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United States District Court,
S.D. New York.

Nicholas CLEM, Eric Dobson, Heather Graham, Caitlin Casterlin, Shelby Kamm, Derek Runnells, Kathy Batz, Sana Hanna, and Candice Easley, individually and on behalf of all others similarly situated, Plaintiffs,
v.
KEYBANK, N.A., Defendant.

No. 13 Civ. 789(JCF).
|
Signed June 20, 2014.

ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION OF THE SETTLEMENT CLASS, FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT, APPROVAL OF THE FLSA SETTLEMENT, AND APPROVAL OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND SERVICE AWARDS

JAMES C. FRANCIS, United States Magistrate Judge.

***1** Plaintiffs Nicholas Clem, Eric Dobson, Heather Graham, Caitlin Casterlin, Shelby Kamm, Derek Runnells, Kathy Batz, Sana Hanna, and Candice Easley (together, "Plaintiffs") are individuals who worked as Client Service Managers ("CSMs") for Defendant KeyBank, N.A. ("KeyBank" or "Defendant"). On February 4, 2013, Plaintiffs commenced this action as a putative class action under Federal Rule of Civil Procedure 23 and as a collective action under 29 U.S.C. § 216(b), claiming that KeyBank failed to pay them overtime wages to which they were entitled under the wage and hour laws of New York, Colorado, Washington, Maine, Ohio, Oregon, Indiana, and the Fair Labor Standards Act ("FLSA"). Plaintiffs sought unpaid overtime wages, attorneys' fees and costs, interest, liquidated damages, and injunctive and declaratory relief.

After engaging informal discovery to allow the Parties to assess the claims and calculate damages in advance of mediation, the Parties reached a settlement totaling $3.5 million. Decl. of Justin M. Swartz in Supp. of Pls.' Mot. for Certification of the Settlement Class, Final Approval of the Class Action Settlement, and Approval of the FLSA Settlement ("Swartz Decl.") ¶¶ 11–16. The Parties reached this settlement after a full day mediation session in San Francisco with David Rotman, Esq., a well-known and experienced mediator in wage and hour law. *Id.* ¶ 15. At the conclusion of the mediation. Mr. Rotman made a mediator's proposal, which the Parties subsequently accepted. *Id.* During the next several months, the Parties negotiated the remaining terms of the settlement, which were memorialized in a formal Joint Settlement and Release ("Settlement Agreement") executed by the Parties on or about March 12, 2014. *Id.* ¶ 16.

On March 27, 2014, this Court entered an Order preliminarily approving the settlement on behalf of the class set forth therein (the "Class" or the "Class Members"), conditionally certifying the settlement class, appointing Outten & Golden LLP and Shavitz Law Group P.A. as Class Counsel, and authorizing notice to all Class Members. ECF No. 45.

On April 16, 2014, a claims administrator sent Court-approved notices to all Class Members informing them of their rights under the settlement, including the right to opt out or object to the settlement for Class Members in the seven states where Rule 23 claims were brought, and of Class Counsel's intention to seek up to one-third of the settlement fund for attorneys' fees, and their out-of-pocket expenses. Swartz Decl., Ex. B (Christopher Walsh Decl .) ¶ 11, Exs. A & B. Three Class Members objected to the settlement, and three opted out of the settlement. *Id.* ¶¶ 15–16.

On June 4, 2014, Plaintiffs filed a Motion for Certification of the Settlement Class, Final Approval of the Class Action Settlement, and Approval of the FLSA Settlement ("Motion for Final Approval"). That same day, Plaintiffs also filed Motions for Approval of Attorneys' Fees and Reimbursement of Expenses ("Motion for Attorneys' Fees") and for Service Awards ("Motion for Service Awards"). Defendant took no position with respect to any of these motions and did not object to the requests for attorneys' fees, costs, or service payments.

