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As of: March 14, 2013 11:56 AM EDT

## Ryan v. Volume Servs. Am.

Supreme Court of New York, New York County  
March 7, 2013, Decided  
Index No. 652970/2012

**Reporter:** 2013 N.Y. Misc. LEXIS 932

EVELYN RYAN, on behalf of herself and all others similarly situated, Plaintiffs, -against- VOLUME SERVICES AMERICAN, INC. d/b/a CENTERPLATE, and VOLUME SERVICES, INC., Defendants.

**Notice:** NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS.

**Prior History:** [Ryan v. Volume Servs. Am., 2012 N.Y. Misc. LEXIS 5513 \(N.Y. Sup. Ct., Dec. 6, 2012\)](#)

### Core Terms

settlement, class member, class action, attorney's fees, class representative, hour class, settlement fund, lodestar, appoint

**Judges:** [\*1] MELVIN L. SCHWEITZER, Justice.

**Opinion by:** MELVIN L. SCHWEITZER

### Opinion

The above-entitled matters came before the Court on Plaintiff's Motion for Final Approval of Class Action Settlement ("Motion for Final Approval").

**FINAL JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff filed the present Class Action Complaint in New York County Supreme Court on August 23, 2012 (the "Litigation"). The Complaint asserted a single claim against Defendants under [NYLL, Article 6, § 196-d](#), on behalf of Plaintiff and a class of in-seat service employees who worked at Yankee Stadium in New York between 2005 and 2008. On September 21, 2012, a Joint Settlement and Release ("Settlement Agreement") was fully executed by all parties to effectuate the parties' agreement to resolve this matter for \$750,000. Plaintiff filed a motion for preliminary approval of the settlement on November 9, 2012. On December 6, 2012, the Court granted preliminary approval of the settlement, directed that notices be sent to Class Members, and set March 7, 2013 as the date for a Fairness Hearing.

On February 20, 2013, Plaintiff filed a Motion for Final Approval. Defendants took no position with respect to Plaintiff's Motion [\*2] for Final Approval, and did not object to Plaintiff's request for attorneys' fees, costs, service awards, or payment to the claims administrator.

The Court held a fairness hearing on March 7, 2013. No Class Member objected to the settlement, and no Class Member requested exclusion.

Having considered the Motion for Final Approval, and the supporting Affidavit of Brian S. Schaffer, the oral argument presented at the March 7, 2013 fairness hearing, and the complete record in this matter, for the reasons set forth therein and stated on the record at the

March 7, 2013 fairness hearing, and for good cause shown,

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

**Certification Of The Settlement Class**

1. This Court certifies the following class under Article 9 of the New York Civil Practice Law and Rules ("CPLR") for settlement purposes:

MVP Servers and Runners who: (a) worked at Yankee Stadium in New York for at least twenty games between May 9, 2005 and December 31, 2008.

**Approval Of The Settlement Agreement**

2. The Court hereby grants the Motion for Final Approval and finally approves the settlement as set forth in the Settlement Agreement.

3. [CPLR § 908](#) requires judicial approval for any [\*3] compromise of claims brought on a class basis. In determining whether to approve a class action settlement, courts examine "the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." [Fiala v. Metro. Life Ins. Co.](#), 27 Misc.3d 599, 899 N.Y.S.2d 531, 537 (Sup. Ct. N.Y. County 2010) (citing [Klein v. Robert's Am. Gourmet Food, Inc.](#), 28 A.D.3d 63, 73, 808 N.Y.S.2d 766 (N.Y. App. Div. 2d Dep't 2006)). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact." [In re Colt Indus. Shareholder Litig.](#), 155 A.D.2d 154, 160, 553 N.Y.S.2d 138 (N.Y. App. Div. 1st Dep't 1990) (internal quotation marks omitted). A court should also "balance the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for

the inherent risks of litigation." [Klein](#), 28 A.D.3d at 73. All of these factors weigh in favor of approving the settlement.

