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

Robert O'DELL, Francisco Diaz, Anabel Diaz,
and Alicia Perez, on behalf of themselves
and all others similarly situated, Plaintiffs,

v.

AMF BOWLING CENTERS, INC., Defendant.

No. 09 CV 759(DLC). | Sept. 18, 2009.

Opinion

**ORDER GRANTING PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT,
CONDITIONAL CERTIFICATION OF THE
SETTLEMENT CLASS, APPOINTMENT OF
OUTTEN & GOLDEN LLP AND FITAPELLI
& SCHAFFER, LLP AS CLASS COUNSEL,
AND APPROVAL OF PLAINTIFFS'
PROPOSED NOTICE OF SETTLEMENT
AND CLASS ACTION PROCEDURE**

[DENISE COTE](#), District Judge.

*1 The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Settlement, Conditional Certification of the Settlement Class, Appointment of Outten & Golden LLP and Fitapelli & Schaffer, LLP as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement and Class Action Settlement Procedure ("Motion for Preliminary Approval") (Docket No. ____).

I. Preliminary Approval of Settlement

1. Based upon the Court's review of the Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlement, the Declaration of Justin M. Swartz ("Swartz Declaration"), 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 Settlement and

Release Agreement ("Settlement Agreement"), attached to the Swartz Declaration as Exhibit C.

2. 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).

3. The Court finds that the Settlement Agreement is the result of extensive, arm's length negotiations by counsel well-versed in the prosecution of wage and hour class and collective actions. The assistance of a well-known employment mediator, Michael D. Young, reinforces that the Settlement Agreement is non-collusive.

II. Conditional Certification of the Proposed Rule 23 Settlement Class

4. The Court provisionally certifies the following class under [Fed.R.Civ.P. 23\(e\)](#), for settlement purposes ("Settlement Class"):

- (A) all persons who are or were employed by AMF and have worked at least 10 months as Lane Captains, Lane Servers, Lane Attendants, Lounge Attendants, Food & Beverage Attendants, Runners and/or Bartenders at Traditional Centers between January 27, 2003 and June 12, 2009, and
- (B) all persons who have worked at least 1 month as Lane Captains, Lane Servers, Lane Attendants, Lounge Attendants, Food & Beverage Attendants, Runners and/or Bartenders at 300 Centers between January 27, 2003 and June 12, 2009.

5. Plaintiffs meet all of the requirements for class certification under [Fed.R.Civ.P. 23\(a\) and \(b\)\(3\)](#).

6. Plaintiffs satisfy [Fed.R.Civ.P. 23\(a\)\(1\)](#) because there are approximately 1604 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.")

7. Plaintiffs satisfy [Fed.R.Civ.P. 23\(a\)\(2\)](#) because Plaintiffs and the class members share common issues of fact and law, including whether Defendants misappropriated mandatory gratuities and voluntary tips by distributing a portion of them to non-tip eligible employees. *See Reyes v. Buddha-Bar NYC*, No. 08 Civ. 2494, 2009 U.S. Dist. LEXIS 45277,

at *6 (S.D.N.Y. May 28, 2009); *Mohney v. Shelly's Prime Steak Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2009 U.S. Dist. LEXIS 27899, at * *10–11 (S.D.N.Y. Mar. 31, 2008); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156 (S.D.N.Y.2008).

*2 8. Plaintiffs satisfy Fed.R.Civ.P. 23(a)(3) because Plaintiffs' claims arise from the same factual and legal circumstances that form the bases of the class members' claims. See *Buddha-Bar NYC*, 2009 U.S. Dist. LEXIS 45277, at *6; *Mohney*, 2009 U.S. Dist. LEXIS 27899, at * *10–11.

9. Plaintiffs satisfy Fed.R.Civ.P. 23(a)(4) because Plaintiffs' interests are not antagonistic or at odds with class members, see *Toure v. Cent. Parking Sys.*, No. 05 Civ. 5237, 2007 U.S. Dist. LEXIS 74056, at * *18–19 (S.D.N.Y. Sept. 28, 2007), and because Plaintiffs' counsel “have an established record of competent and successful prosecution of large wage and hour class actions, and the attorneys working on the case are likewise competent and experienced in the area.” See *Damassia*, 250 F.R.D. at 158.

10. Plaintiffs also satisfy Rule 23(b)(3). Common factual allegations and a common legal theory predominate over any factual or legal variations among class members. See *Buddha-Bar NYC*, 2009 U.S. Dist. LEXIS 45277, at * *7–8; *Mohney*, 2009 U.S. Dist. LEXIS 27899, at *12. 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 *Buddha-Bar NYC*, 2009 U.S. Dist. LEXIS 45277, at * *7–8; *Mohney*, 2009 U.S. Dist. LEXIS 27899, at *12; *Damassia*, 250 F.R.D. at 161, 164.

III. Appointment of Plaintiffs' Counsel as Class Counsel

11. The Court appoints Outten & Golden LLP and Fitapelli & Schaffer, LLP (“Plaintiffs' Counsel”) as Class Counsel because they meet all of the requirements of Fed.R.Civ.P. 23(g). See *Damassia*, 250 F.R.D. at 165 (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).

