.2d 259 (5th Cir. 1972), *reh'g denied*, 522 F.2d 1383 (5th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976) (same).

It is of paramount importance that this Court take this opportunity to require evidentiary hearings in such circumstances, as the failure to conduct such hearings leaves employees subject to the risk that, as in Ms. Collis' case, their matters may sometimes be settled even when there was no agreement to settle.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT B. FITZPATRICK, ESQ.*
RYAN P. CHAPLINE, ESQ.
Robert B. Fitzpatrick, PLLC
1825 Connecticut Avenue, N.W.
Suite 640
Washington, D.C. 20009-5728
(202) 588-5300 (phone)
(202) 588-5023 (fax)
fitzpatrick.law@verizon.net (email)

Counsel for Petitioner
*Counsel of Record

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 10-1955

[Filed May 2, 2011]

TORINA A. COLLIS,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
BANK OF AMERICA, NATIONAL ASSOCIATION,	)
	)
Defendant - Appellee.	)

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Essitte, Senior District Judge. (8:06-cv-01411-PJM)

Submitted: April 28, 2011 Decided: May 2, 2011

Before DAVIS, KEENAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Torina A. Collis, Appellant, Pro se. Elena D. Marcuss, MCGUIREWOODS, LLP, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent n this circuit.

PER CURIAM:

Torina A. Collis appeals the district court's order in her civil action granting in part and denying in part her motion to reopen. We have reviewed the record and conclude there is no reversible error. Accordingly, we affirm for the reasons stated by the district court. Collis v. Bank of Am. Nat'l Ass'n, No. 8:06-cv-01411-PJM, 2010 U.S. Dist. LEXIS 73490 (D. Md. July 21, 2010). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 10-1955
(8:06-cv-01411-PJM)

[Filed June 21, 2011]

TORINA A. COLLIS,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
BANK OF AMERICA, NATIONAL ASSOCIATION,	)
	)
Defendant - Appellee.	)
	)

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Davis, Judge Keenan and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

2010 U.S. Dist. LEXIS 73490

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 06-1411

[Filed July 20, 2010]

TORINA A. COLLIS,)
)
Plaintiff,)
)
v.)
)
BANK OF AMERICA N.A.,)
)
Defendant.)

MEMORANDUM OPINION

Pro se Plaintiff Torina A. Collis has sued Bank of America ("the Bank"), alleging that it violated the Fair Labor Standards Act (hereinafter "FLSA") by failing to compensate her for time worked in excess of forty hours per week. On September 15, 2009, the Court issued an Order pursuant to Local Rule 111 having been advised by the parties that, following a settlement conferences with Magistrate Judge Charles B. Day, they had reached a settlement. On October 15,

2009 Collis filed a Motion to Reopen and Reverse the Rule 111 Order [Paper No. 74], in response to which the Bank filed a Cross-Motion to enforce the settlement [Paper No. 77]. For the reasons stated below, the Court **GRANTS** the Plaintiff's Motion to Reopen, but only so that the Court may **GRANT** Defendant's Motion to Enforce the Settlement, which it now does.[1]

I.

The Bank argues that the parties reached an oral agreement to settle this case on June 18, 2009 at the last of three separate settlement conferences with Magistrate Judge Day. The Bank provided Collis with a document memorializing the terms agreed to at the settlement conference a few days later on June 25, 2009. Although she did not sign the agreement, the Bank states that Collis's subsequent actions clearly indicate that the case had indeed settled, pursuant to the oral agreement reached by the parties. In support of this proposition the Bank notes that the Joint Pretrial Order submitted to the Court by Collis and the Bank in a related race discrimination case reported to the Court that this case had in fact

---

[1] Both parties have filed Motions to Seal the details of the Settlement Agreement [Paper Nos. 75 and 81]. Because the Settlement Agreement requires that the parties maintain the confidentiality of the terms, these Motions are **GRANTED**. Additionally, Collis has filed a Motion for Extension of Time [Paper No. 78] to file her reply brief in this matter. Her reply brief was later filed but has nonetheless been considered by the Court. Therefore the Motion for Extension is **MOOT**.

settled.[2] Moreover, at the pretrial conference in the related race discrimination action, Collis informed the Court that, while she had not yet signed the agreement, the case had settled but the parties were still working on the language of the agreement. Furthermore, Collis let the various deadlines for pretrial submissions in this case pass without taking any action. Therefore, says the Bank, Collis intended to honor the agreement reached at the June 18, 2009 settlement conference.

