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

Matthew LOVAGLIO, Rebecca Jozwiak, and Shao Hua Lee, on behalf of themselves and others similarly situated, Plaintiffs,
v.
W & E HOSPITALITY INC., Go Nobu, Inc., Eita, Inc., 366 East, Inc., H. Yachi, Inc., Daichan, Inc., Kazuo Wakayama, and Tatsunori Yamada, Defendants.

No. 10 CIV 7351(LLS). | July 6, 2012.

Attorneys and Law Firms

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Opinion

FINAL JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

LOUIS L. STANTON, District Judge.

***1** On September 24, 2010, Plaintiffs Matthew Lovaglio, Rebecca Jozwiak, and Shao Hua Lee, filed a complaint alleging that defendants W & E Hospitality Inc., Go Nobu, Inc., Eita, Inc., 366 East, Inc., H.Yachi, Inc., Daichan, Inc., Kazuo Wakayama, and Tatsunori Yamada (Collectively "Defendants" or "East) violated the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). Plaintiffs alleged, *inter alia*, that Defendants violated the FLSA and NYLL by: (I) unlawfully taking a "tip credit" and paying Plaintiffs and class members less than the minimum wage; (2) failing to compensate Plaintiffs and class members with proper premium overtime compensation when they worked in excess of 40 hours per work week; (3) failing to pay Plaintiffs and class members spread-of-hours pay when they worked ten or more hours in a day; (4) unlawfully distributing a portion of customer tips to tip-ineligible employees; and (5) failing to pay Plaintiffs and class members the full amount of their wages as a result of deductions for breakages, customer walkouts, mistakes, and uniform related expenses. Plaintiffs filed a First Amended Class Action Complaint on October 14, 2010, and a Second Amended Class Action Complaint on January 12, 2012.

On May 26, 2011, Defendants agreed on a conditional basis and solely for purposes of sending notice to potential collective action members, to allow the case to proceed as a collective action against all five of the East restaurants in New York. On June 3, 2011, the Court Ordered that the case provisionally proceed as a collective action under 29 U.S.C. § 216(b), and notice was issued to servers, bussers and runners who worked at East since September 24, 2007.

During the course of litigation, extensive discovery was exchanged, including, but not limited to, payroll reports, tip sheets, personnel files, tip credit notification forms, copies of minimum wage posters, and corporate ownership documents. On March 23, 2011 and April 12, 2011, full-day depositions of corporate representatives from Defendants Eita, Inc. and 366 East, Inc were conducted.

Following months of negotiation, on January 4, 2012, the parties jointly notified the Court that they had reached an agreement in principle. On February 17, 2012, a Joint Settlement and Release, which provides for $1,250,000.00 plus injunctive relief, was fully executed by all parties.

On March 12, 2012, the Court entered an Order ("Preliminary Approval Order") preliminary approving the Settlement and authorizing dissemination of notice (the "Notice") to the Class. The Notice described (1) the terms of the settlement; (2) relief available to Class Members; (3) the date, time, and place of the Fairness Hearing; (4) the procedures for objecting to the settlement and appearing at the Fairness Hearing; (5) the service fees sought; (6) the attorneys' fees sought; and (7) contact information for Class Counsel. The Notice was mailed to 225 Class Members, along with each Class Member's estimated settlement share.

***2** The Class is defined as all servers, runners, and bussers who work or have worked at East Japanese Restaurants in New York for at least two pay periods between September 24, 2004 and December 31, 2010 and did not timely opt-out of the New York Labor Law class.

No Class Member objected and only two Class Members opted out of the Settlement.

Pursuant to the Preliminary Approval Order, Plaintiffs filed their Motion for Final Approval. Defendants did not oppose any portion of this motion.

The Court held a final fairness hearing on July 5, 2012 (the "Fairness Hearing").

Having considered the Motion for Final Approval, the supporting memorandum of law, the Declaration of Brian S. Schaffer and exhibits thereto; the oral arguments presented at the Fairness Hearing; and the complete record in this matter, for the reasons set forth therein and stated on the record at their Fairness blearing and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, THAT:

1. This Order incorporates by reference the definitions in the Settlement Agreement and all capitalized terms used in this Final Judgment shall have the same meanings as set forth in the Settlement Agreement, unless otherwise defined herein.

2. This court approves the Settlement and all terms set forth in the Settlement Agreement and finds that the Settlement is, in all respects, fair, reasonable, adequate, and not a product of collusion. *See Fed.R.Civ.P. 23(e); Frank v. Eastman Kodak Co.*, 228 F.R .D. 174, 184 (W.D.N.Y.2005) (*quoting Joel A. v. Giuliani*, 218 F.3d 132, 138–39 (2d Cir.2000)).

