

2011 WL 6402303

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

Ian MATHESON and Sean Gallagher,
on behalf of themselves and all
others similarly situated, Plaintiffs,

v.

T-BONE RESTAURANT, LLC a/k/a Strip
House New York; Peter H. Glazier; Penny
Glazier; and Mathew Glazier, Defendants.

No. 09 Civ. 4214(DAB). | Sept. 13, 2011.

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 THE PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION PROCEDURE

DEBORAH A. BATTS, 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 Plaintiffs' Counsel as Class Counsel, and Approval of the Proposed Notice of Settlement and Class Action Settlement Procedure ("Motion for Preliminary Approval") (Docket No. 35).

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, the Declaration of Justin M. Swartz, the Supplemental Declaration of Justin M. Swartz ("Supplemental 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 Stipulation of Settlement and Release ("Settlement Agreement"), attached to the Supplemental Swartz Declaration as Exhibit A.

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); *Danieli v. IBM Corp.*, No. 08 Civ. 3688, 2009 WL 6583144, at *4 (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").

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.

4. The assistance of an experienced mediator, Carol Wittenberg, reinforces that the Settlement Agreement is non-collusive. *Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, No. 06 Civ. 4270, 2008 WL 7863650, at *1 (S.D.N.Y. Dec. 16, 2008) (granting preliminary approval to settlement that resulted from mediation overseen by Carol Wittenberg).

II. Conditional Certification of the Proposed Rule 23 Settlement Class

5. The Court provisionally certifies the following class under [Federal Rule of Civil Procedure 23\(e\)](#), for settlement purposes ("Settlement Class"):

All individuals who work or worked at the Strip House New York restaurant as tipped hourly service workers from April 29, 2003 through the date of this Order.

6. Plaintiffs meet all of the requirements for class certification under [Federal Rule of Civil Procedure 23\(a\) and \(b\) \(3\)](#).

7. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(1\)](#) because there are approximately 186 putative 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.")

8. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(2\)](#) because Plaintiffs and Class Members share common issues of fact and law, including whether Defendants failed to pay proper overtime wages, misappropriated tips by unlawfully distributing a portion of tips to tip-ineligible employees and to the house, improperly took a tip credit, failed to pay call-in pay, and failed to reimburse workers for uniform-related

expenses. See *deMunecas v. Bold Food, LLC*, No. 09 Civ. 440, 2010 WL 2399345, at *1 (S.D.N.Y. Apr. 19, 2010); *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713, 2010 WL 2399328, at *2; *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811, 2009 WL 6583143, at *1 (S.D.N.Y. Sept.22, 2009); *Mohney*, 2009 WL 5851465, at *1 (S.D.N.Y. Mar.31, 2009); *O'Dell v. AMF Bowling Ctrs., Inc.*, No. 09 Civ. 759, 2009 WL 6583142, at *1 (S.D.N.Y. Sept. 18, 2009); *Reyes v. Buddha-Bar NYC*, No. 08 Civ. 02494, 2009 WL 5841177, at *1 (S.D.N.Y. May 28, 2009).

*2 9. These alleged wage and hour violations—involving common operative facts stemming from corporate policies that affected the class members in the same way—are sufficient to meet Rule 23(a)'s commonality factor. See *deMunecas*, 2010 WL 2399345, at *1; *McMahon*, 2010 WL 2399328, at *2; *Prasker*, 2009 WL 6583143, at *1; *O'Dell*, 2009 WL 6583142, at *1; *Reyes*, 2009 WL 5841177, at *3; *Mohney*, 2009 WL 5851465, at *4.

10. Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(4) because there is no evidence that the named Plaintiffs' and Class Members' interests are at odds. See *deMunecas*, 2010 WL 2399345, at *2; *McMahon*, 2010 WL 2399328, at *2; *Reyes*, 2009 WL 5841177, at *3. “[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.” *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y.1998)) (internal quotation marks omitted).

11. Plaintiffs' interests are not antagonistic or at odds with the interests of the class members. See *Toure v. Cent. Parking Sys.*, No. 05 Civ. 5237, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007). 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.” *O'Dell*, 2009 WL 6583142, at *2.

12. Plaintiffs also satisfy Rule 23(b)(3). Common factual allegations of failure to pay proper overtime wages, misappropriation of tips, unlawful distribution of tips to tip-ineligible employees, improperly taking a tip credit, failure to pay call-in pay, and failure to reimburse workers for uniform-related expenses predominate over any factual or legal variations among class members. See *deMunecas*, 2010 WL 2399345, at *2; *McMahon*, 2010 WL 2399328, at *2; *Prasker*, 2009 WL 6583143, at *2; *Reyes*, 2009 WL 5841177, at *3. 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 like the restaurant workers here who lack the resources to bring their claims individually. See *deMunecas*, 2010 WL 2399345, at *2; *McMahon*, 2010 WL 2399328, at *3; *Reyes*, 2009 WL 5841177, at *3.

