

Monzon v. 103W77 Partners, LLC

United States District Court for the Southern District of New York

October 15, 2014, Decided; October 15, 2014, Filed

13 Civ. 5951 (AT); 14 Civ. 530 (AT)

Reporter

2014 U.S. Dist. LEXIS 147093

ROLDAN MONZON, on behalf of himself and all others similarly situated, Plaintiff, -against- 103W77 PARTNERS, LLC, SMOKIN' JFRASER INC., and JOHN FRASER, Defendants. ALBINO GALVEZ and JUAN HERNANDEZ, on behalf of themselves and all others similarly situated, Plaintiffs, -against- 103W77 PARTNERS, LLC, SMOKIN' JFRASER INC., and JOHN FRASER, Defendants.

Core Terms

settlement, notice, class member, Plaintiffs', class action, preliminary approval, settling, hour class, appointing, experienced, prosecuting, days, certification, purposes, Courts, tipped, proposed settlement, early settlement, fail to pay, requirements

Counsel: [*1] For Roldan Monzon On behalf of himself and all others similarly situated, Plaintiff (1:13-cv-05951-AT): Brian Scott Schaffer, Eric Joshua Gitig, Fitapelli & Schaffer, LLP, New York, NY.

Raul Quinde, Plaintiff (1:13-cv-05951-AT), Pro se.

Flavio Andrade, Plaintiff (1:13-cv-05951-AT), Pro se.

Jonathon Liska, Plaintiff (1:13-cv-05951-AT), Pro se.

For 103W77 Partners, LLC, Smokin' JFraser Inc, John Fraser, Defendants (1:13-cv-05951-AT): Carolyn Diane Richmond, LEAD ATTORNEY,

Fox Rothschild, LLP (NYC), New York, NY; Alexander Wilde Leonard, Fox Rothschild, LLP (NYC), New York, NY; James M. Lemonedes, Fox Rothschild, Attorneys at Law (NYC), New York, NY.

For Albino Galvez on behalf of themselves and all others similarly situated, Juan Hernandez on behalf of themselves and all others similarly situated, Plaintiffs (1:14-cv-00530-AT): Andrew Paul Kimble, Valli Kane & Vagnini, Garden City, NY; Brian Scott Schaffer, Eric Joshua Gitig, Fitapelli & Schaffer, LLP, New York, NY.

For 103W77 Partners LLC, Smokin JFraser Inc., John Fraser, Defendants (1:14-cv-00530-AT): Alexander Wilde Leonard, Carolyn Diane Richmond, Fox Rothschild, LLP (NYC), New York, NY; James M. Lemonedes, Fox Rothschild, Attorneys at [*2] Law (NYC), New York, NY.

Judges: ANALISA TORRES, United States District Judge.

Opinion by: ANALISA TORRES

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 PLAINTIFFS' PROPOSED NOTICE OF SETTLEMENT AND CLASS ACTION SETTLEMENT PROCEDURE

The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of the Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement and Class Action Settlement Procedure ("Motion for Preliminary Approval"). Defendants have 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' Motion for Preliminary Approval, the Court grants preliminary approval of the settlement memorialized in the Settlement Agreement and Release [*3] ("Settlement Agreement") between named Plaintiffs Roldan Monzon, Albino Galvez, Juan Hernandez, Opt-in Plaintiffs Raul Quinde, Flavio Andrade, Jonathon Liska (collectively, "Plaintiffs"), and Defendants 103W77 Partners, LLC, Smokin' JFraser Inc., and John Fraser (collectively, "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. 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 U.S. Dist. LEXIS 61643, 2013 WL 1832181, at *1 (S.D.N.Y. Apr. 30, 2013) (citation omitted); Hernandez v. Anjost Corp., No. 11 Civ. 1531 (AT), 2013 U.S. Dist. LEXIS 116048, 2013 WL 4145952, at *1 (S.D.N.Y. Aug. 14, 2013).

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." Anjost, 2013 U.S. Dist. LEXIS 116048, 2013 WL 4145952, at *2 (citation omitted).

4. Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal [*4] presentation by the settling parties. Tiro v. Pub. House Invs., LLC, Nos. 11 Civ. 7679 (CM) et al., 2013 U.S. Dist. LEXIS 72826, 2013 WL 2254551, at *1 (S.D.N.Y. May 22, 2013); Clark v. Ecolab, Inc., Nos. 07 Civ. 8623 (PAC) et al., 2009 U.S. Dist. LEXIS 108736, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 17, 2009). Courts often grant preliminary settlement approval without requiring a hearing or a court appearance. Sukhnandan v. Royal Health Care of Long Island LLC, No. 12 Civ. 4216 (RLE), 2013 U.S. Dist. LEXIS 126004, 2013 WL 4734818, at *1 (S.D.N.Y. Sept. 3, 2013) (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). "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 U.S. Dist. LEXIS 61643, 2013 WL 1832181, at *1 (internal quotation marks and citation omitted).

5. 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., 2012 U.S.

[Dist. LEXIS 165771, \[WL\] at *2](#) (endorsing early settlement of wage and hour class action); [Sukhnandan, 2013 U.S. Dist. LEXIS 126004, 2013 WL 4734818, *1](#) (stating that early settlements should be encouraged when warranted); [Castagna v. Madison Square Garden, L.P., No. 09 Civ. 10211 \(LTS\)\(HP\), 2011 U.S. Dist. LEXIS 64218, 2011 WL 2208614, at *10 \(S.D.N.Y. Jun. 7, 2011\)](#) (commending plaintiffs' attorneys for [*5] negotiating early settlement); [Diaz v. E. Locating Serv. Inc., No. 10 Civ. 4082 \(JCF\), 2010 U.S. Dist. LEXIS 139136, 2010 WL 5507912, at *1 \(S.D.N.Y. Nov. 29, 2010\)](#) (granting final approval of pre-suit class settlement in wage and hour case).

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.

8. The assistance of an experienced employment mediator, Ruth D. Raisfeld, Esq., reinforces that the Settlement Agreement is non-collusive. *See, e.g., Anjost, 2013 U.S. Dist. LEXIS 116048, 2013 WL 4145952, at *2* ("The assistance of an experienced mediator ... reinforces that the Settlement Agreement is non-collusive."); [Capsolas v. Pasta Res. Inc., No. 10 Civ. 5595 \(RLE\), 2012 U.S. Dist. LEXIS 65408, 2012 WL 1656920, at *1 \(S.D.N.Y. May 9, 2012\)](#) ("assistance of an experienced mediator, Ruth Raisfeld, Esq., reinforces that the Settlement Agreement is non-collusive."); [In re Penthouse Executive Club Comp. Litig., No. 10 Civ. 1145 \(KMW\), 2013 U.S. Dist. LEXIS 63065, 2013 WL 1828598, at *1 \(S.D.N.Y. Apr. 30, 2013\)](#) ("A settlement ... reached with the help of third-party neutrals enjoys a presumption that the settlement achieved meets the requirements of due process.") (internal quotation marks and citation omitted).

II. Conditional Certification of the Proposed Rule 23 Settlement Class

9. Provisional settlement class certification and appointment of class counsel have several [*6] 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).

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

All tipped servers, captains, bartenders, runners, bussers, baristas, and all other tipped employees at Dovetail who work or have worked between December 1, 2007 and May 22, 2014, and all dishwashers at Dovetail who work or have worked between January 29, 2008 and May 22, 2014.

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

12. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(1\)](#) because there are approximately 220 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).

13. 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 FLS A and NYLL for failure [*7] to pay appropriate overtime pay, pay spread-of-hours pay, provide proper wage notices, as well as Defendants' failure to pay all tipped workers minimum wage and all earned gratuities. See [Flores v. Hanover, LLC, No. 13 Civ. 5184 \(AJP\), 2014 U.S. Dist. LEXIS 21366, 2014 WL 632189, at *3 \(S.D.N.Y. Feb. 18, 2014\)](#) ("Plaintiffs ... and the Class Members share common issues of fact and law, including whether Defendants unlawfully took a 'tip credit' and paid less than the minimum wage; failed to pay proper premium overtime compensation, failed to pay spread-of-hours pay, [and] misappropriated tips by unlawfully distributing a portion to non-tip eligible workers...") (citing [Lovaglio v. W & E Hospitality Inc., No. 10 Civ. 7351 \(LLS\), 2012 U.S. Dist. LEXIS 72645, 2012 WL 1890381, at *1 \(S.D.N.Y. Mar. 12, 2012\)](#); [Sukhnandan, 2013 U.S. Dist. LEXIS 126004, 2013 WL 4734818, at *3](#); [Schear v. Food Scope America, Inc., 297 F.R.D. 114, 124 \(S.D.N.Y. 2014\)](#) (finding commonality where plaintiffs' and class members' claims "depend upon a common contention, namely, that the sushi chefs, expediters, and stockers are not eligible for inclusion in the tip pool under the NYLL").

