UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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CRISOFORO TIRO, et al.,

Plaintiffs,

-against-

11 Civ. 7679 (CM)

PUBLIC HOUSE INVESTMENTS, LLC, et al.,

Defendants.

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TEJADA VILLA et al.,

Plaintiffs,

-against-

11 Civ. 8249 (CM)

PUBLIC HOUSE INVESTMENTS, LLC et al.,

Defendants.

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McMahon, J.:

INTRODUCTION

Plaintiffs Crisoforo Tiro, Leonardo Cortes, Enrique Hernandez, Humberto Campos Lara, and Rodolfo Tejada Villa (collectively, "Named Plaintiffs") submit this memorandum of law in support of their motion for final approval of a proposed settlement in this wage and hour class/collective action brought on behalf of restaurant workers employed by Public House Investments, LLC, Public House NYC, LLC, Public House MGMT NYC, LLC, Butterfield 8 NYC, LLC, Martell's NYC, LLC, Black Finn NYC, LLC, Chris Cocozziello, Brian Harrington, Gary Cardi, and Frank Falesto (collectively, "Defendants" or "New York Restaurants"). The parties' $1,300,000 settlement resolves all claims before this Court, pursuant to the proposed compromise set forth in the Joint Settlement Agreement and Release ("Settlement Agreement"), and satisfies all criteria for final approval. Therefore, the motion is granted and the settlement is approved. The motion for counsel fees is also granted.

PROCEDURAL BACKGROUND

I. COMMENCEMENT OF THE LITIGATION & SENDING OF 216(b) NOTICE

Plaintiffs commenced the instant actions on October 28, 2011 and November 15, 2011 as putative class actions under Federal Rule of Civil Procedure 23 and collective actions under 29 U.S.C. § 216(b), bringing claims under the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). Schaffer Decl. ¶¶ 4, 5. Specifically, Plaintiffs asserted that Defendants denied: (a) tipped service employees minimum wage, overtime compensation, spread-of-hours pay, and gratuities; and (b) hourly employees overtime compensation and spread-of-hours pay. Id. In

addition to the respective wage and hour violations, Plaintiffs' Complaints both alleged that Defendants operated the New York Restaurants as a single integrated employer and jointly employed all putative class members. Id. ¶ 6. On January 27, 2012, the Court consolidated the actions for all purposes. Id. ¶ 7. Defendants filed Answers to Plaintiffs' Complaints on February 3, 2012. Id. ¶ 8.

In February 2012, Defendants consented to conditionally certifying the FLSA collective, and notice of the federal claims was issued. Id. ¶¶ 10, 11. After sending notice, an additional 60 employees – 39 tipped and 21 non-tipped – filed FLSA consents to join the case. Id. ¶ 12.

II. INITIAL DISCOVERY AND BRIEFING OF PLAINTIFFS' RULE 23 MOTION

In preparation for Plaintiffs' Rule 23 Motion, and in accordance with the Court's instructions, Defendants disclosed thousands of pages of wage and hour records, including time records, payroll registers, private event contracts, tip allocation sheets, and employee history reports. Id. ¶¶ 9, 13. Additionally, Class Counsel interviewed numerous Class Members, obtained a substantial amount of documents from Class Members and 11 supporting declarations, and conducted extensive legal research regarding the specific nature of Defendants' FLSA and NYLL violations, as well as the joint liability of each Defendant as Plaintiffs' single integrated employer. Id. ¶ 14. Further, pursuant to the Court's Order, the Named Plaintiffs each appeared for depositions on March 14 and 15, 2012. Id. ¶ 15. Plaintiffs' Rule 23 Motion was fully briefed by the parties on July 16, 2012. Id. ¶ 16.

III. ALLEGED IMPROPER CONTACT WITH PUTATIVE CLASS MEMBERS

On May 3, 2012, a phone conference was held with the Court to discuss Plaintiffs' allegations that Defendants had retaliated against Named Plaintiffs Leonardo Cortes and Humberto Campos Lara, improperly contacted putative class members at Public House, and omitted employees from the class list. Id. ¶¶ 17, 18. Following the conference, Defendants agreed to: refrain from any further conduct that could be construed as retaliatory; mail a corrective notice to current Public House employees; post the corrective notice at Public House; and discuss the corrective notice at an employee meeting. Id. ¶

18. On August 2, 2012, the parties appeared for an evidentiary hearing in connection with Plaintiffs' renewed claims that Defendants improperly communicated with putative class members. Id. ¶ 19. Following testimony from four witnesses, the Court ordered Defendants to issue a corrective notice and refrain from any future communications with putative class members regarding the litigation. Id.

IV. RULE 23 CERTIFICATION AND DEFENDANTS' PETITION FOR APPEAL

On December 4, 2012, the Court granted Plaintiffs' Rule 23 Motion. Id. ¶ 20. In so doing, the Court exercised its authority under Rule 23(c)(5) to divide the two proposed global classes into eight subclasses – consisting of one tipped and one hourly subclass at each of the New York Restaurants – finding that certification of each subclass satisfied a rigorous Rule 23 analysis. Id. The Court also granted Plaintiffs' request that F&S be appointed as Class Counsel. Id.

