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

Sharon YUZARY, Jon Racow, Henry Hu, Mina Dimetry, Teron Haughton, Daniel Hauer, Billy Tzewa Mui, Calvin Mazlumyan, and Kim Lebleu, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

HSBC BANK USA, N.A.; HSBC USA, Inc.; and HSBC North America Holdings, Inc., Defendants.

No. 12 Civ. 3693(PGG). | April 30, 2013.

Attorneys and Law Firms

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Shavitz Law Group, P.A., [Gregg I. Shavitz](#), admitted pro hac vice, [Susan H. Stern](#), admitted pro hac vice, Boca Raton, FL.

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS, APPOINTMENT OF PLAINTIFFS' COUNSEL AS CLASS COUNSEL, AND APPROVAL OF PLAINTIFFS' PROPOSED NOTICES OF SETTLEMENT

PAUL G. GATDEPHE, District Judge.

*1 The above-entitled matter came before the Court on Plaintiffs' Motion for Preliminary Approval of Class Settlement, Provisional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notices of Settlement ("Motion for Preliminary Approval"). Defendants agreed, for settlement purposes only, not to

oppose the motion.

I. Preliminary Approval of Settlement

1. Based upon the Court's review of the Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Approval, the Declaration of Justin M. Swartz ("Swartz Declaration"), the Declaration of Brian S. Schaffer ("Schaffer Declaration"), the Declaration of C.K. Lee ("Lee Declaration"), the Declaration of Gregg I. Shavitz ("Shavitz Declaration"), and all other papers submitted in connection with Plaintiffs' Motion for Preliminary Approval, the Court grants preliminary approval of the settlement memorialized in the Joint Stipulation of Settlement and Release ("Settlement Agreement") and Addendum to the Settlement Agreement ("Addendum") between Plaintiffs Sharon Yuzary, Jon Racow, Henry Hu, Mina Dimetry, Teron Haughton, Daniel Hauer, Billy Tzewa Mui, Calvin Mazlumyan, and Kim LeBleu (together, "Plaintiffs") and Defendants HSBC Bank USA, N.A.; HSBC USA, Inc.; and HSBC North America Holdings, Inc. (together, "HSBC" or "Defendants") attached to the Swartz Declaration 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.1998). 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. See *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009).

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. *Clark*, 2009 WL 6615729, at *3.

4. Preliminary approval of a settlement agreement requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and, in some cases, an informal presentation by the settling parties. *Clark*, 2009 WL 6615729, at *3 (citing *Herbert B. Newberg & Alba Conte, Newberg on Class Actions ("Newberg") § 11.25 (4th ed.2002)*), Courts often grant preliminary settlement approval without requiring a hearing or a court appearance. See *Hernandez*

v. Merrill Lynch & Co., Inc., No. 11 Civ. 8472, 2012 WL 5862749, at *1 (S.D.N.Y. Nov. 15, 2012) (granting preliminary approval based on plaintiffs' memorandum of law, attorney declaration, and exhibits); *Palacio v. E*TRADE Fin. Corp.*, No. 10 Civ. 4030, 2012 WL 1058409, at *1 (S.D.N.Y. Mar. 12, 2012) (same). To grant preliminary approval, the court need only find that there is "probable cause to submit the [settlement] proposal 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) (internal citation omitted). 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. *Clark*, 2009 WL 6615729, at *3.

*2 5. The Court concludes that the proposed Settlement Agreement is within the range of possible final settlement approval, such that notice to the class is appropriate. See *In re Traffic Exec. Ass'n*, 627 F.2d at 634; *Hernandez*, 2012 WL 5862749, at *1.