14. Plaintiffs satisfy *Federal Rule of Civil Procedure 23(a)(3)*. Plaintiffs' claims arise from the same factual and legal circumstances that form the bases 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, and failing to furnish Plaintiffs and class members with required wage notices and/or wage statements. Plaintiffs [*8] 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 [Anjost, 2013 U.S. Dist. LEXIS 116048, 2013 WL 4145952, at *3](#) (typicality satisfied where "[p]laintiffs' claims arise from the same factual and legal circumstances that form

the bases of the Class Members' claims"); [Morris v. Affinity Health Plan, Inc., 859 F. Supp. 2d 611, 616 \(S.D.N.Y. 2012\)](#) (same).

15. 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 [O'Dell v. AMF Bowling Ctrs., Inc., No. 09 Civ. 759 \(DLC\), 2009 U.S. Dist. LEXIS 85954, 2009 WL 6583142, at *2 \(S.D.N.Y. Sept. 18, 2009\)](#) (finding that plaintiffs satisfied *Fed. R. Civ. P. 23(a)(4)* "because [p]laintiffs' interests [were] not antagonistic or at odds with class members"). In addition, Plaintiffs' Counsel, Fitapelli & Schaffer, LLP ("F&S") meet *Rule 23(a)(4)*'s adequacy requirement because they "are experienced and well-qualified employment lawyers and class action lawyers and have particular expertise in prosecuting and settling wage and hour class actions." [Matheson v. T-Bone Rest., LLC, No. 09 Civ. 4214 \(DAB\), 2011 U.S. Dist. LEXIS 143773, 2011 WL 6268216, at *3 \(S.D.N.Y. Dec. 13, 2011\)](#).

16. Plaintiffs 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 v. Pub. House Invs., LLC, 288 F.R.D. 272, 281 \(S.D.N.Y. 2012\)](#) (finding the predominance standard met where the overarching [*9] issue was "whether [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. [Green v. Wolf Corp., 406 F.2d 291, 301 \(2d Cir. 1968\)](#); see, e.g., [Morris, 859 F. Supp. 2d at 617](#); [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

17. 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\(g\).](#)

18. 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.

19. Courts have found F&S to be adequate class counsel in wage and hour class and collective actions. *See, e.g.,* [Flores, 2014 U.S. Dist. LEXIS 21366, 2014 WL 632189, at *4](#) ("[F&S] did substantial work identifying, investigating, prosecuting, and settling [plaintiffs' [*10] and Class Members' claims."); [Yuzary, 2013 U.S. Dist. LEXIS 61643, 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, 2013 N.Y. Misc. LEXIS 932](#) ("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."); [Tiro, 2013 U.S. Dist. LEXIS 72826, 2013 WL 2254551, at *3](#) (appointing F&S as class counsel); [Girault v. Supersol 661 Amsterdam, LLC, No. 11 Civ. 6835 \(PAE\), 2012 U.S. Dist. LEXIS 89976, 2012 WL 2458172, at *2 \(S.D.N.Y. June 28, 2012\)](#) (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, 2012 U.S. Dist. LEXIS 72645, 2012 WL 1890381, at *2](#) (appointing F&S as class counsel because they "did substantial work identifying,

