SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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IRINA ARNUTOVSKAYA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

- v -

ALTERATION GROUP OF NY, LLC, AND RELATED OR AFFILIATED ENTITIES, JEREMY MILLER,

Defendants.

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INDEX NO. 161194/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 99, 100

were read on this motion to/for MISCELLANEOUS.

Motion by named plaintiff IRINA ARNUTOVSKAYA ("Named Plaintiff"), on behalf of herself and the proposed class ("Class Members" or "Plaintiffs") as defined in the Settlement Agreement ("Settlement") (NYSCEF Doc No 74 [Settlement Agreement] at 2), for Final Approval of Class Action Settlement—including the approval of settlement checks to qualified class members, attorneys' fees and costs, claims administration costs, and for a service award to Named Plaintiff—is granted, without opposition.

JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

On December 19, 2017, Named Plaintiff filed a Class Action Complaint against defendants ALTERATION GROUP OF NY, LLC d/b/a/ ALTERATION SPECIALISTS OF NEW YORK ("ASNY"), and related or affiliated entities, and JEREMY MILLER (collectively "Defendants") alleging that Defendants violated the New York Labor Law ("NYLL") Articles 6 and 19 and 12 New York Codes, Rules, and Regulations ("NYCEE") § 142 by not compensating Plaintiffs for all the hours worked and by maintaining a policy and practice of paying its tailors commissions at a rate lower than the rate promised and further by unlawfully deducting earned wages from Plaintiffs' last paychecks. (NYSCEF Doc No 1 [Class Action Complaint] ¶¶1-4.) The Complaint alleges four causes of action: (1) NYLL – minimum wage; (2) NYLL – overtime compensation; (3) NYCEE – unpaid wages; and, (4) breach of contract. (*Id.* ¶¶ 50-87.) In addition to the class-wide claims, Named Plaintiff alleges the aforementioned individual claim for breach of her employment contract. (*Id.*)

On March 12, 2019, having heard oral argument, this Court issued an order certifying a class consisting of tailors who worked for ASNY since December 19, 2011. (NYSCEF Doc No 55 [Order Granting Motion for Class Certification]; *see also* NYSCEF Doc No 56 [Transcript of Oral Argument on Class Certification] at 19:12-24:19.) The defined class does not include any manager, corporate officer, director, clerical or office workers. (*See* NYSCEF Doc No 43 [Memorandum in Supp of Motion for Class Certification] at 1; *see also* Order Granting Motion for Class Certification.)

On November 20, 2019, the parties presented to the Court a Proposed Settlement which the Court preliminarily approved. Additionally, the Court also authorized publication of the Notice of Class Action Settlement ("Notice"), Claim Form and Release ("Claim Form"), and the Opt-Out Form (collectively referred to as the "Notice Packet"). (Ex A, NYSCEF Doc No 89 [Order Granting Preliminary Approval].)

According to the affidavit of Settlement Claims Administrator Tomasz Kulak ("Kulak") of Martom Solutions LLC ("MSLLC"), on December 27, 2019, the Notice Packet was distributed to the sixty-four (64) Class Members via First Class Mail. (NYSCEF Doc No 91 [Kulak Aff] ¶¶ 4, 6.)[1] According to Kulak's affidavit, of the sixty-four (64) Notice Packets distributed by First Class Mail, three (3) were returned as undeliverable. (*Id.* ¶ 8.) MSLLC performed a skip trace and found three (3) new addresses for these Class Members and the Notice Packets were promptly re-mailed. (*Id.* ¶¶ 7, 8.) Of the three (3) re-mailed Notice Packets, none were returned. (*Id.* ¶ 8.) Of the sixty-four (64) Class Members, fifteen (15) Class Members responded. (*Id.* ¶ 9.) Of the fifteen (15) Class Members, fourteen (14) filed claims and are authorized to receive a settlement check. (*Id* ¶¶ 9, 12.) Only one Class Member opted out of the Settlement. (*Id.* ¶ 10.) No Class Members objected to the Settlement. (*Id.* ¶ 11; *see also* Ex B, NYSCEF Doc No 90 [Notice] at 1 [Objection Deadline].)