On December 18, 2012, Defendants petitioned the Second Circuit for leave to appeal the Court's Certification Order under Fed. R. Civ. P. 23(f), claiming that the Court failed to engage in a "rigorous analysis" of whether each subclass satisfies Rule 23 standards. Id. ¶ 22. Plaintiffs' filed their opposition to Defendants' petition on December 28, 2012, arguing that the Court's Certification Order was fully supported by the record and that Defendants failed to satisfy the requirements for an appeal under Rule 23(f). Id. ¶ 23. On January 12, 2013, Defendants filed a reply. Id. ¶ 24. To date, no decision has been issued by the Second Circuit in connection with Defendants' petition. Id. ¶ 25.

V. MEDIATION AND SETTLEMENT

On February 6, 2013, the parties advised the Court that they had been actively discussing the possibility of a class-wide resolution, and that they had agreed to participate in a mediation. Id. ¶ 29. In preparation for the mediation, Defendants produced additional time and payroll records and private event contracts. Id. ¶ 30. Class Counsel also continued to interview and receive data from Class Members. Id. After reviewing and analyzing all of the documents produced by Defendants

and Class Members, Class Counsel was able to prepare a class-wide damages analysis, and evaluate the strengths and weaknesses of Class Members' claims. Id. ¶ 31.

On March 13, 2013, the parties participated in a full-day mediation with Vivian Shelansky of JAMS, an experienced employment law mediator. Id. ¶ 32. At the mediation, Defendants asserted that Class Members did not work the hours they claimed to have worked and were paid in accordance with the FLSA and NYLL, and that the New York Restaurants did not operate as a single integrated enterprise. Id. Defendants further stated that they had modified their wage and hour policies on or around January 1, 2012. Id. In addition, Defendants claimed that the finances available to fund a settlement or pay a judgment were limited, and, to that end, provided Class Counsel with 300 pages of personal and business tax returns. Id. Even though a settlement was not reached at the mediation, the process allowed the parties to better assess the strengths and weaknesses of their case, and helped developed a framework for ongoing settlement negotiations. Id. ¶ 33.

Thereafter, the parties continued to work with the mediator to attempt to negotiate the terms of a class-wide settlement. Id. ¶ 34. On or around April 10, 2013, following additional extensive negotiation, the parties reached an agreement in principle to settle the case on a class-wide basis, and on May 17, 2013, the parties fully executed the Settlement Agreement. Id. ¶¶ 35, 36.

The $1,300,000 settlement amount agreed to by the parties is, of course, a compromise figure. It took into account the risks regarding proof of liability and monies owed in light of Class Members' recollections and Defendants' records. The settlement also took into consideration Defendants' substantiated representations that they would not be able to pay a greater settlement or judgment. In light of the strengths and weaknesses of the case, including the risks in ultimately collecting a greater judgment, Class Counsel believe that the settlement easily falls within the range of reasonableness because it achieves a significant benefit for the Class where failure at trial is possible.

SUMMARY OF THE SETTLEMENT TERMS

I. THE SETTLEMENT FUND

The Settlement Agreement creates a common fund of $1,300,000 ("the Fund"). **Exhibit ("Ex.") A** (Settlement Agreement) ¶ 3.1.[1] The Fund covers Class Members' awards, service payments to the Named Plaintiffs, and attorneys' fees and costs. Id.

II. ELIGIBLE EMPLOYEES

The Rule 23 Class consists of all individuals who work or have worked at the New York Restaurants as (a) "Tipped Service Employees" – servers, bussers, runners, bartenders, barbacks, and similarly situated employees – between October 28, 2005 and April 1, 2013; and (b) "Hourly Employees" – cooks, food preparers, dish washers and similarly situated employees – between November 15, 2005 and April 1, 2013. Id. ¶¶ 1.16.

III. ALLOCATION FORMULA

Each Class Member who does not opt-out of the settlement will receive a proportional share of the Net Settlement Payment based on the number of weeks worked by the Class Member at the New York Restaurants during the relevant periods, whether the Class Member was a Tipped Service Employee or an Hourly Employee, and whether the Class Member previously submitted a written consent to join the FLSA collective action. Id. ¶ 3.4. Specifically, Tipped Service Employees will be assigned additional points for weeks worked prior to January 1, 2012 to compensate them for their additional claims and higher damages, Class Members who joined the FLSA collective will receive additional points in recognition of the risks they incurred and the fact that they affirmatively sought to protect their FLSA rights, and Class Members will be assigned ½ a point for weeks worked between January 1, 2012 to April 1, 2013 due to Defendants contention that the New York Restaurants modified their wage and hour policies on or around January 1, 2012. Id.; Schaffer Decl. ¶¶ 41-44.

[1] All exhibits are attached to the Declaration of Brian S. Schaffer.

IV. RELEASE OF CLAIMS

In return for the above consideration, the Settlement Agreement provides that every Class Member who does not timely opt out of the settlement will release Defendants from all wage and hour claims that were or could have been asserted in the litigation on or before the Effective Date. **Ex. A** (Settlement Agreement) ¶ 4.1(B). Class Members who do not opt out and who sign their settlement checks will be deemed to have provided their written consents to join the FLSA collective and to have released their FLSA claims. Id ¶ 4.1(C). Additionally, all Class Members will release any claims they may have against Defendants for attorneys' fees or costs associated with Class Counsel's representation, other than those approved by the Court pursuant to the Settlement Agreement. Id ¶ 4.2

V. FACTORS CONSIDERED IN THE SETTLEMENT OF THE CLAIMS

Plaintiffs weighed the weaknesses and complexities in this case against the benefit of receiving a large percentage of the damages sought without the risks of trial. Schaffer Decl. ¶ 37. Class Counsel have thoroughly analyzed Defendants' factual and legal defenses, examined documents and other information produced by Defendants and Class Members, reviewed the defenses and documents with Plaintiffs, and assessed the strength of Defendants' arguments. Id. Additionally, in considering the possibility of settlement, Plaintiffs and Class Counsel accounted for the time, delay, and costs of trial and appeal, as well as Defendants' inability to pay a significantly larger sum than the Settlement Agreement provides for. Id. To be sure, the guaranteed payment of a substantial amount of money to Class Members in light of Defendants' financial instability was an important factor in Plaintiffs' acceptance of the settlement. In light of the strengths and weaknesses of the case, Class Counsel believes the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiffs and Class Members in the face of significant obstacles. Id.