investigating, and settling [p]laintiffs' and the class members' claims"); [Matheson, 2011 U.S. Dist. LEXIS 143773, 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, 2009 U.S. Dist. LEXIS 85954, 2009 WL 6583142, at *2](#) (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"); *see also* [Juarez v. 449 Rest., Inc., No. 13 Civ. 6977 \(AJN\), 2014 U.S. Dist. LEXIS 94011, 2014 WL 3361765 \(S.D.N.Y. July 2, 2014\)](#) (granting plaintiff's motion for conditional certification); [Chhab v. Darden Rests., Inc., No. 11 Civ. 8345 \(NRB\), 2013 U.S. Dist. LEXIS 135926, 2013 WL 5308004 \(S.D.N.Y. Sept. 20, 2013\) \[*11\]](#) (same); [Salomon v. Adderley Indus., Inc., 847 F. Supp. 2d 561 \(S.D.N.Y. 2012\)](#) (same); [Karic v. Major Auto. Cos., Inc., 799 F. Supp. 2d 219 \(E.D.N.Y. 2011\)](#) (same).

20. The work that Plaintiffs' Counsel has performed both in litigating and settling this case demonstrates their skill and commitment to representing the class' interests.

IV. Notice

21. The Court approves the proposed Notice of Proposed Class Action Settlement ("Class Notice"), which is attached as Exhibit B to the Schaffer Deck, and directs its distribution to the Class. The content of the Class Notice fully complies with due process and [Fed. R. Civ. P. 23.](#)

22. Pursuant to [Fed. R. Civ. P. 23\(c\)\(2\)\(B\)](#), a notice must provide:

the best notice that is 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: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under [*12] *Rule 23(c)(3)*.

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

23. The Class 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"). Courts in this district have approved class notices that are very similar to that proposed by Plaintiffs. *See, e.g., Girault, 2012 U.S. Dist. LEXIS 89976, 2012 WL 2458172, at *3; Lovaglio, 2012 U.S. Dist. LEXIS 72645, 2012 WL 1890381, at *3; Matheson, 2011 U.S. Dist. LEXIS 143773, 2011 WL 6268216, at *6-7; O'Dell, 2009 U.S. Dist. LEXIS 85954, 2009 WL 6583142, at *3.*

V. Class Action Settlement Procedure

- a. Within 14 days of the entry of this Order, Defendants will provide the claims administrator and F&S with a list in electronic form of the names, last known addresses, job positions or departments, dates of employment during the relevant time periods, and social security numbers, if available, for all putative class members;
- b. Within 30 days of the entry of this Order, the claims administrator shall mail, via First Class United States mail, the Class Notice to all class members using each individual's last known address;
- c. Class members will have 45 days from the date the Class Notice is mailed to opt out of the settlement or object to it;

d. Plaintiffs will file a Motion for Final Approval of the Settlement at least 15 days prior to the fairness hearing;

e. The Court will hold a final fairness hearing on **February [*13] 17, 2015, at 4:15 p.m.** at the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, Courtroom 15D;

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 Final Effective Date will be 30 days following the deadline for taking an appeal. In the event a notice of appeal is filed, the Final Effective Date shall be the latest of the following: (1) any appeal from the Final Order has been finally dismissed; (2) the Final Order has been affirmed on appeal in a form substantially identical to the form of the Final Order entered by the Court; (3) the time to petition for review with respect to any appellate decision affirming the Final Order has expired; and (4) if a petition for review of an appellate decision is filed, the petition has been denied or dismissed, or, if granted, has resulted in affirmance of the Final Order in a form substantially identical to the form of the Final Order entered by the Court.;

g. The Settlement Fund shall be paid in two equal payments, each comprising one-half of the total Settlement [*14] Fund. The first payment will be made no later than June 1, 2015, and the second payment will be made no later than June 1, 2016. If the Final Effective Date occurs after either or both of these dates, any affected payment(s) shall be delayed until 10 business days after the Final Effective Date; and

h. Within 10 days after receipt of each of the above-referenced settlement payments, the claims administrator shall send settlement checks comprising one-half of: (a) each class member's individual settlement payment; (b) class counsel's approved attorneys' fees and costs; (c) approved service awards; and (d) the claims administrator's fees.

SO ORDERED.

Dated: October 15, 2014

New York, New York

/s/ Analisa Torres

ANALISA TORRES

United States District Judge