6. 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. 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 *Hernandez*, 2012 WL 5862749, at *2 (endorsing early settlement of wage and hour class action); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527, 2004 WL 2397190, at * 12 (S.D.N.Y. Oct. 26, 2004) (early settlements should be encouraged when warranted by the circumstances of the case); *Castagna v. Madison Square Garden, L.P.*, No. 09 Civ. 10211, 2011 WL 2208614, at *10 (S.D.N.Y. Jun. 7, 2011) (commending Plaintiffs' attorneys for negotiating early settlement); *Diaz v. E. Locating Serv. Inc.*, No. 10 Civ. 4082, 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). The parties here acted responsibly in reaching an early settlement in this case. See *Hernandez*, 2012 WL 5862749, at *2; *In re Interpublic Sec. Litig.*, 2004 WL 2397190, at *12,

7. The assistance of an experienced JAMS employment mediator, Michael D. Young, reinforces that the Settlement Agreement is non-collusive. *O'Dell v. AMF Bowling Centers, Inc.*, No. 09 Civ. 759, 2009 WL 6583142, at * 1 (S.D.N.Y. Sept. 18, 2009) (granting preliminary approval to settlement that resulted from mediation overseen by Michael D. Young).

II. Conditional Certification of the Proposed Rule 23 Settlement Classes

8. Provisional settlement class certification and appointment of class counsel have several 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) (discussing the advantages of certifying classes for settlement purposes); *Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271, 2011 WL 382200, at *1 (S.D.N.Y. Jan. 21, 2011) (conditionally certifying wage and hour settlement class and granting preliminary approval of settlement).

9. For settlement purposes only, the Court provisionally certifies the following sub classes under [Federal Rule of Civil Procedure 23\(e\)](#), for settlement purposes ("Settlement Class"):

a. New York Sub-Class: The "New York Sub-Class" consists of all individuals who were employed in Covered Positions by Defendants in New York from February 7, 2006 through November 15, 2012;

*3 b. California Sub-Class: The "California Sub-Class" consists of all individuals who were employed in Covered Positions by Defendants in the California from May 9, 2008 through November 15,2012;

c. Connecticut Sub-Class: The "Connecticut Sub-Class" consists of all individuals who were employed in Covered Positions by Defendants in the Connecticut from May 9, 2010 through November 15, 2012; and

d. New Jersey Sub-Class: The "New Jersey Sub-Class" consists of all individuals who were employed in Covered Positions by Defendants in the New Jersey from May 9, 2010 through November 15, 2012.

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

11. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(1\)](#) because there are approximately 1,950 Rule 23 Class Members and, thus, joinder is impracticable. See

Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.1995) (“[N]umerosity is presumed at a level of 40 members”).

12. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(2\)](#) because they and the class members share common issues of fact and law, including whether Defendants failed to pay **overtime** premiums in violation of federal and state wage and hour laws, and whether Defendants failed to keep accurate records of the hours Plaintiffs worked. See *Morris v. Affinity Health Plan, Inc.*, 859 F.Supp.2d 611, 615–16 (S.D.N.Y.2012) (commonality satisfied where, among other allegations, plaintiffs claimed that defendant had policy of not paying all class members **overtime** pay); *Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *3 (S.D.N.Y. May 11, 2010) (common issues that help to satisfy [Rule 23](#) commonality requirement include “whether [Defendant] failed to pay Plaintiffs and the state settlement Class Members **overtime** premium pay for all hours they worked over 40 in a workweek; and ... whether [Defendant] maintained accurate time records of the hours Plaintiffs and the state settlement Class Members worked”).

13. Plaintiffs satisfy [Federal Rule of Civil Procedure 23\(a\)\(3\)](#) because Plaintiffs’ claims for **overtime** pay arise from the same factual and legal circumstances that form the bases of the Class Members’ claims. See *Hernandez*, 2012 WL 5862749, at *3 (typicality satisfied where “[p]laintiffs’ claims for **overtime** pay [arose] from the same factual and legal circumstances that form[ed] the bases of the [c]lass [m]embers’ claims”); *Morris*, 859 F.Supp.2d at 616 (same).

14. 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 *Morris*, 859 F.Supp.2d at 616 (no evidence that named plaintiffs’ and class members’ interests were at odds).

15. In addition, Plaintiffs’ Counsel, Outten & Golden LLP (“O & G”), Fitapelli & Schaffer, LLP (“F & S”), the Lee Litigation Group, PLLC (“Lee Litigation Group”), and the Shavitz Law Group, P .A. (“SLG”) meet [Rule 23\(a\)\(4\)](#)’s adequacy requirement.