VI. CLASS MEMBERS' RESPONSE TO SETTLEMENT

Pursuant to the Court's Order granting preliminary approval, the Claims Administrator mailed the settlement notice to all 719 Class Members. **Ex. B** (Declaration of Michael Rosenbaum ("Rosenbaum Decl.")) ¶ 3. The time has expired for Class Members to opt out of and/or object under the Agreement. **Ex. A** (Settlement Agreement) ¶ 2.4. Only four Class Members have opted out of the settlement, and no Class Members have objected to the settlement. **Ex. B** (Rosenbaum Decl.) ¶¶ 8, 9. Thus, the overwhelming response to the settlement has been positive.

I. THE RULE 23 SETTLEMENT IS APPROVED.

"Rule 23(e) requires court approval for a class action settlement to insure that it is procedurally and substantively fair, reasonable and adequate." *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *7 (S.D.N.Y. Sept. 16, 2011). Approval of a class action settlement is within the Court's discretion, "which should be exercised in light of the general judicial policy favoring settlement." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (McMahon, J). "The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

A. The Proposed Settlement Class Should Be Certified.

For the reasons set forth in the Court's May 22, 2013 Order, the settlement class satisfies the requirements of Fed. R. Civ. P. 23(a) & (b)(3), and should be finally certified. *See* Docket No. 107.

B. The Proposed Settlement Is Fair, Reasonable, And Adequate.

In order to approve a class action settlement, a district court "must determine whether the settlement, taken as a whole, is fair, reasonable and adequate." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *3 (S.D.N.Y. July 27, 2007); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). "Federal courts within this Circuit make the

fairness determination based upon 'two types of evidence:' (1) substantive and (2) procedural." *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *11 (S.D.N.Y. Nov. 30, 2010) (*quoting Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). "Courts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement' of class action suits." *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214 (DAB), 2011 WL 6268216, at *4 (S.D.N.Y. Dec. 13, 2011) (*quoting Wal-Mart Stores*, 396 F.3d at 116); *see In re EVCI*, 2007 WL 2230177, at *4 ("Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement); *Lovaglio v. W & E Hospitality, Inc.*, No. 10 Civ. 7351 (LLS), 2012 WL 2775019, at *2 (S.D.N.Y. July 6, 2012) (approving settlement where terms are fair, reasonable, adequate, and not a product of collusion).

1. The Settlement Is Procedurally Fair.

The proposed settlement is procedurally fair because it was reached through vigorous, arm's-length negotiations after experienced counsel had evaluated the merits of Plaintiffs' claims, and is untainted by collusion. A court determines a settlement's procedural fairness by looking at the negotiating process leading to settlement. *See Matheson*, 2011 WL 6268216, at *4 (*citing Wal-Mart Stores*, 396 F.3d at 116; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)); *see also Novartis*, 2010 WL 4877852, at *16 ("The proper focus of this inquiry is on the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves."). "A 'presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Matheson*, 2011 WL 6268216, at *4 (*quoting Wal-Mart Stores*, 396 F.3d at 116).

Here, the settlement was reached after Class Counsel conducted a thorough investigation and evaluated the claims and defenses, and after vigorous negotiations between the parties. Schaffer Decl. ¶¶ 37, 38. Additionally, whereas here, the settlement is the by-product of a

mediation before an experienced employment law mediator, there is a presumption of fairness and arm's-length negotiations. *See, e.g., In re Citigroup Inc. Bond Litigation*, No. 08 Civ. 9522 (SHS), 2013 WL 4427195, at *2 (S.D.N.Y. Aug. 20, 2013) (finding that settlement negotiations were procedurally fair where the parties were represented by knowledgeable counsel, engaged in extensive and contested discovery, and had their negotiations overseen by an experienced mediator); *Johnson*, 2011 WL 4357376, at *8 ("These arm's-length negotiations involved counsel and a mediator well-versed in wage and hour law, raising a presumption that the settlement achieved meets the requirements of due process.") (*citing Wal-Mart Stores*, 396 F.3d at 116).

2. The Settlement Is Substantively Fair And Meets The *Grinnell* Standards For Class Action Settlement Approval.

The settlement is substantively fair because its terms are fair, adequate, and reasonable pursuant to the analytical framework set forth by the Second Circuit in *Grinnell* for evaluating the substantive fairness of a class action settlement. 495 F.2d at 448, *abrogated on other grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir. 2000). The *Grinnell* factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463; *see also Wal-Mart Stores*, 396 F.3d at 117. These factors ought not be applied in a formulaic manner. Rather, "[t]he evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice." *Grinnell.*, 495 F.2d at 468. Here, all of the *Grinnell* factors weigh in favor of approval of the Settlement Agreement.

a) Litigation Through Trial Would Be Complex, Costly, And Long

(Grinnell Factor 1).