***2** The Court held a fairness hearing on June 17, 2014. No Class Member objected to the settlement at the hearing.

Having considered the Motion for Final Approval, the Motion for Attorneys' Fees and Reimbursement of Expenses, the Motion for Service Awards, and the supporting declarations, the oral argument presented at the June 17, 2014 fairness hearing, and the complete record in this matter, for the reasons set forth therein and stated on the record at the June 17, 2014 fairness hearing, and for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED: CERTIFICATION OF THE SETTLEMENT CLASS

1. The Court certifies the following sub-classes under Federal Rule of Civil Procedure 23(e), for settlement purposes (the "Rule 23 Class Members"):

> a. all individuals who were employed as CSMs in the State of Colorado from February 4, 2010 to April 20, 2013; and
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> b. all individuals who were employed as CSMs in the State of Maine from February 4, 2010 to April 20, 2013; and
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> c. all individuals who were employed as CSMs in the State of New York from February 4, 2007 to April 20, 2013; and
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> d. all individuals who were employed as CSMs in the State of Ohio from February 4, 2010 to April 20, 2013; and
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> e. all individuals who were employed as CSMs in the State of Oregon from February 4, 2010 to April 20, 2013; and
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> f. all individuals who were employed as CSMs in the State of Indiana from February 4, 2010 to April 20, 2013; and
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> g. all individuals who were employed as CSMs in the State of Washington from February 4, 2010 to April 20, 2013; Swartz Decl. ¶ 16; Ex. A (Settlement Agreement) § 1.29.

2. Plaintiffs meet all of the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b) (3).

3. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(1) because there are approximately 1,501 Rule 23 Class Members and, thus, joinder is impracticable. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995) ("[N]umerosity is presumed at a level of 40 members....").

4. The proposed class also satisfies Federal Rule of Civil Procedure 23(a)(2), the commonality requirement. Plaintiffs and the Class Members share common issues of fact and law, including whether Defendant misclassified them as exempt employees and failed to pay them overtime wages in violation of state wage, and hour laws and failed to keep accurate time records of the hours they worked. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 473 (S.D.N.Y.2013) (common issues that help to satisfy Rule 23 commonality requirement include whether "Defendant misclassified them as exempt employees, failed to pay them overtime wages in violation of state wage and hour laws, and failed to keep accurate records of time worked"); *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 615–16 (S.D.N.Y.2012) (commonality satisfied where, among other allegations, plaintiffs claimed that defendant had a policy of not paying all class members overtime pay).

***3** Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(3), typicality, because Plaintiffs' wage and hour claims arise from the same factual and legal circumstances that form the basis of Class Members' claims. *See Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472, 2013 WL 1209563, at *3 (S.D.N.Y. Mar. 21, 2013) (typicality satisfied where "[p]laintiffs' [overtime claims] claims arose from the same factual and legal circumstances that form[ed] the bases of the [c]lass [m]embers' claims"); *Morris*, 859 F.Supp.2d at 616 (same).

5. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(4) because there is no evidence that the Plaintiffs' and Class Members' interests are at odds. *See Beckman*, 293 F.R.D. at 473 (finding adequacy requirement met where there was no evidence that plaintiffs' and class members' interests were at odds); *accord Diaz v. E. Locating Serv. Inc.*, No. 10 Civ. 4082, 2010 WL 5507912, at *3 (S.D.N.Y. Nov. 29, 2010).

6. In addition, Plaintiffs' Counsel also meet the adequacy requirement of Rule 23(a)(4). Outten & Golden attorneys have "substantial experience prosecuting and settling employment class actions, including wage and hour class actions[,] and are well-versed in wage and hour law and class action law." *Beckman*, 293 F.R.D. at 473 (internal quotation marks and citation omitted); *see also Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693, 2013 WL 5492998, at *3 (S.D.N.Y. Oct. 2, 2013) (finding O & G and Shavitz Law Group experienced and adequate to serve as class counsel). Likewise, the Shavitz Law Group has acted as lead counsel or co-counsel on dozens of wage

and hour class and collective actions, including *Yuzary*, 2013 WL 5492998, at *3; *Beckman*, 293 F.R.D. at 473; and *Palacio v. E*TRADE Fin. Corp.*, No. 10 Civ. 4030, 2012 WL 1058409, at *2 (S.D.N.Y. Mar. 12, 2012) (appointing O & G and the Shavitz Law Group as Class Counsel based on their experience in "numerous wage and hour class and collective actions").