4. In reaching the settlement, Class Counsel took into account the risks of establishing [\*4] liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendants. The settlement negotiations were at all times hard fought and arm's length, between parties represented by counsel experienced in wage and hour law, and they have produced a result that Plaintiff's Counsel believes to be in the best interests of the Class in light of the costs and risks of continued litigation. [Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.](#), 396 F.3d 96, 116 (2d Cir. 2005) (internal quotation omitted). Additionally, Defendants have and will continue to vigorously contest Plaintiff's claims if the action does not settle. In light of the strengths and weaknesses of the case, the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiff and the Class Members in the face of significant obstacles. While there is a possibility that the Class could recover more money, including interest, after trial, the Settlement provides the significant benefit of a guaranteed and substantial payment to Class Members, rather than "speculative payment of a hypothetically larger amount years down the road." [Teachers Ret. Sys. v. A.C.L.N. Ltd.](#), No. 01 Civ. 11814 (MP), 2004 U.S. Dist. LEXIS 8608, 2004 WL 1087261, at \*5 (S.D.N.Y. May 14, 2004). [\*5] The favorable reception by the Class also constitutes strong evidence of the fairness of the proposed Settlement and supports judicial approval. [RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.](#), No. 94 Civ. 5587 (PKL)(RL), 2003 U.S. Dist. LEXIS 8239, 2003 WL 21136726, at \*1 (S.D.N.Y. May 15, 2003).

**Service Awards To the Class Representative**

5. The Court finds reasonable the service award of \$10,000 for the class representative, Evelyn Ryan, given the significant contributions she made to advance the prosecution and resolution of the lawsuit. This award shall be paid from the settlement fund.

6. A court may grant enhancement awards in a class action. Such awards "reward[] the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery, including depositions." [Cox v. Microsoft Corp.](#), No. 105193/2000, 26 Misc.3d 1222[A], 907 N.Y.S.2d 436, 2007 NY Slip Op 52667[U], at \*4 [Sup. Ct. N.Y. County 2007]; see also [Mark Fabrics Inc. v. GMAC Commercial Credit LLC](#), No. 604631/02, 2005 N.Y. Misc. LEXIS 3566 (Sup. Ct. N.Y. County Dec. 22, 2005) (granting enhancement award). Enhancement [\*6] 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 coworkers." [Frank v. Eastman Kodak Co.](#), 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

7. Plaintiff expended considerable time and effort to assist Class Counsel with the case. As such, her 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[,] " including by responding to counsel's questions and reviewing documents); [Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.](#), No. 08 Civ. 7670 (BSJ)(JCF), 2010 U.S. Dist. LEXIS 12762, 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).

8. Plaintiff also assumed significant risks in prosecuting this action. In the employment context, where workers are often [\*7] black-listed if they are considered "trouble makers," class representatives are particularly vulnerable to retaliation. See, e.g., [Silberblatt v. Morgan Stanley](#), 524 F. Supp. 2d 425, 435 (S.D.N.Y. 2007) ("A class representative who has been exposed to a demonstrable risk of employer retaliation or whose future employability has been

impaired may be worthy of receiving an additional payment, less other be dissuaded."). Even where there is not a record of actual retaliation, service fees are appropriate in recognition of the risk of retaliation assumed by lead plaintiffs for the benefit of absent class members. [Frank](#), 228 F.R.D. at 187-88 ("Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded.").

9. The service award totaling \$10,000 for Plaintiff is reasonable and well within the range awarded by courts in similar matters. See, e.g., [Capsolas v. Pasta Resources Inc.](#), No. 10 Civ. 5595 (RLE), 2012 U.S. Dist. LEXIS 144651, 2012 WL 4760910, at \*9 (S.D.N.Y. Oct. 5, 2012) (approving service awards of \$20,000 and \$10,000 for [\*8] class representatives in wage and hour action); [Lovaglio v. W & E Hospitality Inc.](#), No. 10 Civ. 7351 (LLS), 2012 U.S. Dist. LEXIS 94077, 2012 WL 2775019, at \*4 (S.D.N.Y. July 6, 2012) (approving service awards of \$10,000 to three class representatives in wage and hour action); [Matheison v. T-Bone Restaurant, LLC](#), No. 09 Civ. 4212 (DAB), 2011 U.S. Dist. LEXIS 143773, 2011 WL 6268216, at \*9 (S.D.N.Y. Dec. 13, 2011) (approving a service award of \$45,000 for a class representative in a wage and hour action); [Willix v. Healthfirst, Inc.](#), No. 07 Civ. 1143 (ENV)(RER), 2011 U.S. Dist. LEXIS 21102, 2011 WL 754862, at \*7 (E.D.N.Y. Feb. 18, 2011) (finding service awards in wage and hour action of \$30,000 and \$15,000 to be reasonable); [Mentor v. Imperial Parking Sys., Inc.](#), No. 05 Civ. 7993 (WHP), 2010 U.S. Dist. LEXIS 132831, 2010 WL 5129068, at \*1-2 (S.D.N.Y. Dec. 15, 2010) (granting \$40,000 and \$15,000 service awards in wage and hour action.); [Duchene v. Michael Cetta, Inc.](#), No. 06 Civ. 4576 (PAC)(GWG), 2009 U.S. Dist. LEXIS 85955, 2009 WL 5841175 (S.D.N.Y. Sept. 10, 2009) (approving service payments of \$25,000 and \$10,000 in wage and hour action).

