

2016 WL 3004511

Editor's Note: Additions are indicated by **Text** and deletions by ~~Text~~.

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

AHMED CHHAB, KATHRYN SHRADER, LANCE FELDHUN, MICHAEL RELLE, VINCENT ANTHONY BORELAND, and ADRIANNE BENZION on behalf of themselves and all others similarly situated, Plaintiffs,

v.

DARDEN RESTAURANTS, INC., GMRI, INC., CAPITAL GRILLE HOLDINGS, INC. d/b/a THE CAPITAL GRILLE, and RARE HOSPITALITY INTERNATIONAL, INC., Defendants.

11 Civ. 8345 (NRB)

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Filed 05/20/2016

**PROPOSED 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 PLAINTIFFS' PROPOSED NOTICES OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE**

Hon. Naomi Reice Buchwald, United States District Judge

The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Class Settlement, Provisional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notices of Settlement ("Motion for Preliminary Approval"). Defendants agreed, for settlement purposes only, not to oppose the motion.

**I. Preliminary Approval of Settlement**

1. Based upon the Court's review of Plaintiffs'

Memorandum of Law in Support of their Motion for Preliminary Approval, the Declaration of Joseph A. Fitapelli ("Fitapelli Decl.") and all other papers submitted in connection with Plaintiffs' Motion for Preliminary Approval, the Court grants preliminary approval of the settlement memorialized in the Joint Stipulation of Settlement and Release ("Settlement Agreement") between Plaintiffs Ahmed Chhab, Kathryn Shrader, Lance Feldhun, Michael Rella, Vincent Anthony Boreland, and Adrienne Benzion (collectively "Plaintiffs") and Defendants Darden Restaurants, Inc., GMRI, Inc., Capital Grille Holdings, Inc. d/b/a The Capital Grille, and Rare Hospitality International, Inc. (collectively "Defendants"), attached to the Fitapelli Decl. as Exhibit A, and "so orders" all of its terms.

2. Courts have discretion regarding the approval of a proposed class action settlement. *Flynn v. New York Dolls Gentlemen's Club*, No. 13 CIV. 6530 (PKC) (RLE), 2014 WL 4980380, at \*1 (S.D.N.Y. Oct. 6, 2014) (citing *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998)); see also *Monzon v. 103W77 Partners, LLC*, Nos. 13 Civ. 5951 (AT) et al., 2014 WL 6480557, at \*1 (S.D.N.Y. Oct. 15, 2014). "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." *Gonqueh v. Leros Point to Point, Inc.*, No. 14-CV-5883 (GHW), 2015 U.S. Dist. LEXIS 117166, at \*2-3 (S.D.N.Y. Sept. 2, 2015) (quoting *Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 WL 1832181, at \*1 (S.D.N.Y. Apr. 30, 2013)); see also *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (while exercising its discretion, a court should be mindful of the "strong judicial policy in favor of settlements, particularly in the class action context").

3. Preliminary approval, what Plaintiffs seek here, is the first step in the settlement process. The purpose of preliminary approval is to simply allow notice to be issued to the Class and for class members to either 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. *Flynn*, 2014 WL 4980380, at \*1; see also *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12 CIV. 4216 (WHP) (RLE), 2013 WL 4734818, at \*1 (S.D.N.Y. Sept. 3, 2013).

4. Preliminary approval 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. See, e.g., *Tiro v. Pub.*

*House Invs., LLC*, Nos. 11 Civ. 7679 (CM) *et al.*, 2013 WL 2254551, at \*1 (S.D.N.Y. May 22, 2013). Courts will often grant preliminary settlement approval without requiring a hearing or a court appearance. *Gonqueh*, 2015 U.S. Dist. LEXIS 117166, at \*3; *see also Sukhmandan*, 2013 WL 4734818, at \*1 (granting preliminary approval based on the plaintiffs' memorandum of law, attorney declaration, and exhibits). "The preliminary determination of fairness 'is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness.'" *Long v. HSBC USA Inc.*, No. 14 CIV. 6233 (HBP), 2015 WL 5444651, at \*3 (S.D.N.Y. Sept. 11, 2015) (quoting *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980)).

5. "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." *Gonqueh*, 2015 U.S. Dist. LEXIS 117166, at \*3-4 (quoting *Yuzary*, 2013 WL 1832181, at \*1).