The Fairness Hearing that was originally scheduled for March 25, 2020, was cancelled due to the COVID-19 pandemic. As per the Notice Packet, all objections to the Settlement were to be submitted by February 25, 2020. (Notice Packet at 1.) According to the moving papers, no objections were filed. Notwithstanding the prior notification, on May 6, 2020, Plaintiffs' firm Virginia & Ambinder, LLP ("Class Counsel")[2] mailed a Supplemental Notice to Class Members informing them that the Court was going to evaluate the Settlement based on written submissions and would schedule a Virtual Fairness Hearing for the Class Members if so requested. (NYSCEF Doc No 100 [Supplemental Notice]; *see also* NYSCEF Doc No 99 [Newhouse Supp Aff] ¶ 3.) None of the Supplemental Notices were returned as undeliverable. (NYSCEF Doc No 99 [Newhouse Supp Aff] ¶ 4.) No Class Member again objected to the Settlement or requested to appear at a potential Virtual Fairness Hearing. (NYSCEF Doc No 99 [Newhouse Supp Aff] ¶ 26.) Under the circumstances, the Court deems the right to appear and be heard at the Fairness Hearing to be satisfied and waived.

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[1] A similar notice was posted on MSLLC's website, which presently seems not to be accessible. (NYSCEF Doc No 91 [Kulak Aff] ¶¶ 4, 6.)

[2] Section 1.7 of the Settlement Agreement states that "Class Counsel" and "Plaintiffs' Counsel" shall mean Lloyd Ambinder and Jack Newhouse ["Newhouse"] of and including Virginia & Ambinder LLP with an address of 40 Broad Street, 702 Floor, New York, New York 10004." (NYSCEF Doc No 74 [Settlement Agreement].)

Having considered the Motion for Final Approval of Class Action Settlement and the record in this matter, for the reasons set forth in the written submissions by the parties, and for good cause shown,

Accordingly, it is hereby, ORDERED that

A. Certification of the Class

1. Pursuant to CPLR 901 and 902, the Court certifies, for settlement purposes, a Class consisting of all individuals who are presently or were formerly employed as tailors by ASNY from December 19, 2011, to the date of the preliminary approval order, which is November 20, 2019. (NYSCEF Doc No 74 [Settlement Agreement] at 2.) The Class does not include any manager, corporate officer, director, clerical or office workers. (*See* NYSCEF Doc No 43 [Memorandum in Supp of Motion for Class Certification] at 1; *see also* Order Granting Motion for Class Certification.)

B. Approval of the Settlement

2. The Court grants the Motion for Final Approval of Class Action Settlement,[3] including:

    a) $72,500 for an award of attorneys' fees, expenses, and costs — $38,032.36 of which comes from the Gross Settlement Amount[4] and $34,467.64 of which makes up 33.33% or one third of the Gross Payment;[5]
    b) $3,000 for the Service Award to Named Plaintiff from the Gross Settlement Amount;
    c) $2,000 for the settlement of Named Plaintiff's individual Breach of Contract claim from the Gross Settlement Amount;
    d) $29,526.42 for Settlement Checks from the Net Settlement Fund;[6] and
    e) $6,787.30 for Claims Administrator's costs from the Net Settlement Fund.[7]

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3 In a call with the Court dated June 18, 2020, Plaintiff's Counsel informed the Court that after the opt-in deadline passed, an additional class member sought to opt-in, and Defendants did not object. In light of this additional member opting-in, there may be a slight discrepancy in the numbers.

4 Gross Settlement Amount is defined as the maximum amount that can be paid by Defendants and includes all Costs and Fees. Based on the Settlement and Plaintiff's Counsel Newhouse's letter dated June 18, 2020, it is equal to $146,435.29. (NYSCEF Doc No 74 [Settlement Agreement] 1.18 at 3; *see also* NYSCEF Doc No 103 [Newhouse Letter dated June 18, 2020].)

