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

Crisoforo TIRO, Leonardo Cortes, Enrique Hernandez, and Humberto Campos Lara, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
PUBLIC HOUSE INVESTMENTS, LLC, **Public House** NYC, LLC, **Public House** MGMT NYC, LLC, Butterfield 8 NYC, LLC, Martell's NYC, LLC, Black Finn NYC, LLC, Chris Cocozziello, Brian Harrington, Gary Cardi, and Frank Falesto, Defendants.
Rodolfo Tejada Villa and Enrique Hernandez, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
Public House Investments, LLC, **Public House** NYC, LLC, **Public House** MGMT NYC, LLC, Butterfield 8 NYC, LLC, Martell's NYC, LLC, Black Finn NYC, LLC, Chris Cocozziello, Brian Harrington, Gary Cardi, and Frank Falesto, Defendants.

Nos. 11 Civ. 7679(CM), 11 Civ. 8249(CM). | May 22, 2013.

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT, CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL, AND APPROVAL OF THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE

COLLEEN McMAHON, District Judge.

***1** The above-entitled matters came before the Court on Plaintiffs' Motion for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, Appointment of Fitapelli & Schaffer, LLP as Class Counsel, and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure ("Motion for Preliminary Approval").

I. PRELIMINARY APPROVAL OF SETTLEMENT

1. Based upon the Court's review of the Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement and the Declaration of Brian Schaffer ("Schaffer Declaration") and the exhibits attached thereto, the Court grants preliminary approval of the settlement memorialized in the Joint Settlement Agreement and Release ("Settlement Agreement") between Plaintiffs Crisoforo Tiro, Leonardo Cortes, Enrique Hernandez, Humberto Campos Lara, and Rodolfo Tejada Villa (collectively, "Plaintiffs") and Defendants **Public House** Investments, LLC, **Public House** NYC, LLC, **Public House** MGMT NYC, LLC, Butterfield 8 NYC, LLC, Martell's NYC, LLC, Black Finn NYC, LLC, Chris Cocozziello, Brian Harrington, Gary Cardi, and Frank Falesto (collectively "Defendants"), attached to the Schaffer Declaration as Exhibit A, and "so orders" all of its terms.

2. Courts have discretion regarding the approval of a proposed class action settlement. *Maywalt v. Parker & Parsley Petroleum Co .*, 67 F.3d 1072, 1079 (2d Cir.1995). "In exercising this discretion, courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks." *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693(PGG), 2013 WL 1832181, at *1 (S.D.N.Y. Apr. 30, 2013) (citation omitted).

3. Preliminary approval, which is what Plaintiffs seek here, is the first step in the settlement process. It simply allows notice to issue to the class and for Class Members to object to or opt-out of the settlement. After the notice period, the Court will be able to evaluate the settlement with the benefit of the Class Members' input. *Id.* (citation omitted).

4. Preliminary approval of a settlement agreement requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623(PAC) *et al.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (*citing* Herbert B, Newberg & Alba Conte, Newberg on Class Actions ("*Newberg*") § 11.25(4th ed.2002)). Nevertheless, courts often grant preliminary settlement approval without requiring a hearing or a court appearance. *See Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472(KBF)(DCF), 2012 WL 5862749, at *1 (S.D.N.Y. Nov. 15, 2012) (granting preliminary approval based on

plaintiffs' memorandum of law, attorney declaration, and exhibits). To grant preliminary approval, the court need only find that there is " 'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir.1980); *see Newberg* § 11.25 ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness ... and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members); *see also Girault v. Supersol 661 Amsterdam, LLC*, No. 11 Civ. 6835(PAE), 2012 WL 2458172, at *1 (S.D.N.Y. June 28, 2012) (granting preliminary approval where the "proposed Settlement Agreement [was] within the range of possible settlement approval, such that notice to the Class [was] appropriate"); *Danieli v. IBM*, No. 08 Civ. 3688, 2009 WL 6583144, at *4–5 (S.D.N.Y. Nov. 16, 2009) (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted"). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the class members receive notice of the settlement." *Yuzary*, 2013 WL 1832181, at *1 (internal quotation marks and citation omitted).

***2** 5. The Court concludes that the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the Class is appropriate. *See In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir.1980); *Danieli*, 2009 WL 6583144, at *4–5 (granting preliminary approval where settlement "has no obvious defects" and proposed allocation plan is "rationally related to the relative strengths and weaknesses of the respective claims asserted").