6. The Court concludes that the proposed Settlement Agreement is within the range of possible settlement approval, such that notice to the Class is appropriate.

7. The Court finds that the Settlement Agreement is the result of extensive, arms-length negotiations by counsel well-versed in the prosecution of wage and hour class and collective actions.

## II. Conditional Certification of the Proposed Rule 23 Settlement Class

8. Provisional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed Settlement Agreement, and setting the date and time of the final approval hearing. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 790-92 (3d Cir. 1995) (noting practical purposes of provisionally certifying settlement class).

9. For settlement purposes only, the Court provisionally certifies the following class under Fed. R. Civ. P. 23(e) (the "Class"):

All persons who work or have worked as servers and bartenders, employed at the Capital Grille Restaurants located at: 155 East 42nd Street, New York, New York 10017; 120 West 51st Street, New York, New York 10020; and 120 Broadway, New

York, New York 10271; from November 17, 2005 through September 29, 2015.

10. For settlement purposes only, Plaintiffs meet all of the requirements for class certification under Federal Rule of Civil Procedure 23(a) and (b)(3).

11. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(1) because there are over 400 class members and, thus, joinder is impracticable. *See Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (stating that numerosity is presumed at a level of 40 members).

12. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(2) because Plaintiffs and class members bring nearly identical claims arising from Defendants' alleged uniform violations of the FLSA and NYLL. *See Bravo v. Palm W. Corp.*, No. 14 CIV. 9193 (SN), 2015 WL 5826715, at \*1 (S.D.N.Y. Sept. 30, 2015) ("Plaintiff and class members all bring nearly identical claims arising from Defendants' alleged uniform violations of the FLSA and NYLL for failure to pay appropriate minimum wage, overtime pay and spread-of-hours pay, misappropriating tips, failure to pay for uniform-related expenses, making unlawful deductions, and failing to provide proper annual wage notices and wage statements").

13. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(3) because Plaintiffs' claims arise from the same factual and legal circumstances that form the basis of the class members' claims. Defendants' alleged violations of law were the result of the same company policy and pattern or practice of failing to properly compensate Plaintiffs and class members. Plaintiffs also claim the same injuries as do class members - that Defendants failed to properly pay them in accordance with the FLSA and NYLL. Accordingly, Plaintiffs satisfy the typicality requirement. *See Karic v. Major Auto. Companies, Inc.*, No. 09 Civ. 5708 (ENV) (CPL), 2015 WL 9433847, at \*5 (E.D.N.Y. Dec. 22, 2015) *report and recommendation adopted sub nom. Karic v. The Major Auto. Companies, Inc.*, No. 09 Civ. 5708 (ENV) (CLP), 2016 WL 323673 (E.D.N.Y. Jan. 26, 2016) (Typicality is usually met irrespective of varying fact patterns which underlie individual claims so long as the claims of the class representative are typical of the class members' claims.) (citation omitted).

14. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(4) because Plaintiffs' interests are not antagonistic or at odds with class members' interests. *Id.*; *see also Bravo*, 2015 WL 5826715, at \*3 (finding that the plaintiffs satisfied Fed. R. Civ. P. 23(a)(4) "because there is no evidence that the named Plaintiff's and Class

Members' interests are at odds." In addition, Plaintiffs' Counsel, Fitapelli & Schaffer, LLP ("F&S") and Joseph & Kirschenbaum LLP ("J&K"), meets [Rule 23\(a\)\(4\)](#)'s adequacy requirement. Courts have found F&S to be "experienced and well-qualified employment lawyers and class action lawyers and have particular expertise in prosecuting and settling wage and hour class actions." *Gonqueh*, 2015 U.S. Dist. LEXIS 117166, at \*5 (quoting *Ryan v. Volume Servs. America, Inc.*, No. 652970/2012 (MLS), 2012 N.Y. Misc. LEXIS 932 (N.Y. Sup. Ct. Mar. 7, 2013)); *see also Sukhnandan*, 2013 WL 4734818, at \*1 (listing cases). Court have also found that J&K have extensive experience representing food service workers employees in wage-hour class actions. *See, e.g., Capsolas v. Pasta Res. Inc.*, 10 Civ. 5595 (RLE), 2012 WL 4760910, at \*7 (S.D.N.Y. Oct. 5, 2012; ("Class Counsel [JK] are experienced employment lawyers with good reputations among the employment law bar."); *Ramirez v. Lovin' Oven Catering Suffolk, Inc.*, 11 Civ. 0520 (JLC), 2012 WL 651640, at \*3 (S.D.N.Y. Feb. 24, 2012) (finding that JK "have significant experience prosecuting and settling wage and hour class actions, and are well-versed in both wage and hour and class action law"); *Sand v. Greenberg*, 08 Civ. 7840 (PAC), 2011 WL 1338196, at \*2 (S.D.N.Y. Mar. 22, 2011) (noting JK's "record of competent and successful prosecution of large wage and hour class actions").