7. Plaintiffs also satisfy Rule 23(b)(3). Plaintiffs' common factual allegations and legal theory—that Defendant violated federal and state wage and hour laws by misclassifying Plaintiffs as exempt administrative employees and failing to pay them for premium overtime hours—predominate over any factual or legal variations among Class Members. *See Yuzary*, 2013 WL 5492998, at *4 (finding plaintiffs' common factual allegations and common legal theory predominate over any factual or legal variations among class members in wage and hour misclassification case); *Hernandez*, 2013 WL 1209563, at *3–4 (same); *Diaz*, 2010 WL 5507912, at *3 (same); *Torres v. Gristede's Corp.*, No. 04 Civ. 3316, 2006 WL 2819730, at *16 (S.D.N.Y. Sept. 29, 2006) (plaintiffs "introduced sufficient proof that Defendants engaged in a common practice to deny employees overtime pay[,]" and "[t]his issue predominates over any individual calculations of overtime wages").

***4** 8. Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually. *See Beckman*, 293 F.R.D. at 473; *Morris*, 859 F.Supp.2d at 617. Concentrating the litigation in this Court is desirable because much of the allegedly wrongful conduct occurred within its jurisdiction.

APPROVAL OF THE SETTLEMENT AGREEMENT

9. The Court hereby grants the Motion for Final Approval and finally approves the settlement as set forth in the Settlement Agreement.

10. Rule 23(c) requires court approval for a class action settlement to insure that it is procedurally and substantively "fair, reasonable and adequate." Fed.R.Civ.P. 23(e). To determine procedural fairness, courts examine the "negotiating process leading to the settlement." *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir.2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001). To determine substantive fairness, courts determine whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

11. Courts examine procedural and substantive fairness in light of the "strong judicial policy in favor of settlement" of class action suits. *Wal–Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted); *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions.").

12. A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal–Mart Stores*, 396 F.3d at 116 (internal quotation marks and citation omitted); *see also D'Amato,* 236 F.3d at 85. "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Procedural Fairness

13. The proposed settlement is procedurally fair because it was reached through vigorous, arm's-length negotiations and after experienced counsel had evaluated the merits of Plaintiffs' claims. *See Toure v. Amerigroup Corp.*, No. 10 Civ. 5391, 2012 WL 3240461, at *3 (E.D.N.Y. Aug.6, 2012) (finding settlement to be "procedurally fair, reasonable, adequate, and not a product of collusion" after plaintiffs "conducted a thorough investigation ... [and] enlisted the services of an experienced employment [law] mediator"); *Diaz*, 2010 WL 5507912, at *4.

***5** 14. Class Counsel conducted thorough investigations and evaluated the claims and defenses, engaged in targeted discovery with KeyBank, deposed KeyBank's 30(b)(6) corporate representative, and reached a settlement after a day-long mediation between the Parties. Swartz Decl. ¶¶ 4–7, 11–16.

15. On December 3, 2013, the Parties attended a full-day mediation session in San Francisco with David Rotman, Esq., a well-known and experienced mediator in wage and hour law. At the conclusion of the mediation, Mr. Rotman made a mediator's proposal, which the Parties subsequently accepted. During the next several months, the Parties negotiated the remaining terms of the Settlement Agreement. *Id.* ¶ 27. These arm's-length negotiations involved counsel and a mediator well-versed in wage and hour law, "rais[ing] a presumption that the

settlement they achieved meets the requirements of due process." *See Wal–Mart Stores,* 396 F.3d at 116; *McMahon v. Olivier Cheng Catering & Events, LLC,* No. 08 Civ. 8713, 2010 WL 2399328, at *4 (S.D.N.Y. Mar.3, 2010).

16. In addition, "courts encourage early settlement of class actions, when warranted, because early settlement allows class members to recover without unnecessary delay and allows the judicial system to focus resources elsewhere." *Yuzary,* 2013 WL 5492998, at *5; *see Hernandez,* 2013 WL 1209563, at *1 (endorsing early settlement of wage and hour class action); *Castagna v. Madison Square Garden, L.P.,* No. 09 Civ. 10211, 2011 WL 2208614, at *10 (S .D.N.Y. Jun. 7, 2011) (commending Plaintiffs' attorneys for negotiating early settlement). The Parties here acted responsibly in reaching an early settlement. *See In re Interpublic Sec. Litig .,* No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D.N.Y. Oct. 26, 2004).

Substantive Fairness

17. The settlement is substantively fair. All of the factors set forth in *Grinnell,* which provides the analytical framework for evaluating the substantive fairness of a class action settlement, weigh in favor of final approval.