5 Gross Payment ("Gross Payment" or "Individual Allocations to Class Members") is that portion of the Gross Settlement Amount from which Defendants have agreed to pay Class Members. It is a total of $103,402.93. (NYSCEF Doc No 90 [Notice]; NYSCEF Doc No 103 [Newhouse Letter dated June 18, 2020].)

6 Net Settlement Fund is that portion of the Gross Settlement Amount that consists of the following: Individual Allocations to Class Members who have opted into the Settlement ($29,526.42); Service Award ($3,000); Attorneys' Fees and Costs ($72,500); and Claims Administration Fees & Costs ($6,787.30). Its total amount equals to $111,813.72. (NYSCEF Doc No 103 [Newhouse Letter dated June 18, 2020].)

7 The balance of the Gross Settlement Amount of $32,621.57 was available to Class Members but was not claimed. As such, this amount will theoretically revert back to Defendants after payroll and any other applicable taxes are deducted. Class Counsel states that the payroll taxes are estimated to be about $3,300. (NYSCEF Doc No 103 [Newhouse Letter dated June 18, 2020].)

3. CPLR 908 requires judicial approval for any 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., Inc.*, 27 Misc 3d 599, 606 [Sup Ct 2010] [internal citations omitted].) "Adequacy requires balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." (*Id.* at 607 [internal citations and quotations omitted].) 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 AD2d 154, 160 [1st Dept 1990], *affd as mod sub nom. Matter of Colt Indus. Shareholder Litig. v Colt Indus. Inc.*, 77 NY2d 185 [1991] [internal citations omitted].)

4. In the present case, the Court finds that the aforementioned factors overall weigh in favor of approving the Settlement. Although the participation rate is approximately 23% (or 15/64), similar rates have been accepted by courts in New York. (*See, e.g., Hernandez v Immortal Rise, Inc.*, 306 FRD 91, 100 [EDNY 2015] [finding a 20% participation rate reasonable, which is "well above average in class action settlements"); *Lopez v The Dinex Group, LLC*, 2015 N.Y. Slip Op. 31866[U] [Sup Ct, 2015] [finding a participation rate of 32.8% reasonable].) "Claims-made settlements typically have a participation rate in the 10-15 percent range." (*Hernandez*, 306 FRD at 100, citing 2 McLaughlin on Class Actions § 6:24 [8th ed.].) The Court is aware that a possible explanation for this rate—which has been referred to by other courts—is that the notice in the mail was treated as "junk mail." (*Cf.* Andrew C. Brunsden, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J Emp & Lab L 269, 292-94 [2008] [noting that opt-in rates in 2008 ranged between 2% and 89.5%, with a nationwide average of 15.71% due largely to the tendency to "do nothing in response to class notices"]; Noah A. Finkel, *State Wage-and-Hour Law Class Actions: The Real Wave of 'FLSA' Litigation?*, 7 Employee Rts & Emp Pol'y J 159, 161 [2003].) In addition, there are other factors that might have affected the opt-in rate such as immigration status, language, and educational barriers. (*See, e.g., De La Cruz v. Gill Corn Farms, Inc.*, 2005 U.S. Dist. LEXIS 44675, at *6-7 [NDNY Jan. 25, 2005].) Also, a further factor for the Court's analysis, is only one Class Member has opted out of the Settlement, and none have objected to it. (NYSCEF Doc No 91 [Kulak Aff] ¶¶ 10, 11; *see also Maley v Del Global Techs. Corp*., 186 F Supp 2d 358, 362- 63 [SDNY 2002].) Further, in the instant case, the approximate 23% participation rate is outweighed by other factors that are in favor of the settlement, such as the risks of litigation. For example, in order to establish their claim, Plaintiffs would have to prove that: (1) they were entitled to receive overtime compensation; and (2) they were not paid adequate overtime compensation. (NYSCEF Doc No 102 [2d Supp Aff Newhouse] ¶ 5.) First, Plaintiffs recognize, for settlement purposes, that regarding the issue of entitlement, the law is unclear as to whether tailors who engaged in alterations may be exempt from statutory overtime and state that no court has specifically ruled on this issue. (*Id.* ¶¶ 11, 14; *see also* 29 U.S.C. § 207[i].) Correspondingly, Defendants had argued in their opposition to class certification that Plaintiffs are not entitled to overtime compensation