To assess the substantive fairness of a settlement, courts weigh the benefits of a potential settlement against the time and expense of continued litigation. *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 361-62 (S.D.N.Y. 2002) (McMahon, J). "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *Johnson*, 2011 WL 4357376, at *8 (*quoting In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)). This case is no exception, with 719 Class Members bringing fact intensive claims under both federal and state law.

Continued litigation would cause additional expense and delay. Plaintiffs allege several violations of the FLSA and NYLL, involving multiple defendants, under a theory of single-integrated enterprise liability. Although there has been significant discovery, additional discovery would be required to establish collective liability and damages, including depositions of Class Members, Defendants, and Defendants' employees and managers. By way of comparison, in a class/collective action case asserting FLSA and NYLL violations that is currently being prosecuted by Class Counsel, the parties collectively took 18 depositions and exchanged over 380,000 pages of discovery. Schaffer Decl. ¶ 37. That case has lasted almost four years and is still pending. Id. Here, barring disposition on summary judgment, a complicated trial would ultimately be necessary, featuring extensive testimony by Defendants, Plaintiffs, and numerous Class Members. Preparing and putting on evidence at such a trial would consume tremendous amounts of time and resources and demand substantial judicial resources. Any judgment would likely be appealed, thereby extending the duration of the litigation. This settlement, on the other hand, makes monetary relief available to class members in a prompt and efficient manner. Therefore, the first *Grinnell* factor weighs in favor of final approval.

b) The Reaction Of The Class Has Been Positive (Grinnell Factor 2).

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley*, 186 F. Supp. 2d at 362. Where relatively few class members opt-out of or object to the settlement, the lack of opposition supports court approval of the settlement. *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008).

Here, Class Members have shown an enthusiastic response to the settlement. The Claims Administrator mailed the Settlement Notice – which included an explanation of the allocation formula and an estimate of each Class Member's award, and informed Class Members of their right to object to or exclude themselves from the settlement – to all Class Members. **Ex. B** (Rosenbaum Decl.) ¶¶ 8, 9. To date, there have been no objections to the Settlement and only four Class Members out of the 719 noticed have opted out. Id. "This favorable response demonstrates that the class approves of the settlement and supports final approval." *Matheson*, 2011 WL 6268216, at *5 (*citing Johnson*, 2011 WL 4357376, at *9).

c) Discovery Has Advanced Far Enough To Allow The Parties To Responsibly Resolve The Case (Grinnell Factor 3).

Under the third *Grinnell* factor, the question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (*quoting In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement … but an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176 (*quoting Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y.1998)). The parties' discovery here meets this standard.

Although preparing this case through trial would require hundreds of hours of discovery for both sides, the extensive discovery already completed is enough to allow the parties to recommend

settlement. As discussed above, Class Counsel interviewed numerous Class Members, and reviewed substantial amounts of data from Defendants and Class Members, including over 12,000 pages of wage and hour records, tax returns, and documents related to Defendants' corporate structure. Schaffer Decl. ¶ 13, 14, 30. Id. As a result, Class Counsel was able to evaluate the strength and weaknesses of Class Members' claims and reasonably estimate the total potential damages. Id. ¶ 31. Class Counsel thus entered into the proposed Settlement Agreement with a thorough understanding of Plaintiffs' case. Id. ¶ 37. Such knowledge of the strengths and weaknesses of their cases supports a finding that the Settlement Agreement is the result of fair and reasonable negotiation. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 185 (W.D.N.Y. 2005). In fact, courts often grant final approval of class settlements in cases where the parties conducted the same amount or even less discovery than the amount accomplished in this case. *See, e.g.*, *Beckman v. Keybank, N.A.*, No. 12 Civ. 7836 (RLE), 2013 WL 1803736, at *3, 7 (S.D.N.Y. Apr. 29, 2013) (granting final approval where parties reached pre-suit settlement and engaged in informal discovery only); *Matheson*, 2011 WL 6268216, at *5 (stating that an efficient, informal exchange of information, and participation in a day-long mediation allowed the parties to weigh the strengths and weaknesses of their claims); *Johnson*, 2011 WL 4357376, at *9-10 (finding that parties were "well-equipped to evaluate the strengths and weaknesses of the case" and granting final approval where parties engaged in informal discovery and no depositions were taken). Therefore, this factor favors final approval.

d) Plaintiffs Would Face Real Risks If The Case Proceeded (Grinnell Factors 4 and 5).

Although Plaintiffs believe their case is strong, it is also subject to considerable risk as to liability and damages. In evaluating the risks of establishing liability, a court must "assess the risks of litigation against the certainty of recovery offered by the Settlement." *In re Telik*, 576 F. Supp. 2d at 579. Courts recognize that regardless of the perceived strength of a plaintiff's case, liability is "no sure

thing," and that "[l]itigation inherently involves risks." *Wal-Mart Stores*, 396 F.3d at 118. "Indeed, the primary purpose of settlement is to avoid the uncertainty of a trial on the merits." *Matheson*, 2011 WL 6268216, at *5 (*citing In re Ira Haupt & Co.*, 304 F.Supp. 917, 934 (S.D.N.Y. 1969)).