6. The Court finds that the Settlement Agreement is the result of extensive, arm's length negotiations by counsel well-versed in the prosecution and defense of wage and hour class and collective actions. "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y.2005). "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.*, Nos. 05 Civ. 10240(CM) *et al.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

7. "The assistance of an experienced JAMS employment mediator, [Vivian Shelansky of JAMS], reinforces that the Settlement Agreement is non-collusive." *Yuzary*, 2013 WL 1832181, at *2. "A settlement ... reached with the help of third-party neutrals enjoys a presumption that the settlement achieved meets the requirements of due process." *In re Penthouse Executive Club Comp. Litig*, No. 10 Civ. 1145(KMW), 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013) (internal quotation marks and citation omitted).

II. CONDITIONAL CERTIFICATION OF THE PROPOSED RULE 23 SETTLEMENT CLASS

8. The Court previously certified the following two classes in this action: (1) Tipped Class—all tipped, hourly food-service workers employed at one or more of the New York Restaurants (**Public House** New York, Butterfield8 Restaurant & Lounge, Wicker Park Bar & Bistro, and Tammany Hall Tavern/Black Finn) from October 28, 2005 to the present; and (2) Non–Tipped Class—all non-tipped, non-exempt kitchen workers employed at one or more of the New York Restaurants from November 15, 2005 to the present. *See Tiro v. **Public** **House** Investments, LLC*, 288 F.R.D. 272, 282 (S.D.N.Y.2012). These classes were further divided into four subclasses consisting of one tipped and one non-tipped subclass at each of the New York Restaurants. *See Id.*

9. To facilitate administration of the settlement, the Court provisionally certifies the following class under Federal Rule of Civil Procedure 23(e), for settlement purposes only ("Settlement Class"):

> All individuals who work or have worked at the New York Restaurants as (a) Tipped Service Employees between October 28, 2005 and April 1, 2013; and (b) Hourly Employees between November 15, 2005 and April 1, 2013.

10. The decision to alter a class certification is within the sound discretion of the trial court. *See* Fed.R.Civ.P. 23(c)(1)(C), 23(d); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 379 (2d Cir.1997) ("Under Rule 23(c)(1), class certification may be altered or amended at any time before a decision on the merits ... Rule 23(d) allows the district court to make such orders as are necessary to assure the orderly administration of the proceedings."); *In re MTBE Prods. Liability Litig.*, 241 F.R.D. 435, 438 (S.D.N.Y.2007) ("It is well established that a court has the inherent power and discretion to redefine and modify a class in a way which allows maintenance of an action as

a class action.") (internal quotation marks and citations omitted).

***3** 11. Moreover, the proposed settlement class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, as well as Rule 23(b)(3)'s requirements of predominance and superiority, and Defendants do not oppose conditional certification of the redefined class for settlement purposes. *See* 4 *Newberg* § 11.27 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only."); *see also Marisol A.*, 126 F.3d at 377 ("Rule 23 is given liberal rather than restrictive construction [in the Second Circuit], and courts are to adopt a standard of flexibility [in evaluating class certification].").

III. RETENTION OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL

12. The Court previously appointed Fitapelli & Schaffer, LLP ("F & S") as class counsel, finding that "Plaintiffs have demonstrated that ... Fitapelli & Schaffer, LLP, is more than qualified to represent fairly and adequately the interests of the class." *See Tiro*, 288 F.R.D. at 281.

13. F & S continues to meet the criteria set forth in Rule 23(g), which governs the appointment of class counsel for a certified class. *See* Fed.R.Civ.P. 23(g)(1)(A) (instructing courts to consider four criteria when evaluating the adequacy of proposed counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class).

14. F & S did substantial work identifying, investigating, prosecuting and settling the claims, has substantial experience prosecuting and settling wage and hour class actions, are well-versed in wage and hour and class action law, and are well-qualified to represent the interests of the class.

15. F & S also committed substantial resources during the course of the litigation, which served to protect the interests of the class and attain the proposed settlement.