**The Claims Administrator's Fees Should Be**

## **Approved**

10. The Court confirms Kurtzman Carson Consultants, LLC as the Claims Administrator. The Court approves Plaintiff's request for the Claims Administrator [\*9] to be paid out of the settlement fund. The estimated administration costs are between \$15,000 and \$17,000. However, this number is subject to change, as significant work still remains to complete the administration.

## **Award Of Fees And Costs To Class Counsel**

11. On December 6, 2012, the Court appointed F&S as Class Counsel because they did substantial work identifying, investigating, litigating, and settling Plaintiff's and the class members' claims, have 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. *See* NYSCEF Doc. No. 15.

12. 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. [Girault v. Supersol 661 Amsterdam, LLC, No. 11 Civ. 6835 \(PAE\), 2012 U.S. Dist. LEXIS 89976, 2012 WL 2458172, at \\*2 \(S.D.N.Y. June 28, 2012\)](#) (appointing F&S as class counsel because they "did substantial work identifying, investigating, and settling Plaintiffs' and the class members' claims, have 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 94077, 2012 WL 2775019, at \\*2-3 \[\\*10\]](#) (appointing F&S as class counsel and stating that F&S has "extensive experience in litigating wage and hour class actions" and "achieved an excellent result for the class"); [Matheson, 2011 U.S. Dist. LEXIS 143773, 2011 WL 6268216, at \\*3](#) (appointing F&S as class counsel and stating that F&S "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 v. AMF Bowling Ctrs., Inc., No. 09 Civ. 759](#)

[\(DLC\), 2009 U.S. Dist. LEXIS 85954, 2009 WL 6583142, at \\*2 \(S.D.N.Y. Sept. 18, 2009\)](#) (appointing F&S as class counsel and finding that F&S has "an established record of competent and successful prosecution of large wage and hour class actions, and the attorneys ... are likewise competent and experienced in the area"). Class Counsel's experience prosecuting large scale class and collective employment law actions on behalf of workers was directly responsible for bringing about the positive settlement in this case.

13. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the best interests of the class. Class Counsel has committed substantial resources to [\*11] prosecuting this case.

14. The Court hereby grants Class Counsel's request for attorneys' fees and awards Class Counsel \$250,000.00, which is one-third of the settlement fund.

15. The CPLR authorizes a court to grant attorneys' fees to class counsel who obtain a judgment on behalf of a class: "If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered[.]" [CPLR § 909](#).

16. A court may calculate reasonable attorneys' fees by either the lodestar method (multiplying the hours reasonably billed by a reasonable hourly rate, then applying a multiplier based on more subjective factors) or based on a percentage of the recovery. [Fiala, 899 N.Y.S.2d at 540](#). Where a settlement establishes a common fund, the percentage method is often preferable because "[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours." [Cox, 26 Misc.3d 1220\(A\), 2007 NY Slip Op 52667\[U\] at \\*3; \[\\*12\]](#) *see also* [Peck v. AT&T Corp., No. 601587/2000, 2002](#)

[N.Y. Misc. LEXIS 2026, at \\*26 \(Sup. Ct. N.Y. County July 26, 2002\)](#) (“The percentage of the recovery approach determines the reasonableness of the fee.”). Similarly, “[t]he trend in [the Second] Circuit is toward the percentage method, ... which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of the litigation.” [Wal-Mart Stores, Inc., 396 F.3d at 121](#) (internal quotation marks omitted); *see also* [Strougo v. Bassini, 258 F. Supp. 2d 254 \(S.D.N.Y. 2003\)](#) (collecting cases); [In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 483-85 \(S.D.N.Y. 1998\)](#) (collecting cases).