*4 8. Plaintiffs also satisfy [Rule 23\(b\)\(3\)](#). Common factual allegations and a common legal theory predominate over any factual or legal variations among class members. See *Hernandez*, 2012 WL 5862749, at *4 (common factual allegations and legal theory predominated over variations in wage and hour misclassification case); *Torres v. Gristede’s Corp.*, No. 04

Civ. 3316, 2006 WL 2819730, at *16 (S.D.N.Y. Sept. 29, 2006) (plaintiff “introduced sufficient proof that Defendants engaged in a common practice to deny employees **overtime** pay,” and “this issue predominates over any individual calculations of **overtime** wages”). Class adjudication of this case is superior to individual adjudication because it will conserve judicial resources and is more efficient for class members, particularly those who lack the resources to bring their claims individually. See *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

9. For settlement purposes only, the Court appoints O & G, F & S, Lee Litigation Group, and SLG (together, “Plaintiffs’ Counsel”) as Class Counsel because they meet all of the requirements of [Federal Rule of Civil Procedure 23\(g\)](#). See *Damassia*, 250 F.R.D. at 165 (explaining that [Rule 23\(g\)](#) requires the court to consider “the work counsel has done in identifying or investigating potential claims in the action, ... counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, ... counsel’s knowledge of the applicable law, and ... the resources counsel will commit to representing the class”) (internal quotation marks omitted).

10. Plaintiffs’ Counsel did substantial work identifying, investigating, prosecuting, and settling Plaintiffs’ and Class Members’ claims.

11. O & G attorneys “have substantial experience prosecuting and settling employment class actions, including wage and hour class actions[,] and are well-versed in wage and hour and class action law .” *Johnson v. Brennan*, No. 10 Civ. 4712, 2011 WL 1872405, at *2 (S.D.N.Y. May 17, 2011) (internal quotation marks omitted); see also *Capsolas v. Pasta Res. Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *2 (S.D.N.Y. May 9, 2012) (O & G attorneys “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”); *McMahon v. Olivier C hen g Catering and Events, LLC*, No. 08 Civ. 8713, 2010 WL 2399328, at *6 (S.D.N.Y. Mar. 3, 2010) (O & G “are experienced employment lawyers with good reputations among the employment law bar ... [and] have prosecuted and favorably settled many employment law class actions, including wage and hour class actions”); *Damassia*, 250 F.R.D. at 158 (S.D.N.Y.2008) (O & G lawyers have “an established record of competent and successful prosecution of large wage and hour class actions, and the

attorneys working on the case are likewise competent and experienced in the area”). Courts have appointed O & G as class counsel in numerous class and collective actions, including *Hernandez*, 2012 WL 5862749, at *4 (appointing O & G and SLG as class counsel, noting both firms’ “years of experience prosecuting and settling wage and hour class actions”); *Capsolas*, 2012 WL 1656920, at *2 (appointing O & G as class counsel); *Palacio*, 2012 WL 1058409, at *2 (appointing O & G and SLG as class counsel and noting both firms’ extensive experience litigating and settlement wage and hour class and collective actions); *Matheson v. T-Bone Restaurant, LLC*, No. 09 Civ. 4214, 2011 WL 6402303, at *3 (S.D.N.Y. Sept. 13, 2011) (appointing O & G and F & S as class counsel, finding that they “have substantial experience prosecuting and settling ... wage and hour class actions, and are well-versed in wage and hour law and in class action law”); *Johnson*, 2011 WL 1872405, at *2 (appointing O & G as class counsel); and *Clark*, 2009 WL 6615729, at *5 (appointing O & G as class counsel), among others.

*5 12. 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, including *Lovaglio v. W & E Hospitality Inc.*, No. 10 Civ. 7351, 2012 WL 2775019, at *2, 4 (S.D.N.Y. July 6, 2012) (F & S has “extensive experience in litigating wage and hour class actions” and “achieved an excellent result for the class”); *Girault v. Supersol 661 Amsterdam, LLC*, No. 11 Civ. 6835, 2012 WL 2458172, at *2 (S.D.N.Y. June 28, 2012) (appointing F & S as class counsel because they “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”); and *Matheson*, 2011 WL 6402303, at *2–3, among others.