15. Plaintiffs also satisfy [Federal Rule of Civil Procedure 23\(b\)\(3\)](#). Plaintiffs' and class members' common factual allegations and legal theory - that Defendants violated federal and state wage and hour law - predominate over any variations among class members. *See Tiro*, 288 F.R.D. at 281 (finding the predominance standard met where the overarching issue was "whether [the] [d]efendants failed to pay their employees at each restaurant in accordance with the law"). In addition, "the class action device is superior to other methods available for a fair and efficient adjudication of the controversy" because the class device will achieve economies of scale, conserve judicial resources, preserve public confidence in the integrity of the judicial system by avoiding the waste and delay of repetitive proceedings, and prevent inconsistent adjudications of similar claims. *Gonqueh*, 2015 U.S. Dist. LEXIS 117166, at \*6-7 (quoting *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968)); *see also Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 617 (S.D.N.Y. 2012); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 161, 164 (S.D.N.Y. 2008).

### III. Appointment of Plaintiffs' Counsel as Class Counsel

16. For settlement purposes only, the Court appoints F&S

and J&K as Class Counsel because they meet all of the requirements of [Federal Rule of Civil Procedure 23\(g\)](#).

17. Class Counsel did substantial work identifying, investigating, litigating, and settling Plaintiffs' and the Class Members' claims, have years of experience litigating and settling wage and hour class and collective actions, and demonstrate an expertise in wage and hour and class action law.

18. The work that Class Counsel has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.

### IV. Notices

19. The Court approves the proposed Notices of Proposed Class and Collective Action Settlement ("Class Notices"), which are attached as Exhibit B and C to the Fitapelli Decl., and directs its distribution to the Class. The content of the Class Notice fully complies with due process and [Fed. R. Civ. P. 23](#).

20. 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\(c\)\(2\)\(B\)](#).

21. The Class Notice satisfies each of these requirements and adequately puts class members on notice of the proposed settlement. *Girault*, 2012 WL 2458172, at \*3. Courts in this district have approved class notices that are very similar to those proposed by Plaintiffs. *See, e.g., id.* at \*3; *Lovaglio*, 2012 WL 1890381, at \*3; *Matheson*, 2011 WL 6268216, at \*6-7; *O'Dell*, 2009 WL 6583142, at \*3.

**VI. CLASS ACTION SETTLEMENT PROCEDURE**

1. The Court hereby adopts the following settlement procedure:

a. Within 30 days of the entry of this Order, Defendants will provide class counsel with a list in electronic form of the: (1) names, (2) dates of employment; (3) last known addresses, and (4) social security number for all putative class members (the "Class List");

b. The claims administrator shall mail the Class Notice to all class members within 60 days of the entry of this Order;

c. Class members will have 60 days after the date the Class Notice is mailed to return a claim form, opt out of or object to the settlement;

d. Plaintiffs will file a Motion for Final Approval at least 14 days prior to the fairness hearing;

e. The Court will hold a final fairness hearing on October 20, 2016 at 11 a.m., at the United States District Court for the Southern District of New

York, 500 Pearl Street, New York, New York, Courtroom 21A;

f. Plaintiffs and all class members are enjoined from filing or prosecuting any claims, suits or administrative proceedings (including filing claims with the United States and/or New York State Departments of Labor) regarding claims released by the parties' Settlement Agreement unless and until such class members have filed valid requests to be excluded from the settlement; and

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

It is so ORDERED this 19th day of May, 2016.

**All Citations**

--- F.Supp.3d ----, 2016 WL 3004511