18. The *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463.

19. Litigation through trial would be complex, expensive and long. Therefore, the first *Grinnell* factor weighs in favor of final approval.

20. The class's reaction to the settlement was positive. The Notices sent to Class Members included an explanation of the allocation formula and an estimate of each Class Member's award. The Rule 23 Notice also informed Rule 23 Class Members of their right to object to or exclude themselves from the Settlement and explained how to do so. Only three Class Members objected to the settlement, and only three of the 1,501 Rule 23 Class Members opted out. This favorable response demonstrates that the class approves of the settlement, which further supports final approval. *See Davis v. J.P. Morgan Chase & Co.,* 827 F.Supp.2d 172, 177 (W.D.N.Y.2011) (granting final approval and noting "very little negative reaction by class members to the proposed settlement" where 11 out of 3,800 class members opted out, and 3 objected); *Willix v. Healthfirst, Inc.,* No. 07 Civ. 1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011) (approving settlement where seven of 2,025 class members objected and two requested exclusion); *Bellifemine v. Sanofi–Aventis U.S. LLC,* No. 07 Civ. 2207, 2010 WL 3119374, at *3 (S.D.N.Y. Aug. 6, 2010) (granting final approval where there were no objections but 28 of 5,262 opted out, noting that "[a] small number of objections is convincing evidence of strong support by class members"); *Wright v. Stern,* 553 F.Supp.2d 337, 344–45 (S.D.N.Y.2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out, noting that "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness).

***6** 21. The Parties have completed enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 537 (3d Cir.2004). The Parties engaged in targeted discovery to allow the Parties to assess the claims and calculate damages in advance of mediation. Defendant produced over nine hundred pages of documents to Plaintiffs, including job descriptions for the CSM positions and various corporate documents discussing the CSM position, its creation, and the duties and responsibilities of the position. Defendant also produced additional documents to assist in the analysis of hours worked. Defendant deposed six Named and Opt–In Plaintiffs, and Plaintiffs deposed KeyBank's 30(b)(6) corporate representative. Swartz Decl. ¶ 11–14. The third *Grinnell* factor weighs in favor of final approval.

22. The risk of establishing liability and damages further weighs in favor of final approval. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 126 (S.D.N.Y.1997). Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.,* 304 F.Supp. 917, 934 (S.D.N.Y.1969); *see also Velez v. Majik Cleaning Serv., Inc.,* No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007). Here, Plaintiffs faced numerous risks as to both liability and damages, including overcoming KeyBank's exemption defenses, proving willfulness in order to obtain a third year of liability and damages, and overcoming Defendant's likely fluctuating workweek argument. The

proposed settlement eliminates this uncertainty. The fourth and fifth factors therefore weigh in favor of final approval.

23. The risk of obtaining collective and class certification and maintaining both through trial is also present. Contested collective and class certification motions would likely require extensive discovery and briefing. If the Court did authorize notice to the FLSA collective, Defendant would likely challenge that determination by seeking decertification at a later date, after the close of discovery. If the Court were to grant class certification, Defendant might seek to file an appeal under Federal Rule of Civil Procedure 23(f), the resolution of which would require an additional round of briefing. Settlement eliminates the risk, expense, and delay inherent in the litigation process. The sixth *Grinnell* factor weighs in favor of final approval.

24. Even if KeyBank could withstand a greater judgment, its ability to do so, "standing alone, docs not suggest that the settlement is unfair." *Frank,* 228 F.R.D. at 186 (quoting *In re Austrian,* 80 F.Supp.2d at 178 n. 9). Therefore, the seventh *Grinnell* factor is neutral and does not preclude the Court from granting final approval.

***7** 25. The substantial amount of the settlement weighs in favor of final approval. The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.' " *Frank,* 228 F.R.D. at 186 (quoting *In re Austrian,* 80 F.Supp.2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.' " *Id.* (quoting *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972)). The eighth and ninth *Grinnell* factors weigh in favor of final approval.

APPROVAL OF THE FLSA SETTLEMENT

26. The Court hereby approves the FLSA settlement.

27. Because, under the FLSA, "parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date," FLSA collective actions do not implicate the same due process concerns as Rule 23 actions. *McKenna v. Champion Intern. Corp.,* 747 F.2d 1211, 1213 (8th Cir.1984), *abrogated on other grounds by Hoffmann–LaRoche Inc. v. Sperling,* 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989); *see also McMahon,* 2010 WL 2399328, at *6. Accordingly, the high standard for approval of a class action under Rule 23 does not apply to an FLSA settlement.

28. Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *See Lynn's Food Stores, Inc. v. United States,* 679 F.2d 1350, 1353 n. 8 (11th Cir.1982); *McMahon,* 2010 WL 2399328, at *6. Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Lynn's Food Stores,* 679 F.2d at 1353–54. If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement. *Id.* at 1354; *McMahon,* 2010 WL 2399328, at *6.

29. In this case, the settlement was the result of arm's-length negotiation involving vigorous arm's-length settlement negotiations. Swartz Decl. ¶¶ 15–16. During the entire process, Plaintiffs and Defendant were represented by counsel experienced in wage and hour law. Accordingly, the Settlement Agreement resolves a clear and actual dispute under circumstances supporting a finding that is fair and reasonable.

DISSEMINATION OF NOTICE

30. Pursuant to the Preliminary Approval Order, the Rule 23 and FLSA Notices were sent by first-class mail to each respective Class Member at his or her last known address (with re-mailing of returned Notices for which new addresses could be located). The Court finds that the Rule 23 and FLSA Notices fairly and adequately advised Class Members of the terms of the settlement, as well as the right of Rule 23 Class Member to opt out of or to object to the settlement, and to appear at the fairness hearing conducted on June 17, 2014. Class Members were provided with the best notice practicable under the circumstances.

***8** 31. The Court further finds that the Notices and their distribution comported with all constitutional requirements, including those of due process.

32. The Court confirms Angeion Group as the claims administrator.

AWARD OF FEES AND COSTS TO CLASS COUNSEL AND AWARD OF SERVICE AWARDS TO PLAINTIFFS

33. On March 27, 2014, the Court appointed Outten & Golden LLP and Shavitz Law Group, P.A. as Class Counsel because they met all of the requirements of Federal Rule of Civil Procedure 23(g). *See Damassia v.*

Duane Reade, Inc., 250 F.R.D. 152, 165 (S.D.N.Y.2008) (Rule 23(g) requires the court to consider "the work counsel has done in identifying or investigating potential claims in the action, ... counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, ... counsel's knowledge of the applicable law, and ... the resources counsel will commit to representing the class.") (internal quotation marks omitted).

34. Class Counsel are experienced employment lawyers with good reputations among the employment law bar. *See Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *2 (S.D.N.Y. Apr. 16, 2012) (noting Outten & Golden LLP's reputation as a "respected labor and employment firm" and that attorneys had "prosecuted and favorably settled many employment law class actions, including wage and hour class actions"); *Palacio*, 2012 WL 1058409, at *2 (appointing Outten & Golden LLP and Shavitz Law Group, P.A. as Class Counsel based on their experience in "numerous wage and hour class and collective actions").

35. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests. Class Counsel have committed substantial resources to prosecuting this case.

36. The Court hereby grants Plaintiffs' Motion for Attorneys' Fees and awards Class Counsel $1,166,666.67, which is 33% of the settlement fund.

37. The trend in this Circuit is to use the percentage of the fund method in common fund cases like this one, *Wal–Mart Stores*, 396 F.3d at 121; *Yuzary*, 2013 WL 5492998, at *9; *Diaz*, 2010 WL 5507912, at *7.

38. Although the Court has discretion to award attorneys' fees based on the lodestar method or the percentage-of-recovery method, *McDaniel v. County of Sc hen ectady*, 595 F.3d 411, 417 (2d Cir.2010), in wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award, *Beckman*, 293 F.R.D. 477; *McMahon*, 2010 WL 2399328, at *7. "Fee awards in wage and hour cases are meant to encourage members of the bar to provide legal services to those whose wage claims might otherwise be too small to justify the retention of able, legal counsel." *Hernandez*, 2013 WL 1209563, at *8 (internal quotation marks and citation omitted). The FLSA and state wage and hour statutes are remedial statutes, the purposes of which are served by adequately compensating attorneys who protect wage and hour rights. *McMahon*, 2010 WL 2399328, at *7; *Sand*, 2010 WL 69359, at *3.