13. C.K. Lee has served as lead counsel in numerous wage and hour class and collective actions, including *Han v. AB Gansevoort*, No. 11 Civ. 2423 (S.D.N.Y.); *Marie v. Energy Resources*, No. 11 Civ. 2490 (S.D.N.Y.); *Han v. Sterling National Mortgage*, No. 09 Civ. 5589 (E.D.N.Y.); *Amaya v. 166 Park*, No. 11 Civ. 1081 (E.D.N.Y.), among others,

14. SLG has been lead counsel or co-counsel on dozens of wage and hour class and collective actions, including *Hernandez*, 2012 WL 5862749, at *4; *Palacio*, 2012 WL 1058409, at 2; *Saliford v. Regions Financial Corp.*, No. 10 Civ. 61031 (S.D.Fla.); *Stewart v. Prince Telecom, Inc.*, No. 10 Civ. 4881 (S.D.N.Y.); *Hosier v. Mattress Firm, Inc.*, No. 10 Civ. 294 (M.D.Fla.); *Briscoe–Grey v. Sears Holding Corp.*, No. 09 Civ. 81408 (S.D.Fla.); *Lewis v.*

Iowa College Acquisition Corp., No. 08 Civ. 61011 (S.D.Fla.); *Brooks v. First Data Corp.*, No. 11–18202 (Fla. 17th Cir.); and *Romero v. Florida Power and Light Co.*, No. 09 Civ. 1401 (M.D.Fla.), among others.

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

IV. Notices

16. The Court approves the Proposed Notice of Proposed Settlement of Class Action and Fairness Hearing, and the Proposed Notice of Proposed Settlement of Collective Action Lawsuit and Fairness Hearing (collectively, the “Proposed Notices”), filed on February 20, 2012, and directs their distribution to the Class.

17. The content of the Rule 23 Notice fully complies with due process and Federal Rule of Civil Procedure 23.

18. Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), a notice must provide:

the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

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

19. The Rule 23 Notice satisfies each of these requirements and adequately puts Class Members on notice of the proposed settlement. *See, e.g., In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y.1993) (class notice “need only describe the terms of the settlement generally”); *Johnson*, 2011 WL

1872405, at *3. The Rule 23 Notice is also appropriate because it describes the terms of the settlement, informs the classes about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing. *Hernandez*, 2012 WL 5862749, at *5.

V. Class Action Settlement Procedure

20. The Court hereby adopts the settlement procedure;

- a. Within 20 days of the date of this Order, the Claims Administrator shall mail the Notices to Class Members;
- b. Rule 23 Class Members will have 30 days from the date the Notice is mailed to opt out of the settlement or object to it;
- c. Plaintiffs will file a Motion for Final Approval of Settlement no later than 15 days before the fairness hearing;
- d. The Court will hold a final fairness hearing on *July 25, 2013 at 10:00 a.m.* at the United States District Court for the Southern District of New York, 40 Foley Square, New York, New York, Courtroom 705;

e. If the Court grants Plaintiffs' Motion for Final Approval of the Settlement, the Court will issue a Final Order and Judgment. If no party appeals the Court's Final Order and Judgment, the "Effective Date" of the settlement will be the day after the deadline for taking an appeal has passed;

f. If rehearing, reconsideration or appellate review is sought, the "Effective Date" shall be the day after all appeals are resolved in favor of final approval;

g. The Claims Administrator will disburse settlement checks to the Class Members, Class Counsel's attorneys' fees and expenses to Class Counsel, the Service Awards, and the Claims Administrator's fee within 3 days of the Effective Date; and

h. The parties shall abide by all terms of the Settlement Agreement and Addendum.

The Clerk of the Court is directed to terminate the motion (Dkt. No. 52).

It is so ORDERED this *29th* day of *April*, 2013.