3. The Court finds that the Class shall be certified pursuant to the requirements of *Fed.R.Civ.P. 23*.

4. The $1,250,000.00 settlement amount is substantial and includes meaningful payments to Class Members. In reaching this conclusion, the Court is satisfied that the settlement was fairly and honestly negotiated. It was the result of vigorous arm's-length negotiations, which were undertaken in good faith by counsel with extensive experience in litigating wage and hour class actions, and serious questions of law and fact exist such that the value of an immediate recovery outweighs the mere possibility of further relief after protracted and expensive litigation. *SeeD'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001).

5. The Parties' judgment that the settlement is fair and reasonable, as well as the Class's favorable response to the settlement, weigh in favor of final approval of the settlement.

6. The Settlement's effective date shall be thirty days after entry of this Order if no appeal is taken of this Order. If an appeal is taken in this matter, the effective date shall be the day-after the appeal is withdrawn or after an appellate decision affirming the final approval decision becomes final.

7. The Claims Administrator will distribute settlement checks to the Class Members, Class Counsel's attorneys' fees and expenses to Class Counsel, the Service Awards to named Plaintiffs, and the Claims Administrators fee, within 15 days of the effective date.

***3** 8. Upon the effective date of the settlement, each Class Member shall have released all NYLL claims asserted in this lawsuit through December 31, 2010, including all NYLL claims for misappropriated tips, unpaid wages, interest, liquidated damages, and attorneys' fees and costs related to such claims.

9. All Class Members who endorse the settlement checks shall forever and fully release Defendants from all FLSA claims asserted in this lawsuit through December 31, 2010, including all FLSA claims for unpaid wages, liquidated damages and attorneys' fees and costs related to such claims. The Court also approves the FLSA settlement and finds that it is a fair and reasonable resolution of a *bona fide* dispute reached as a result of contested litigation. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir.1981).

10. This Court awards Class Counsel one-third of the total settlement amount, or $416,666.66, as attorneys' fees to be paid from the settlement fund.

11. This Court awards Class counsel $3,882.24, for costs and expenses incurred in this Litigation to be paid from the settlement fund.

12. The Court finds that the amount of fees requested is fair and reasonable using the "percentage of recovery" method, which is consistent with the trend in the Second Circuit. *Johnson v. Brennan*, No. 10 Civ. 4712(CM), 2011 WL 4357376 (S.D.N.Y. Sept. 16, 2011).

13. Class Counsel's request for one-third of the settlement fund is also consistent with the trend in this Circuit. *Diaz v. Eastern Locating Service Inc.*, No. 10 Civ. 04082(JCF), 2010 WL 5507912 (S.D.N.Y Nov. 29, 2010).

14. Class Counsel achieved an excellent result for the class, *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570, 588–589 (S.D .N.Y.2008).

15. The attorneys' fees requested were entirely contingent upon success in this litigation. Class Counsel expended significant time and effort and advanced costs and expenses without any guarantee of compensation.

16. The attorneys' fees requested are also reasonable in relation to Class Counsel's lodestar. Class Counsel expended over 582.8 attorney hours and 46.5 law clerk hours on this case. Counsel's billing rates are reasonable and when multiplied by their hours worked, amounts to a lodestar of $195,022.50. The attorneys' fees requested are a 2.13 multiplier of the lodestar, which is well within the range of reasonableness. *See, e.g.*, *Wal–Mart Stores, Inc. v. Visa U.S.A Inc.*, 396 F.3d 96, 123 (2d Cir.2005); *Davis v.. J.P. Morgan Chase & Co.*, 827 F.Supp.2d 172, 178 (W.D.N.Y.2011) ("In this case, dividing the $14 million fee request by the lodestar figure yields a multiplier of about 5.3. A review of the case law indicates that while that figure is toward the high end of acceptable multipliers, it is not atypical for similar fee-award cases."); *In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d at 590 ("In contingent litigation, lodestar multiples of over 4 are routinely awarded by courts [.]"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, *7 (S.D.N.Y. July 27, 2007) ("Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District.").

***4** 17. This Court awards the Settlement Claims Administrator its reasonable fees in administering this settlement, to be paid out from the settlement fund.

18. The Court approves $10,000.00 Service Awards for Plaintiffs Matthew Lovaglio, Rebecca Jozwiak, and Shao Hua Lee to be paid from the settlement fund. This Service Awards are reasonable in light of the efforts the Plaintiffs expended in furthering the interests of the Class.

19. The entire Litigation is dismissed with prejudice and without costs to any party. All Class Members, except those individuals who timely and validly opted-out of the Settlement, are barred and permanently enjoined from participating in any other individual or class lawsuit against the Releasees concerning the Released Claims.

20. Without affecting the finality of this Judgment and Order, the Court reserves continuing and exclusive jurisdiction over parties to the settlement agreement to administer, supervise, construe and enforce the Settlement Agreement including enforcing the injunctive relief per section 3.6 of the Settlement Agreement.

21. The Parties having so agreed, good cause appearing, and there being no just reason for delay, it is expressly directed that this Final Judgment and Order be, and hereby is, entered as a final order.

It is so ORDERED this 5th day of July, 2012.

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