***9** 39. Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by "private attorneys general," attorneys who fill that role must be adequately compensated for their efforts. *Beckman*, 293 F.R.D. 477; *see also Hernandez*, 2013 WL 1209563, at *8. "If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk." *Id.; see Sand v. Greenberg*, No. 08 Civ. 7840, 2010 WL 69359, at *3 (S.D.N.Y. Jan. 7, 2010) ("But for the separate provision of legal fees, many violations of the Fair Labor Standards Act would continue unabated and uncorrected.").

41. Class Counsel's request for 33% of the Fund is reasonable and "consistent with the norms of class litigation in this circuit." *Yuzary*, 2013 WL 5492998, at *10 (internal quotation marks and citation omitted).

42. Although *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 493 F.3d 110 (2d Cir.2007) does not address a common fund fee petition, it supports Class Counsel's request for one-third of the fund because " 'reasonable, paying client[s]' ... typically pay one-third of their recoveries under private retainer agreements." *McMahon*, 2010 WL 2399328, at *8 (internal citation and quotations omitted). While *Arbor Hill* is not controlling because it does not address a common fund fee petition, it supports use of the percentage of the fund method. *Hernandez*, 2013 WL 1209563, at *9; *Diaz*, 2010 WL 5507912, at *7.

43. In addition, in Plaintiffs' retainer agreements with Class Counsel, Plaintiffs agreed that Class Counsel could apply to the Court for 33% of a class-wide recovery and that they would pay Class Counsel 33% of any individual recovery. Decl. of Justin M. Swartz in Supp. of Pis.' Mot. for Approval of Attys' Fees and Reimbursement of Expenses and Pis.' Mot, for Approval of Service Awards ("Swartz Fees & Service Awards Decl.") ¶ 10. This also provides support for Class Counsel's request for 33% of the fund.

44. No Class Member objected to Class Counsel's request for 33% of the fund, which also provides support for Class Counsel's fee request.

45. All of the factors in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 48–49 (2d Cir.2000) weigh in favor of the requested fee award.

46. Applying the lodestar method as a "cross check," *see id.* at 50, the Court finds that the fee that Class Counsel

seeks is reasonable. "Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." *Beckman,* 293 F.R.D. 481 (citations omitted); *see also Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1052 (9th Cir.2002) (listing nationwide class action settlements where multiplier ranged up to 19.6 times lodestar); *Sewell,* 2012 WL 1320124, at *13 ("Courts commonly award lodestar multipliers between two and six." (citations omitted)); *In re Lloyd's Am. Trust Fund Litig.,* No. 96 Civ. 1262, 2002 WL 31663577, at *27 (S.D .N.Y. Nov. 26, 2002) (a "multiplier of 2.09 is at the lower end of the range of multipliers awarded by courts within the Second Circuit" (citation omitted)); *see, e.g., Steiner v. Am. Broad. Co .,* 248 F. App'x 780, 783 (9th Cir.2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed") (citations omitted); *Yuzary,* 2013 WL 5492998, at *11 (awarding multiplier of 7.6 in wage and hour misclassification class action); *Davis,* 827 F.Supp.2d at 185–86 (awarding multiplier of 5.3 in wage and hour class action); *Buccellato v. AT & T Operations, Inc.,* No. 10 Civ. 463, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (awarding multiplier of 4.3 in wage and hour class action); *New England Carpenters Health Benefits Fund v. First Databank, Inc.,* No. 05 Civ. 11148, 2009 WL 2408560, at *2 (D.Mass. Aug. 3, 2009) (awarding multiplier of 8.3); *In re Enron Corp. Sec, Derivative & ERISA Litig.,* 586 F.Supp.2d 732, 803 (S.D.Tex.2008) (awarding multiplier of 5.2); *In re Cardinal Health Inc. Sec. Litig.,* 528 F.Supp.2d 752, 768 (S.D.Ohio 2007) (awarding multiplier of 6); *In re Rite Aid Sec. Litig.,* 362 F.Supp.2d 587, 589–90 (E.D.Pa.2005) (awarding multiplier of 6.96); *Maley v. Del Global Techs. Corp.,* 186 F.Supp.2d 358, 371 (S.D.N.Y. Jan.29, 2002) ("modest multiplier" of 4.65 in wage and hour class action was "fair and reasonable"); *Cosgrove v. Sullivan,* 759 F.Supp. 166, 167 n. 1, 169 (S.D.N.Y.1991) (awarding multiplier of 8.74). Here, Class Counsel are seeking a lodestar multiplier of approximately 3.5. This is well within the range of multipliers that have been granted by courts in this Circuit and elsewhere.