12. Plaintiffs' Counsel did substantial work identifying, investigating, and settling Plaintiffs' and the class members' claims.

13. Plaintiffs' Counsel are experienced and well-qualified employment lawyers and class action lawyers and have particular expertise in prosecuting and settling wage and hour class actions. See, e.g., *Buddha-Bar NYC*, 2009 U.S. Dist. LEXIS 45277, at * *10–11; *Mohney*, 2009 U.S. Dist. LEXIS 27899, at * *14–16.; *Damassia*, 250 F.R.D. at 165 (appointing Outten & Golden as class counsel on the basis of its “experience[] in handling wage and hour class actions and ... knowledge of the applicable law”). Courts have repeatedly found Outten & Golden LLP to be adequate class counsel in employment law class actions.¹ The work that Plaintiffs' Counsel has performed both in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests.

IV. Class Notice

*3 14. The Court approves the Proposed Notice of Settlement of Class Action Lawsuit and Fairness Hearing (“Notice”), which is attached to Plaintiffs' Sept. 16, 2009 letter, and directs its distribution to the Class.

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

16. 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).

17. 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. 57, 60 (S.D.N.Y.1993) (class notice “need only describe the terms of the settlement generally”).

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

V. Class Action Settlement Procedure

19. The Court hereby sets the following settlement procedure:

a. The Settlement Administrator shall mail the Notice to Class Members within 5 days after the Court grants preliminary approval of the settlement;

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

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

d. The Court will hold a final fairness hearing on November 6, 2009 at 10:30 am at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, Courtroom 11B;

e. 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;

f. If a party appeals the Court's Final Order and Judgment, the “Effective Date” of the settlement shall be the day after all appeals are finally resolved;

g. The Settlement Administrator will disburse the settlement checks to the Class Members, Class Counsel's attorneys' fees and expenses to Class Counsel, and the Service Awards to Named Plaintiffs within 5 days of the Effective Date; and

*4 h. The parties shall abide by all other terms of the Settlement Agreement.

It is so ORDERED.

ORDER

For the reasons stated on the record at the December 4, 2009 conference with the Court, it is hereby

ORDERED that the proposed class is certified for settlement purposes under [Rule 23\(e\), Fed.R.Civ.P.](#)

IT IS FURTHER ORDERED that the plaintiffs' November 19, 2009 motion for final approval of the class action settlement is granted; and the settlement set forth in the joint stipulation of settlement and release executed on August 27 and 28, 2009 is approved under [Rule 23, Fed.R.Civ.P.](#)

IT IS FURTHER ORDERED that the plaintiffs' November 19, 2009 motion for approval of attorneys' fees and reimbursement of expenses is granted for the amounts of \$172,000 in attorneys' fees and \$7,070 in expenses to the Outten & Golden LLP firm.

IT IS FURTHER ORDERED that the plaintiffs' November 19, 2009 motion for service payments is granted for the amounts of \$5,000 to named plaintiff Robert O'Dell, and \$2,500 each to named plaintiffs Francisco Diaz, Anabel Diaz, and Alicia Perez. These amounts shall be paid from the settlement fund.

IT IS FURTHER ORDERED that the Clerk of Court shall close the case.

SO ORDERED.

Footnotes

1 *See, e.g., Westerfield v. Wash. Mut. Bank*, No. 06 Civ. 2817, 2009 U.S. Dist. LEXIS 54553, at * 9–10 (S.D.N.Y. June 26, 2009); *Buddha-Bar NYC*, 2009 U.S. Dist. LEXIS 45277, at * 10–11; *Mohney*, 2009 U.S. Dist. LEXIS 27899, at * 14–16.; [Damassia](#), 250 F.R.D. at 165 (appointing Outten & Golden as class counsel on the basis of its “experience[] in handling wage and hour class actions and ... knowledge of the applicable law”); *Stefaniak v. HSBC Bank USA, N.A.*, No. 05 Civ. 720, 2008 U.S. Dist. LEXIS 53872, at *8 (W.D.N.Y. June 28, 2008) (Outten & Golden “are experienced in prosecuting and settling employment-based class and collective actions, including wage and hour matters,” “possess the experience and ability to represent effectively the class's interests,” and “[have] adequately represented the class in this action.”) (internal brackets and citation omitted); *Gilliam v. Addicts Rehab. Ctr. Fund*,

No. 05 Civ. 3452, 2008 U.S. Dist. LEXIS 23016, at *6 (S.D.N.Y. Mar. 24, 2008) (“[Outten & Golden] ha[s] substantial experience prosecuting class action cases involving wage and hour claims”); *Torres v. Gristede's Operating Corp.*, 04 Civ. 3316, 2006 U.S. Dist. LEXIS 74039, at *49 (“[Outten & Golden] is qualified, experienced, and generally able to conduct the [class wage and hour] litigation.”) (internal quotations omitted); *Rosenburg v. I.B.M.*, No. CV 06–00430, 2007 U.S. Dist. LEXIS 53138, at * *5–6 (N.D.Cal. July 12, 2007) (appointing Outten & Golden as class counsel in wage-and-hour class action); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 87 (S.D.N.Y.2001) (Outten & Golden is “experienced and well-qualified in the fields of labor law and class litigation and, in particular, wage-and-hour class litigation”).

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