2016 WL 3099372
United States District Court,
S.D. New York.

EDUARDO ILLOLDI and JACLYN SILVER, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
KOI NY LLC d/b/a KOI RESTAURANT and KOI NY DOWNTOWN LLC d/b/a KOI SOHO, Defendants.

Case No: 1:15-cv-6838 (VEC)
|
Filed 05/31/2016

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

Hon. Valerie E. Caproni United States District Judge

The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Class Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice 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 Brian S. Schaffer ("Schaffer Decl."), and all other papers submitted in connection with Plaintiffs' Preliminary Approval Motion, the Court grants preliminary approval of the settlement memorialized in the Joint Stipulation of Settlement and Release ("Settlement Agreement") between Plaintiffs Eduardo Illoldi and Jaclyn Silver ("Plaintiffs") and Defendants Koi NY LLC and Koi NY Downtown LLC ("Defendants"), attached to the Schaffer Decl. as **Exhibit A,** and "so orders" all of its terms.

2. Courts have discretion regarding the approval of a proposed class action settlement. *See, e.g.*, *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. 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." *Gonqueh v. Leros Point to Point, Inc.*, No. 14-CV-5883 (GHW), 2015 WL 9256932, at *1 (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., Chhab et al. v. Darden Restaurants, Inc. et al.*, No. 11 Civ. 8345 (NRB), 2016 WL 3004511, at *1 (S.D.N.Y. May 20, 2016); *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 WL 9256932, at *1; *see also Sukhnandan*, 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).

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 2015 WL 9256932, at *1 (quoting *Yuzary*, 2013 WL 1832181, at *1).

6. 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. *See, e.g., Hadel v. Gaucho, LLC*, No. 15 Civ. 3706 (RLE), 2016 WL 1060324, at *3 (S.D.N.Y. March 14, 2016) (encouraging early settlements where warranted); *Bravo v. Palm W. Corp.*, No. 14 CIV. 9193 (SN), 2015 WL 5826715, at *2 (S.D.N.Y. Sept. 30, 2015); *Long*, 2015 WL 5444651 (granting preliminary approval of a pre-litigation settlement); *Sukhnandan*, 2013 WL 4734818, *1 (stating that early settlements should be encouraged when warranted); *Yuzary*, 2013 WL 1832181, at *2 (endorsing early settlement of wage and hour class action); *Castagna v. Madison Square Garden, L.P.*, No. 09 Civ. 10211 (LTS)(HP), 2011 WL 2208614, at *10 (S.D.N.Y. Jun. 7, 2011) (commending the plaintiffs' attorneys for negotiating early settlement).

7. The Court concludes that the proposed Settlement Agreement falls within the range of reasonableness and, therefore, meets the requirements for preliminary approval such that notice to the Class Members is appropriate.

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

9. The Court grants Plaintiffs' Preliminary Approval Motion.

II. Conditional Certification of the Proposed Rule 23 Settlement Class

10. Conditional 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).

11. 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, bussers, runners, bartenders, barbacks, and all other employees who worked similar positions and were paid at the tip credit minimum wage at Koi Bryant Park and/or Koi SoHo between August 28, 2009 and April 7, 2016.

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

13. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(1) because there are 390 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).

14. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(2) because Plaintiffs 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 wages and overtime compensation, for the misappropriation of tips, and for failure to provide proper annual wage notices and accurate wage statements. *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.").

15. 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, pattern, and/or practice of failing to properly compensate Plaintiffs and Class Members 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), 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, 2016 WL 323673 (E.D.N.Y. Jan. 26, 2016) (finding typicality "[i]rrespective of any differences in the amounts of overtime, wages or maintenance allowances owed"); *Bravo*, 2015 WL 5826715, at *3 (finding typicality where

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plaintiffs claim that defendants "failed to properly pay them in accordance with the **FLSA** and NYLL); *Long*, 2015 WL 5444651, at * 7.

16. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(4) because Plaintiffs' interests are not antagonistic or at odds with Class Members' interests. *See Hadel*, 2016 WL 1060324, at *3 ("Plaintiff satisfies [Rule] 23(a)(4) because there is no evidence that the named [p]laintiff's and [c]lass [m]embers' interests are at odds."); *Karic*, 2015 9433847, at *6; *Bravo*, 2015 WL 5826715, at *3.

17. In addition, Plaintiffs' Counsel, Fitapelli & Schaffer, LLP ("F&S"), 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." *Hadel*, 2016 WL 1060324, at *3; *see also Bravo*, 2015 WL 5826715, at *3; *Gonqueh*, 2015 WL 9256932, at *3.