***10** 47. The lodestar multiplier Class Counsel seeks is also reasonable because it will diminish over time. *Parker v. Jekyll & Hyde Entm't Holdings, LLC,* No. 08 Civ. 7670, 2010 WL 532960, at *2 (S.D.N.Y. Feb.9, 2010) ("[A]s class counsel is likely to expend significant effort in the future implementing the complex procedure agreed upon for collecting and distributing the settlement funds, the multiplier will diminish over time"). Where "class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower because the award includes not only time spent prior to the award, but after in enforcing the settlement." *Beckman,* 293 F.R.D. at 482 (internal quotation marks and citations omitted). In wage and hour cases, Class Counsel is often called upon to perform work after the final approval hearing, including, answering class member questions, answering questions from the claims administrator, and negotiating and possibly litigating disagreements with Defendant about administering the settlement and distributing the fund. *See* Swartz Fees & Service Awards Decl. ¶ 8. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request. *See Diaz,* 2010 WL 5507912, at *7.

48. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of $39,421.38. Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *See In re Indep. Energy Holdings PLC Sec. Litig.,* 302 F.Supp.2d 180, 183 n. 3 (S.D.N.Y.2003). Here, Class Counsel's unreimbursed expenses, including court and process server fees, postage and courier fees, transportation, working meals, photocopies, electronic research, expert fees, and Plaintiffs' share of the mediator's fees, are reasonable and were incidental and necessary to the representation of the class.

49. The attorneys' fees and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement fund,

50. The Court finds reasonable service awards for Named Plaintiffs Nicholas Clem, Heather Graham, Caitlin Casterlin, Shelby Kamm, and Opt–In Plaintiffs Vickey Esparza and Adelia Mosley in the amount of $7,500 each; for Named Plaintiffs Eric Dobson and Derek Runnells in the amount of $5,000 each; and for Named Plaintiffs Kathy Batz, Sana Hanna, and Candice Easley in the amount of $3,000 each. These amounts shall be paid from the settlement fund.

51. Service awards are common in class action cases and serve to "compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff[s]." *Yitzary,* 2013 WL 5492998, at *12 (quoting *McMahon,* 2010 WL 2399328, at *9) (internal quotation marks omitted). "Service awards fulfill the important purpose of compensating plaintiffs for the time they spend and the risks they take." *Yuzary,* 2013 WL 5492998, at *12 (citing *Massiah v. MetroPlus Health Plan, Inc.,* No. 11 Civ.

5669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012)).

***11** 52. The "Effective Date" of the settlement shall be 5 days after the date of this Order if no party appeals this Order. If a party appeals this Order, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved. This Order shall constitute a judgment for purposes of Rule 58 of the Federal Rules of Civil Procedure.

53. Within 3 days of time to appeal this Order has expired, the claims administrator shall distribute the funds in the settlement account by making the following payments in the order below:

a. Paying Class Counsel one-third of the fund ($1,166,666.67);

b. Reimbursing Class Counsel for $39,421.38 in litigation costs and expenses;

c. Paying service awards to Named Plaintiffs Nicholas Clem, Heather Graham, Caitlin Casterlin, Shelby Kamm, and Opt–In Plaintiffs Vickey Esparza and Adelia Mosley in the amount of $7,500 each; to Named Plaintiffs Eric Dobson and Derek Runnells in the amount of $5,000 each; and to Named Plaintiffs Kathy Batz, Sana Hanna, and Candice Easley in the amount of $3,000 each; and

d. Paying the remainder of the fund to Class Members in accordance with the allocation plan described in the Settlement Agreement,

54. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The Parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.

55. Upon the Effective Date, this litigation shall be dismissed with prejudice, and all Rule 23 Class Members who have not excluded themselves from the settlement and all FLSA Class Members who have opted in to the lawsuit shall be permanently enjoined from pursuing and/or seeking to reopen claims that have been released pursuant to the settlement.

It is so ORDERED.

This Order resolves Docket nos. 48, 51, and 53.

All Citations

Not Reported in F.Supp.3d, 2014 WL 2895918

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