A trial on the merits would involve significant risk as to both liability and damages, particularly with respect to the minimum wage, overtime and tip misappropriation claims, because of their fact-intensive nature. Plaintiffs may have difficulty establishing that they worked the hours the claim to have worked and that Defendants did not pay them appropriately for these hours. It may also be challenging for Plaintiffs to prove that the service charges collected at private events were purported gratuities covered by NYLL § 196-d, and that Defendants distributed these gratuities to positions ineligible to receive tips. Further, Plaintiffs may have trouble demonstrating that Defendants operated as a single integrated enterprise, and that each Defendant thus possesses joint and several liability. These inquiries would require extensive testimony and discovery regarding Defendants' time keeping and compensation practices, as well as Defendants' corporate and management structure. While Plaintiffs believe that they could ultimately establish Defendants' liability, this would require significant factual development and favorable outcomes at trial and on appeal, both of which are inherently uncertain and lengthy. Class Counsel are experienced and realistic, and understand that the resolution of liability issues, outcome of the trial, and inevitable appeals process are inherently uncertain in terms of outcome and duration. *See Beckman*, 2013 WL 1803736, at *6. The proposed settlement alleviates these uncertainties. These factors therefore weigh in favor of final approval.

e) Establishing A Class And Maintaining It Through Trial Would Not Be Simple (Grinnell Factor 6).

The risk of obtaining class certification and maintaining it through trial is also present. Defendants may obtain leave to appeal the Court's Rule 23 Order and would likely move for decertification of the FLSA collective after the conclusion of discovery, both requiring extensive

briefing. If the class is decertified, Plaintiffs would be forced to make a second motion for certification following additional discovery, which Defendants would similarly oppose. Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay. *Johnson*, 2011 WL 4357376, at *10. This factor also favors final approval.

f) Defendants' Ability To Withstand A Greater Judgment Is Not Assured (Grinnell Factor 7).

It is well-known that the restaurant industry has suffered hardship in the current economic environment and the New York Restaurants are not immune from that hardship. Indeed, Defendants closed one of the New York Restaurants (Wicker Park) on November 7, 2011. Consequently, Defendants' asserted during the parties' settlement negotiations that they could not pay more than the current settlement amount, and, to that end, provided Class Counsel with 300 pages of personal and business tax returns prior to the mediation. Schaffer Decl. ¶ 32. Accordingly, each individual Defendant may not be able to withstand a greater judgment, and it is not clear that individual or joint employer liability would be found. The Settlement Agreement eliminates the risk of collection by: (1) requiring Defendants to make monthly payments into the fund; and (b) execute a Confession of Judgment whereby the entire unpaid Settlement Amount will immediately become due in the event that Defendants default on a payment.[2] **Ex. A** (Settlement Agreement) ¶¶ 3.1, 6.1.

Even if Defendants could afford to pay more, a defendant's "ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Matheson*, 2011 WL 6268216, at *5 (*quoting Frank*, 228 F.R.D. at 186; *In re Austrian*, 80 F. Supp. 2d at 178 n.9). Under these circumstances, this factor weighs heavily in favor of approving the final settlement.

g) The Settlement Fund Is Substantial In Light Of The Possible Recovery And The Attendant Risks Of Litigation (Grinnell Factors 8 and 9).

[2] Pursuant to the Settlement Agreement, Defendants have already deposited $310,000 into the fund.

The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Matheson*, 2011 WL 6268216, at *5 (*quoting Frank*, 228 F.R.D. at 186; *In re Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (*quoting Frank*, 228 F.R.D. at 186; *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). "[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell Corp.*, 495 F.2d at 455 n.2; *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair."). Moreover, when settlement assures immediate payment of substantial amounts to class members, "even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road,'" settlement is reasonable under this factor. *Gilliam v. Addicts Rehab Crt. Fund*, No. 05 Civ. 3452 (RLE), 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (*quoting Teachers' Ret. Sys. of LA v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004)).

Here, the $1,300,000 settlement provides much more than "a fraction of the potential recovery." Further, the settlement amount represents a good value given the attendant risks of litigation and the collection risks discussed above, even though the recovery could be greater if Plaintiffs overcame motions to decertify the class and/or collective, succeeded on all claims at trial, and survived an appeal. Moreover, by Class Counsel's estimation, the settlement represents a significant percentage of the recovery that Plaintiffs would have achieved had they prevailed on all of their claims, and a substantial portion of what Defendants would be able to pay if faced with a

judgment. *See* Schaffer Decl. ¶ 38. Thus, "weighing the benefits of the settlement against the risks associated with proceeding in the litigation," the settlement amount achieved in the instant action is more than reasonable. *Johnson*, 2011 WL 4357376, at *11; *see Lovaglio*, 2012 WL 2775019, at *2 (approving settlement where "the value of an immediate recovery outweighs the mere possibility of further relief after protracted and expensive litigation").

II. THE FLSA SETTLEMENT IS APPROVED.

Plaintiffs also request that the Court approve the settlement of their FLSA claims. The standard for approval of an FLSA settlement is significantly lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as a Rule 23 settlement. *Johnson*, 2011 WL 4357376, at *12 (*citing McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984)). "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement," and "approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes." *Id.* (*citing Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353-54, 1353 n.8 (11th Cir. 1982)).

As discussed above, the instant settlement was the result of contested litigation and arm's length negotiation. The parties were represented by counsel experienced in wage and hour law, engaged in strenuous litigation, exchanged extensive discovery and damages calculations, and conducted months of vigorous negotiations in an effort to reach the settlement. Schaffer Decl. ¶¶ 4-38. Therefore, FLSA approval is warranted. *See Beckman*, 2013 WL 1803736, at *7 (granting final approval of FLSA settlement); *Matheson*, 2011 WL 6268216, at *6 (same).