18. Plaintiffs also satisfy Federal Rule of Civil Procedure 23(b)(3). Plaintiffs' and Class Members' common factual allegations and legal theory - that Defendants violated the **FLSA** and NYLL - predominate over any variations among Class Members. *See Hadel*, 2016 WL 1060324, at *3 ("Plaintiffs' and class members' common factual allegations and legal theory - that [d]efendants violated federal and state wage and hour law - predominate over any variations among class members."); *Bravo*, 2015 WL 5826715, at *3*;* *Gonqueh*, 2015 WL 9256932, at *3; *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. *See, e.g.*, *Hadel*, 2016 WL 1060324, at *3; *Karic*, 2015 WL 9433847, at *7; *Bravo*, 2015 WL 5826715, at *3; *Gonqueh*, 2015 WL 9256932, at *3; *Sukhnandan*, 2013 WL 4734818, at *3.

III. Appointment of Plaintiffs' Counsel as Class Counsel

19. For settlement purposes only, the Court appoints F&S as Class Counsel because they meet all of the requirements of Federal Rule of Civil Procedure 23(g).

20. F&S has a reputation for its willingness to commit the resources required to take on large companies in litigation-intensive lawsuits. *See Hadel*, 2016 WL 1060324 at *3; *Bravo*, 2015 WL 5826715, at *4. F&S did substantial work identifying, investigating, prosecuting and settling the claims, has substantial experience prosecuting and settling wage and hour class actions, is well-versed in wage and hour and class action law, and is well-qualified to represent the interests of the Class. *See, e.g., Hadel*, 2016 WL 1060324, at *3-*4; *Karic*, 2015 WL 9433847, at *7; *Bravo*, 2015 WL 5826715, at *4-*5; *Gonqueh*, 2015 WL 9256932, at *3.

21. F&S is comprised of experienced employment attorneys with a very good reputation among the employment law bar and have years of litigation experience in wage and hour matters in state and federal courts. *See, e.g., Hadel*, 2016 WL 1060324, at *4. As such, Courts have found F&S to be adequate class counsel in wage and hour class and collective actions. *See, e.g., Hadel*, 2016 WL 1060324, at *3-*4; *Karic*, 2015 WL 9433847, at *7; *Bravo*, 2015 WL 5826715, at *4-*5; *Gonqueh*, 2015 WL 9256932, at *3.

22. Plaintiffs' Counsel's work in litigating and settling this case demonstrates their skill and commitment to representing the class's interests.

IV. Notice

23. The Court approves the proposed Notice of Class Action Lawsuit Settlement and Fairness Hearing ("Proposed Class Notice") attached as **Exhibit B** to the Schaffer Decl., and directs its distribution to the Class. The Class Notice fully complies with due process and Fed. R. Civ. P. 23 except that the Class Notice must be amended in the follow respect: paragraphs 9 and 10 of the Class Notice must specify the date (day, month, and year) by which Class members must postmark their letters in order to opt-out of the Settlement instead of instructing Class Members to postmark their letters "no later than 30 days from mailing."

24. 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

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> 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).

25. The Class Notices satisfies each of these requirements and adequately puts Class Members on notice of the proposed settlement. *See, e.g., Karic*, 2015 WL 1745037, at *11 ("Notice is adequate if it fairly apprises the prospective members ... of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings."). Courts in this district have approved class notices that are very similar to those proposed by Plaintiffs. *See, e.g., Hadel*, 2016 WL 1060324 at * 5; *Monzon v. 103W77 Partners, LLC*, Nos. 13 Civ. 5951 (AT) *et al.*, 2014 WL 6480557, at *5 (S.D.N.Y. Oct. 15, 2014) (collecting cases).

V. CLASS ACTION SETTLEMENT PROCEDURE

1. The Court hereby adopts the following settlement procedure:

a. Within 15 days of this Order, Defendants will provide Class Counsel and the claims administrator with a list in electronic form of the: (1) names, (2) position(s), (3) last known addresses, (4) location(s) worked, (5) dates of employment and (6) 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 40 days of the entry of this Order;

c. Class Members will have 30 days from the date the Class Notice is mailed to opt out or object to the settlement;

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

e. The Court will hold a final fairness hearing on October 6, 2016 at 11 a. m., at the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York, 10007, Courtroom 443.

It is so ORDERED this 31st day of May, 2016.

All Citations

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