Collis argues that the case should be reopened and the Local Rule 111 Order should be reversed because: (1) she never agreed to the terms of settlement discussed at the June 18, 2009 settlement conference; (2) she was proceeding pro se and was on medication at the time of the settlement conference; (3) the confidentiality provisions of the Settlement Agreement jeopardize her ability to prevail in the related race discrimination case against the Bank; and (4) she was advised at the settlement conference by Magistrate Judge Day that "she had to agree."

II.

The Court's Rule 111 Order requires that the party seeking to reopen the case show "good cause" to do so. The Court has discretion to determine whether good cause has been shown. *See e.g. Rassoull v. Maximus, Inc*., 209 F.R.D. 372, 374 (D. Md. 2002).

---

[2] See *Collis v. Bank of America, N.A.*, No. PJM 06-2451 (D. Md. 2009) (Paper No. 84).

Trial courts have the inherent authority to enforce settlement agreements. *Hensley v. Alcon Labs., Inc*., 277 F.3d 535, 540 (4th Cir 2002). In order to exercise this inherent power, "a district court (1) must find that the parties reached a complete settlement agreement and (2) must be able to determine its terms and conditions." *Hensley*, 277 F.3d at 540-41. If there is no dispute that a settlement has been reached and its terms and conditions can be determined, the Court may summarily enforce the agreement without a plenary hearing. *Hensley*, 277 F.3d at 540.

"[H]aving second thoughts about the results of a settlement agreement does not justify setting aside an otherwise valid agreement." *Young v. FDIC*, 103 F.3d 1180, 1195 (4th Cir. 1997). Moreover, that fact that an agreement was oral and is not in writing does not render it unenforceable, even where the parties contemplated that the agreement would eventually be put in writing. *See King v. Sallie Mae, Inc*., No. 08-2934, 2009 U.S. Dist. LEXIS 74132, at *8 (D. Md. Aug. 20, 2009).

III.

The Court agrees with the Bank that Collis has not shown good cause to reopen the case. Neither Collis' *pro se* status, nor her belated claim that she was medicated at the time of the settlement conference, suggest that she was treated unfairly during the settlement negotiations. Rather, the fact that the Settlement Agreement was reached in the presence of Magistrate Judge Day, and after two prior settlement conferences in which Judge Day also participated, indicates to the Court that Plaintiff had every opportunity to fairly negotiate the terms of the

agreement. Furthermore, Collis' claim that she never agreed to settle is not credible. As noted by the Bank, Collis reported to the Court on multiple occasions that this case had settled. At the same time, the Court finds incredible Collis' allegation that Magistrate Judge Day informed her that "she had to settle." No record evidence other than Collis' say-so supports this farfetched proposition. Finally, Collis' concern that her related race discrimination case could be prejudiced by the Agreement's confidentiality provisions is moot, if it was ever true. The race discrimination case has now been tried to verdict before this Court, unsuccessfully for her as it turned out, but her evidentiary presentation in that case was not limited by the Settlement Agreement in any way.

The Court finds that Collis' multiple representations to the Court that this case had settled, coupled with her failure to respond to all subsequent case-related deadlines after the settlement conference occurred, demonstrate that a complete settlement agreement was reached in this case as memorialized by Defendant shortly after the settlement conference. Therefore the Court will exercise its inherent authority to enforce the terms of the settlement reached by the parties.[3]

---

[3] The Bank is advised that if Collis refuses to receive the payment contemplated by the Settlement Agreement, such payment can be remitted to the Registry of the Court in order to facilitate settlement in this matter. The Bank should tender the amount of the settlement to Collis in the form of a check. If the check is not accepted by her within thirty days of its issue, the Bank may cancel the check and pay an equal amount into the Registry of the Court.

Plaintiff's Motion to Reopen and Reverse the Rule 111 Order [Paper No. 74] is **GRANTED** in part and **DENIED** in part. The Motion to Reopen is **GRANTED**. The Motion to Reverse the Rule 111 Order is **DENIED**. Defendant's Cross-Motion to Enforce the Settlement [Paper No. 77] is **GRANTED**.

A separate Order will **ISSUE**.

/s/ Peter J. Messitte
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

July 19, 2010