III. SERVICE AWARDS TO THE NAMED PLAINTIFFS ARE AUTHORIZED.

Pursuant to the Settlement Agreement, and subject to the Court's approval, a $10,000 service fee is to be awarded to each of the Named Plaintiffs. These awards are reasonable given the

significant contributions the Named Plaintiffs made to advance the prosecution and resolution of the lawsuit. Moreover, no Class Member has objected to these awards. **Ex. B** (Rosenbaum Decl.) ¶ 9.

Courts acknowledge that plaintiffs play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny, and that "[service] awards are particularly appropriate in the employment context" where "the plaintiff is often a former or current employee of the defendant, and thus … he has, for the benefit of the class as a whole, undertaken the risks of adverse actions by the employer or co-workers." *Frank*, 228 F.R.D. at 187; *Velez v. Majik Cleaning Serv.*, No. 03 Civ. 8698 SAS)(KNF), 2007 WL 7232783 (S.D.N.Y. June 25, 2007); *see also Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548 (RLE), 2012 WL 1320124, at *14 (S.D.N.Y. April 16, 2012) ("Plaintiffs litigating cases in an employment context face the risk of subjecting themselves to adverse actions by their employer … [and] being blacklisted as 'problem' employees."). Accordingly, "service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff." *McMahon v. Olivier Cheng Catering and Events, LLC*, No. 08 Civ. 8713 (PGG), 2010 WL 2399328, at *9 (S.D.N.Y. Mar. 3, 2010).

Here, the Court should grant the requested service awards based on the significant work that the Named Plaintiffs undertook on behalf of the Class. The services provided by the Named Plaintiffs included, but were not limited to, informing counsel of the facts initially and as the case progressed, providing counsel with relevant documents in their possession, informing putative Class Members of the lawsuit and encouraging them to participate, appearing for depositions, preparing declarations, aiding counsel in the submission of their Rule 23 Motion, assisting counsel to prepare for mediation and settlement discussions, and reviewing and commenting on the terms of the settlement. Schaffer Decl. ¶ 48. The Named Plaintiffs also undertook what they believed to

be significant risks by bringing this case on behalf of the Class. Id. ¶ 49. As such, the Named Plaintiffs' actions exemplify the very reason service fees are awarded. *See Frank*, 228 F.R.D. at 187 (recognizing the important role that plaintiffs play as the "primary source of information concerning the claim."); *Parker v, Jekyll and Hyde Entm't Holdings, LLC*, No. 08 Civ. 7670 (BSJ)(JCF), 2010 WL 532960, at *1 (S.D.N.Y. Feb. 9, 2010) (recognizing efforts of plaintiffs including meeting with counsel, reviewing documents, formulating theory of case, identifying and locating other class members to expand settlement participants, and attending court proceedings).

Moreover, the $10.000 service awards requested here for each Named Plaintiff are reasonable and well within the range awarded by Courts in similar matters. *See, e.g., Hernandez v. Merrill Lynch & Co., Inc.*, No. 11 Civ. 8472 (KBF)(DCF), 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (approving service awards of $15,000 and $13,000 to class representatives in wage and hour action); *Lovaglio*, 2012 WL 2775019, at *4 (approving service awards of $10,000 to class representatives in wage and hour action); *Matheson*, 2011 WL 6268216, at *9 (approving a service award of $45,000 for a class representative in a wage and hour action); *Johnson*, 2011 WL 4357376, at *21 (approving service awards of $10,000 for class representatives in wage and hour action). The fact that the service awards were negotiated in the context of the mediation also weighs heavily in the court's calculus.

IV. CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS ARE APPROVED.

Plaintiffs' unopposed motion for Final Approval includes a request for attorneys' fees of one-third of the Fund and reimbursement of $21,171.31 in litigation costs and expenses. Schaffer Decl. ¶ 51. The Settlement Agreement and Court-approved Notice sent to all Class Members provide that Class Counsel will apply to the Court for attorneys' fees in the amount of $433,333.33 (33 1/3% of the settlement) and reimbursement of a maximum of $25,000 for the litigation costs and expenses

that Class Counsel has incurred. **Ex. A** (Settlement Agreement) ¶ 3.2(A); **Ex. C**, (Settlement Notice) at page 4. To date, no Class Member has objected to these requests. **Ex B** (Rosenbaum Decl.) ¶ 9.

Although there are two ways to compensate attorneys for successful prosecution of statutory claims, the lodestar and percentage of the fund method, "[t]he trend in this Circuit is to use the percentage of the fund method in common fund cases like this one." *Matheson*, 2011 WL 6268216, at *7 (*citing McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010); *Wal-Mart Stores*, 396 F.3d at 121; *Reyes v. Altamarea Grp., LLC,* No. 10 Civ. 6451 (RLE), 2011 WL 4599822, at *7 (S.D.N.Y. Aug. 16, 2011)).

A. The *Goldberger* Factors Support An Award Of One-Third Of The Common Fund.

In determining the reasonableness of fee applications, courts consider the six factors set forth by the Second Circuit in *Goldberger v. Integrated Res., Inc.*: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. 209 F.3d 43, 50 (2d Cir. 2000). Here all of the *Goldberger* factors weigh in favor of granting approval of Class Counsel's fee application.