16. Courts have repeatedly found F & S to be adequate class counsel in wage and hour class and collective actions. *See, e.g.*, *Yuzari*, 2013 WL 1832181, at *5 ("F & S is experienced in representing workers in wage and hour class actions and has served as lead counsel in numerous wage and hour class and collective actions ..."); *Ryan v. Volume Services America, Inc.*, No. 652970/2012 (MLS), 2012 N.Y. Misc. LEXIS 932 (N.Y.Sup.Ct. Mar. 7, 2013) ("F & S are experienced employment attorneys with a good reputation among the employment law bar. The firm has recovered millions of dollars for thousands of employees."); *Girault*, 2012 WL 2458172, at *2 (stating that F & S has "years of experience prosecuting and settling wage and hour class actions, and are well-versed in wage and hour law and in class action law"); *Lovaglio v.W & E Hospitality Inc.*, No. 10 CIV 7351(LLS), 2012 WL 1890381, at*2 (S.D.N.Y. Mar. 12, 2012) (appointing F & S as class counsel because they "did substantial work identifying, investigating, and settling Plaintiffs' and the class members' claims"); *Matheson v. T–Bone Restaurant, LLC*, No. 09 Civ. 4212(DAB), 2011 WL 6268216, at *3 (S.D.N.Y. Dec. 13, 2011) (appointing F & S as class counsel based on their "substantial experience prosecuting and settling employment class actions, including wage and hour class actions"); *O'Dell v. AMF Bowling Ctrs., Inc.*, No. 09 Civ. 759(DLC), 2009 WL 6583142, at*2 (S.D.N.Y. Sept. 18, 2009) (appointing F & S as class counsel and finding them to be "experienced and well-qualified employment lawyers and class action lawyers" with "particular expertise in prosecuting and settling wage and hour class actions"); *Salomon v. Adderley Indus ., Inc.*, 847 F.Supp.2d 561 (S.D.N.Y.2012) (granting plaintiffs' motion for collective action certification); *Karic v. Major Automotive Companies, Inc.*, 799 F.Supp.2d 219 (E.D.N.Y.2011) (same).

IV. CLASS NOTICE

***4** 17. The Court approves the Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Settlement Notice"), which is attached as Exhibit B to the Schaffer Declaration, and directs its distribution to the Class.

18. The content of the Settlement Notice fully complies with due process and Fed.R.Civ.P. 23.

19. Pursuant to Fed.R.Civ.P. 23(c)(2)(B), a notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the

> nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed.R.Civ.P. 23(c)(2)(B).

20. The Notice satisfies each of these requirements and adequately puts Class Members on notice of the proposed settlement. *See, e.g., In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R .D. 46, 52 (S.D.N.Y.1993) (class notice "need only describe the terms of the settlement generally").

21. The Notice describes the terms of the settlement, informs the class about the allocation of attorneys' fees and costs, and provides specific information regarding the date, time, and place of the final approval hearing.

V. CLASS ACTION SETTLEMENT PROCEDURE

22. The Court hereby sets the following settlement procedure:

a. Within 10 business days after Class Counsel has delivered to Defendants' Counsel a copy of the Settlement Agreement signed by all Plaintiffs, Defendants shall being to fund the settlement by depositing an "Initial Payment" of $200,000 in a Qualified Settlement Fund maintained and/or controlled by the Claims Administrator (the "Fund").

b. Defendants shall deposit 20 additional "Monthly Payments" of $55,000 into the Fund (totaling $1,100,000), beginning within 30 calendar days following the Initial Payment and continuing on or before the monthly anniversary of the first Monthly Payment for 19 months thereafter;

c. Within 30 days of the date of this Order, Defendants shall provide the Claims Administrator with a list of the names, last known addresses, last known telephone numbers, social security number and dates of employment of all the putative Class Members (the "Class List");

d. The Claims Administrator shall mail the Settlement Notice to Class Members within 30 days of receiving the Class List;

e. Class Members will have 30 days from the date the Settlement Notice is mailed to opt out of the settlement or object to it ("Notice Period");

f. Plaintiffs will file a Motion for Final Approval of Settlement within 15 days of the fairness hearing;

***5** g. The Court will hold a final fairness hearing on *September 10, 2013* at *10AM*, at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, Courtroom 14C;

h. If the Court grants Plaintiffs' Motion for Final Approval of the Settlement, the Court will issue a Final Order and Judgment. If no party appeals the Court's Final Order and Judgment, the "Effective Date" of the settlement will be 30 days after the Court enters its Final Order and Judgment;

i. If rehearing, reconsideration or appellate review is sought, the "Effective Date" shall be after any and all avenues of rehearing, reconsideration or appellate review have been exhausted and no further rehearing, reconsideration or appellate review is permitted, and the time for seeking such review has expire;

j. The Claims Administrator will begin disbursing settlement checks to the Class Members, Class Counsel's attorneys' fees and expenses to Class Counsel, and the Service Awards to the Named Plaintiffs within 30 days of the Effective Date, making additional installment payments every four months thereafter until the total settlement has been paid; and

k. The parties shall abide by all other terms of the Settlement Agreement.

l. Counsel shall jointly notify the Second Circuit of this order and the status of settlement efforts by Friday, May 24, 2013.

It is so ORDERED.