17. Further, public policy favors a common fund attorneys’ fee award in wage and hour class actions. *See* [Johnson v. Brennan, No. 10 Civ. 4712 \(CM\), 2011 U.S. Dist. LEXIS 105775, 2011 WL 4357376, at \\*13 \(S.D.N.Y. Sept. 16, 2011\)](#) (collecting cases). “If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk.” *Id.*; *see also* [Sand v. Greenberg, No. 08 Civ. 7840 \(PAC\), 2010 U.S. Dist. LEXIS 1120, 2010 WL 69359, at \\*3 \(S.D.N.Y. Jan. 7, 2010\)](#) (“But for the separate provision of legal fees, [\*13] many violations of the Fair Labor Standards Act would continue unabated and uncorrected.”). “Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by ‘private attorneys general,’ attorneys who fill [that role] must be adequately compensated for their efforts. *See* [Reyes v. Altamarea Grp. LLC, No. 10 Civ. 6451\(RLE\), 2011 U.S. Dist. LEXIS 115984, 2011 WL 4599822, at \\*7 \(S.D.N.Y. Aug. 16, 2011\)](#); *see also* [Sand, 2010 U.S. Dist. LEXIS 1120, 2010 WL 69359, at \\*3](#) (statutory attorneys’ fees are meant to “encourage members of the bar to provide legal services to those whose wage claims might otherwise be too small to justify the retention of able, legal counsel”).

18. “Common fund recoveries are contingent on a successful litigation outcome.” [Guaman v. Ajna-Bar NYC, No. 12 Civ. 2987 \(DF\), 2013 U.S. Dist. LEXIS 16206, 2013 WL 445896, at \\*7 \(S.D.N.Y. Feb. 5, 2013\)](#). Such “contin-

gency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation ... and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk.” [deMunecas v. Bold Food LLC, No. 09 Civ. 0440 \(DAB\), 2010 U.S. Dist. LEXIS 38229, 2010 WL 2399345, at \\*8 \(S.D.N.Y. Apr. 19, 2010\) \[\\*14\]](#) (internal quotation marks omitted). Many individual litigants, including the class members here, “cannot afford to retain counsel at fixed hourly rates ... yet they are willing to pay a portion of any recovery they may receive in return for successful representation.” *Id.*

19. Regardless of the method used to determine reasonable attorneys’ fees, a court should consider the following factors:

[T]he risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case’s history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.

[Fiala, 899 N.Y.S.2d at 610](#). All of these factors weigh in favor of approving the requested fee

20. Applying the lodestar method as a “cross check,” the Court finds that the fee Class Counsel seeks is reasonable, as Class Counsel’s request for one-third of the Fund is less than their current “lodestar”. *See, e.g.,* [Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 184-86 \(W.D.N.Y. 2011\) \[\\*15\]](#) (awarding multiplier of 5.3); [In re RJR Nabisco, Inc. Sec. Litig., No. 88 Civ. 7905 \(MBM\), 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138, at \\*5-8 \(S.D.N.Y. Aug. 24, 1992\)](#) (awarding multiplier of 6); *see also* [In re Telik, Inc. Sec. Litig., 576 F. Supp. 2d 570, 590 \(S.D.N.Y. 2008\)](#)

("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts[.]").

21. 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.

22. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of \$3,703.59.

23. The attorneys' fees and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement fund.

### **Settlement Procedure**

24. The "Effective Date" of the settlement shall be thirty (30) days following this Order if no appeal is taken from the Order. If a party appeals this Order, the "Effective Date" of the settlement shall be the day the Court enters a final order and judgment after resolving any appeals.

25. Within five (5) days of the Effective Date, the Claims Administrator will [\*16] distribute the funds in the settlement account by making the following payments in the order below:

(1) Paying Class Counsel one-third of the fund (\$250,000.00);

(2) Reimbursing Class Counsel for litigation costs and expenses;

(3) Paying the Claims Administrator's fee;

(4) Paying the service award of \$10,000 to Plaintiff Evelyn Ryan; and

(5) Paying the remainder of the fund to Qualified Class Members in accordance with the allocation plan described in the Settlement Agreement.

26. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.

27. Upon the Effective Date, this litigation shall be dismissed with prejudice and all members of the Class who have not excluded themselves from the settlement shall be permanently enjoined from pursuing and/or seeking to reopen claims that have been released pursuant to the settlement.

It is so ORDERED this 7 day of March, 2013.

/s/ Melvin L. Schweitzer

Justice

**MELVIN L. SCHWEITZER**