1. Class Counsel's Time And Labor

Class Counsel's time invested in litigating and settling this case was significant and reasonable. Schaffer Decl. ¶¶ 61, 62. Activities conducted by Class Counsel included: interviewing numerous Class Members; obtaining and analyzing over 12,000 pages of documents related to Defendants' compensation practices and corporate structure; successfully moving for Rule 23 certification, which included preparing for and defending depositions of the Named Plaintiffs, obtaining 11 supporting declarations, and conducting extensive legal research; opposing Defendants' petition to the Second

Circuit for leave to appeal the Court's Order granting Rule 23 certification; completing a detailed, class-wide damages analysis; preparing for and participating in a full-day mediation; and successfully negotiating the terms of the settlement. Id. ¶¶ 13-16, 20-23, 30-36. Class Counsel also expended significant time and resources contesting Defendants' alleged improper contact with putative class members, which included appearing for a phone conference and an evidentiary hearing. Id. ¶¶ 17-19. In addition, following the execution of the Settlement Agreement, Class Counsel has responded to telephone calls and emails from numerous Class Members requesting further information regarding the terms of the settlement, and prepared motions for preliminary and final approval. Id. ¶¶ 66.

In performing these tasks, Class Counsel expended more than 1,300 hours. Id. ¶¶ 61, 65. These hours are reasonable for a complex case like this one. Id. ¶ 61. Class Counsel anticipates spending additional time in the future preparing for the Fairness Hearing and administering the settlement, and the requested fee award is also meant to compensate for that time. Id. ¶ 66; *see, e.g., Matheson*, 2011 WL 6268216, at *9 ("The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward, also supports their fee request.") (citations omitted).

2. The Litigation's Magnitude And Complexity

The size and difficulty of the issues in a case are significant factors to be considered in making a fee award. *Goldberger*, 209 F.3d at 50. "Courts have recognized that wage and hour cases involve complex legal issues." *Johnson*, 2011 WL 4357376, at *16; *see Barrentine v. Arkansas–Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) ("FLSA claims typically involve complex mixed questions of fact and law."). "Among FLSA cases, the most complex type is the 'hybrid' action brought here, where state wage and hour violations are brought as an 'opt out'

class action pursuant to Federal Rule of Civil Procedure 23 in the same action as the FLSA 'opt in' collective action pursuant to 29 U.S.C. § 216(b)." *Johnson*, 2011 WL 4357376, at *17.

This case hinged on several mixed questions of fact and law. In particular, both parties disputed whether: Class Members were entitled to a tip credit; Class Members worked the hours they claimed to have worked; the service charges at issue were purported gratuities, and thus covered by NYLL § 196-d; individuals with whom Class Members were required to share their tips were ineligible to receive tips under the FLSA and the NYLL; and Defendants operated the New York Restaurants as a single integrated enterprise. The numerous and complex issues involved in this action support approval of Class Counsel's attorneys' fee request. *See Johnson*, 2011 WL 4357376, at *17 (stating that Class Counsel's request for 33% of the fund was supported by case's mixed factual and legal questions, including whether certain individuals' job duties rendered them ineligible to receive tips under the FLSA and NYLL).

3. The Risks Of Litigation

"Courts of this Circuit have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees." *Taft v. Ackermans*, No. 02 Civ. 7951 (PKL), 2007 WL 414493, at *10 (S.D.N.Y. Jan. 31, 2007) (quotations omitted). "[D]espite the most vigorous and competent of efforts, success is never guaranteed." *Id.* Class Counsel undertook to prosecute this action without any assurance of payment for their services, litigating this case on a wholly contingent basis in the face of significant risk. Schaffer Decl. ¶ 69-71. There was no guarantee of any recovery whatsoever; if this case had been dismissed on summary judgment, trial or appeal, Class Counsel would have received no payment for their work. Id.

As discussed above, class and collective wage and hour cases of this type are, by their very nature, complicated and time-consuming. Any lawyer undertaking representation of large numbers of affected employees in such actions inevitably must be prepared to make a tremendous investment of time, energy, and resources. *Johnson*, 2011 WL 4357376, at *17. Due also to the contingent nature of the customary fee arrangement, lawyers are asked to be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. *Id.* Further, while Plaintiffs believe that they could ultimately establish both liability and damages, the circumstances of this case presented hurdles to a successful recovery and would have created a significant risk to Plaintiffs at trial. Schaffer Decl. ¶ 37. Thus, Class Counsel's attorneys' fee request is supported by this factor as well. *See Johnson*, 2011 WL 4357376, at *18 (approving request for attorneys' fees in wage and hour class action where continued litigation involved similar risks).

4. Quality Of The Representation

"To determine the 'quality of the representation,' courts review, among other things, the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Taft*, 2007 WL 414493, at *10 (*citing In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004)). Here, Class Counsel have extensive experience representing workers in wage and hour class and collective actions, and this experience was directly responsible for bringing about the positive settlement. Schaffer Decl. ¶¶ 53-58; *see, e.g., Tiro v. Public House Investments, LLC*, Nos. 11 Civ. 7679 (CM) *et al*, 2013 WL 2254551, at *3 (S.D.N.Y. May 22, 2013) (collecting cases); *see also Johnson*, 2011 WL 4357376, at *18 (citing class counsel's experience as one factor supporting an attorneys' fee award of 33% of the fund). Moreover, Defendants were represented by the firm Proskauer Rose LLP, a large nationwide law firm. *See In re Global Crossing*, 225 F.R.D. at 467 ("[T]he quality of opposing counsel is also important in

evaluating the quality of [Class Counsel's] work"). In addition, no Class Members objected to the attorneys' fees or any other part of the settlement, a "reaction … [which] is entitled to great weight by the Court." *Maley*, 186 F. Supp. 2d at 374; **Ex. B** (Rosenbaum Decl.) ¶ 9. As such, this factor weighs in favor of granting the requested fees.