III. Appointment of Plaintiffs' Counsel as Class Counsel

13. The Court appoints Outten & Golden LLP (“O & G”) and Fitapelli & Schaffer, LLP (“Fitapelli & Schaffer”) as Class Counsel because they meet 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).

*3 14. O & G and Fitapelli & Schaffer did substantial work identifying, investigating, and settling Plaintiffs' and Class Members' claims.

15. O & G and Fitapelli & Schaffer lawyers 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 in class action law. See, e.g., *Westerfield v. Wash. Mut. Bank*, No. 06 Civ. 2817, 2009 WL 6490084, at *3 (E.D.N.Y. June 26, 2009) (“O & G's lawyers 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”); *O'Dell*, 2009 WL 6583142, at *2 (“[Outten & Golden and Fitapelli & Schaffer] are experienced and well-qualified employment lawyers and class action lawyers and have particular expertise in prosecuting and settling wage and hour class actions.”). Courts have repeatedly found O & G to be adequate class counsel in employment law class actions.¹

16. The work that O & G and Fitapelli & Schaffer have performed both in litigating and settling this case demonstrates their commitment to the class and to representing the Class's interests.

IV. Class Notice

17. The Court approves the Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing (“Proposed

Notice”), which is attached as Exhibit A to the Settlement Agreement, and directs its distribution to the Class.

18. The content of the Notice fully complies with due process and [Federal Rule of Civil Procedure 23](#).

19. Pursuant to [Federal Rule of Civil Procedure 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 Proposed 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”).

21. The Proposed 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

22. The Court hereby sets the following settlement procedure;

*4 a. Within 30 days of the date the parties execute the Settlement Agreement, Defendants shall provide the Claims Administrator with a list, in electronic form, of the names, last known addresses, telephone numbers, social security numbers, and dates of employment of all Class Members (the “Class List”);

b. The Claims Administrator shall mail the Notice to Class Members within 15 days of the date of this Order;

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

d. Plaintiffs will file a Motion for Judgment and Final Approval no later than 15 days before the fairness hearing;

e. The Court will hold a final fairness hearing on *December 13, 2011* at 11:30 A.M. at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, Courtroom 24B;

f. 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 31 days after the Court enters its Order Granting Final Approval or 15 days after Defendants' last payment is due under the Settlement Agreement, whichever is later;

g. If rehearing, reconsideration or appellate review is sought, the “Effective Date” shall be the day 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 expired, or 15 days after Defendants' last payment is due under the Settlement Agreement, whichever is later;

h. Within 15 business days after the date of this Order, T-Bone Restaurant LLC (“Corporate Defendant”) will provide Plaintiffs with a valid and enforceable Confession of Judgment for \$495,000, less any amounts Defendants have already paid pursuant to the Settlement Agreement. If Defendants fail to make timely payments under the schedule set forth in the Settlement Agreement, Plaintiffs may enforce the Confession of Judgment against Corporate Defendant, and Corporate Defendant must pay for all Plaintiffs' attorneys' fees in connection with such enforcement, provided that Corporate Defendant is first provided with notice of default and are given 30 days within which to cure such default.

i. The Claims Administrator will disburse settlement checks to the Class Members, Class Counsel's attorneys' fees and expenses to Class Counsel, and the Service Awards to Named Plaintiffs within 30 days of

Defendants' final payment in full under the payment schedule set forth in the Settlement Agreement.

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

It is so ORDERED.

Footnotes

- 1 See *deMunecas*, 2010 WL 2399345, at *2; *McMahon*, 2010 WL 2399328, at *6; *Clark*, 2010 WL 1948198, at *8; *Danieli v. IBM*, 2010 WL 2399329, at *2; *Prasker*, 2009 WL 6583143, at *2; *O'Dell*, 2009 WL 6583142, at *2 (S.D.N.Y. Sept.18, 2009); *Reyes*, 2009 WL 5841177, at *4; *Mohney*, 2009 WL 5851465, at *5; *Gilliam v. Addicts Rehab. Ctr. Fund*, No. 06 Civ. 2817, 2008 WL 782596, at *2 (S.D.N.Y. Mar. 24, 2008); *Stefaniak v. HSBC Bank USA*, No. 05 Civ. 720, 2008 WL 7630102, at *3 (W.D.N.Y. June 28, 2008); *Torres*, 2006 WL 2819730, at *15; *Rosenburg v. I.B.M.*, 2007 WL 128232, at *4 (N.D.Cal. Jan.11, 2007); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 87. Courts have also recognized O & G's experience in other areas of employment law. See, e.g., *Jaffe v. Morgan Stanley & Co.*, 2008 WL 346417, at *8 (N.D.Cal. Feb.7, 2008) (employment discrimination class action); *Amochaev v. Citigroup Global Markets, Inc.*, 2007 WL 484778 at *1 (N.D.Cal. February 12, 2007) (employment discrimination class action).

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