5. The Fee Is Reasonable In Relation To The Settlement.

Courts in this Circuit have repeatedly granted requests for one-third of the fund in cases with settlement funds similar to this one. *See, e.g., Lovaglio*, 2012 WL 2775019, at *3 (awarding one-third of the total settlement amount in a wage and hour class action, and stating that "the amount is fair and reasonable," and "consistent with the trend in this Circuit."); *Johnson*, 2011 WL 4357376, at *19 ("A fee of 33% of the Settlement Fund is reasonable and consistent with the norms of class litigation in this circuit.") (quotations omitted). Further, Courts in this Circuit have routinely approved requests for one-third of the fund in cases with settlement funds substantially larger than the present action. *See, e.g., Beckman*, 2013 WL 1803736, at *14 (awarding one-third of $4.9 million fund in wage and hour action, and stating that "the requested fee award appears to be reasonable"); *Hernandez*, 2013 WL 1209563, at *8 ("Class Counsel's request for 33% of the Fund [$2,310,000] is reasonable and consistent with the norms of class litigation in this circuit."); *Capsolas v. Pasta Resources Inc.*, No. 10 Civ. 5595 (RLE), 2012 WL 4760910, at *8 (S.D.N.Y. Oct. 5, 2012) (awarding one-third of $5.25 million fund in wage and hour case); *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185-86 (W.D.N.Y. 2011) (awarding one-third of $42 million settlement fund). Therefore, this factor weighs in favor of granting the requested fees.

6. Public Policy Considerations

In rendering awards of attorneys' fees, "the Second Circuit and courts in this district also have taken into account the social and economic value of class actions, and the need to encourage

experienced and able counsel to undertake such litigation." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999). The FLSA and the NYLL are remedial statutes designed to protect the wages of workers. *See A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945) (recognizing the FLSA's objective – ensuring that every employee receives "a fair day's pay for a fair day's work"). "Adequate compensation for attorneys who protect those rights by taking on such litigation furthers the remedial purpose of those statutes." *Matheson*, 2011 WL 6268216, at *8 (citations omitted). "If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk." *Id.* (citations omitted). Consequently, courts have recognized that fee awards in cases like this serve the dual purposes of encouraging "private attorneys general" to seek redress for violations and discouraging future misconduct of a similar nature. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Class actions are also an invaluable safeguard of public rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

Here, Class Counsel successfully negotiated a settlement that obtains significant monetary compensation for Class Members, and has resulted in new policies within the New York Restaurants. Schaffer Decl. ¶¶ 32, 59. These considerations weigh in favor of granting the fee request. *Beckman*, 2013 WL 1803736, at *13 (33% fee award reasonable where settlement redressed substantial portion of monetary damage suffered by class members and resulted in new policies).

B. The Lodestar Cross Check Further Supports An Award To Class Counsel Of One-Third Of The Settlement Fund.

"Following *Goldberger,* the trend in the Second Circuit has been to apply the percentage method and loosely use the lodestar method as a 'baseline' or as a 'cross check.'" *Johnson*, 2011 WL 4357376, at *20 (citation omitted). While courts still use the lodestar method as a "cross check" when applying the percentage of the fund method, courts are not required to scrutinize

the fee records as rigorously. *Goldberger*, 209 F.3d at 50; *see also In re Global Crossing*, 225 F.R.D. at 468 (using an "implied lodestar" for the lodestar cross check).

Class Counsel's request for one-third of the Fund is approximately 1.01 times "lodestar". Schaffer Decl. ¶ 67. Plaintiffs' counsel cites numerous cases in which awards of significantly more than lodestar have been made. This court is not one that routinely authorizes settlements at six, seven and eight times lodestar, however, so the persuasive value of those cases is negligible. Rather, for me, if the lodestar is significantly out of line with the percentage of recovery, it raises a red flag. Where, as here, lodestar is virtually identical to the percentage of recovery, no red flag waves, which puts Class Counsel's request for $433,333.33 well within the range of reasonableness.

C. Class Counsel Is Entitled To Reimbursement Of Their Litigation Expenses.

Pursuant to the Settlement Agreement and Class Notice, Class Counsel also seeks reimbursement of $21,171.31 in litigation costs and expenses to be paid from the fund. Schaffer Decl. ¶¶ 51, 69. "Courts typically allow counsel to recover their reasonable out-of-pocket expenses." *Matheson*, 2011 WL 6268216, at *9 (*citing In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n. 3 (S.D.N.Y. 2003)). Given that Class Counsel's unreimbursed expenses were incidental and necessary to the representation of the Class, they should be approved. Schaffer Decl. ¶ 68.

CONCLUSION

For the reasons set forth above, the motion is granted and the settlement approved. The Clerk of the Court is directed to remove the motion at Docket # 110 in the Tiro case and Docket #82 in the Villa case from the court's list of outstanding motions and to close the file in both cases.

Dated: September 10, 2013

U.S.D.J.

BY ECF TO ALL COUNSEL