under the law. Defendants argued that Class Members are exempt from traditional overtime requirements under FSLA and NYLL and reserved their right to assert such affirmative defenses as part of a forthcoming Motion for Summary Judgment. (Memo in Opp [Seq 002], NYSCEF Doc No 45 [Memo in Opp to Motion for Class Certification] at 2, n. 1.) Secondly, assuming tailors were entitled to overtime, Plaintiffs would then additionally have the burden of proving their damages for such unpaid overtime. In that regard, Plaintiffs would be required to establish the number of hours worked in excess of forty (40) hours in a week and that they were not paid at the proper overtime rate for those overtime hours. (Memo in Supp, NYSCEF Doc No 96 [Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement] at 4.) In their opposition to the class certification motion, Defendants denied that Plaintiffs worked more than forty (40) hours in a week, and Defendants further argued that, if they did, they were paid the proper wage. On that prior motion, Defendants had submitted affidavits from one manager and ten tailors to show that Plaintiffs did not work many, if any, overtime hours. (NYSCEF Doc No 46 [Affirm in Opp to Class Certification], Ex H [Dipchand Babooram EBT] ¶ 8 [testifying that all the tailors knew or know how to scan their time and so their time sheets showing not much overtime work, if any, reflect their time accurately]; *see also* Ex F [Doris Muscat EBT] ¶¶ 21-24; Ex G [Florika Lika EBT] ¶¶ 15; Ex I [Ramiz Curi EBT] ¶¶ 7, 8; Ex J [Myrna Lundberg EBT] ¶¶ 7-10; Ex K [Ornela Flamuri EBT] ¶¶ 7-11; Ex L [Aleistan Sempher EBT] ¶¶ 7-9; Ex M [Belkis Perdomo EBT] ¶¶ 8-10; Ex N [Anila Hasani EBT] ¶¶ 5-6; Ex O [Falconeris Holguin EBT] ¶¶ 5-7; Ex P [Jean Thermidor EBT] ¶¶ 5-7.) Whereas the ultimate result of a full-scale litigation is uncertain, the settlement provides a certain and immediate recovery. Further, after exchanging extensive discovery, Class Counsel accounted for the costs of further discovery, trial and appeal. (*Id.* ¶¶ 4, 5; s*ee Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F3d 96, 116 [2d Cir 2005] ["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."]; *Vasquez v TGD Grp., Inc.*, 2016 WL 3181150, at *3 [SDNY June 3, 2016].) It was alleged that the Plaintiffs worked on average 5 to 10 hours of overtime per week. The parties agreed as part of the settlement to an allocation to each full-time Class Member of approximately 3.5 hours of overtime per week. (NYSCEF Doc No 102 [2d Supp Aff Newhouse] ¶ 20.) Moreover, this Court finds that the Settlement was reached as a result of arm's-length negotiations between experienced counsel who routinely practice same or similar class action litigation each taking into account their strong points and weak points. (NYSCEF Doc No 88 [Newhouse Supp Aff] ¶¶ 4-8.) Lastly, Class Members' recovery based upon the agreed allocation of overtime is between thirty-five (35) and seventy (70) percent, depending on their alleged overtime hours, which is a reasonable percentage recovery in light of the risks involved in further litigation. (*See In re Bear Stearns Cos., Inc. Sec., Deriv., & ERISA Litig.*, 909 F Supp 2d 259, 269 [SDNY 2012] ["[T]here 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."]; *Raniere v Citigroup Inc.*, 310 FRD 211, 219 [SDNY 2015] [granting a recovery figure of 23% in light of the risks that plaintiffs would not be able to establish liability or prove damages in a minimum wages and overtime pay class action suit]; *Siddiky v Union Sq. Hosp. Group, LLC*, 2017 WL

2198158, at *6 [SDNY May 17, 2017] [granting a recovery figure of 23% in light of the significant risks if plaintiffs were to proceed to trial]; *see also Gilliam v Addicts Rehabilitation Center Fund*, 2008 WL 782596, at *5 [SDNY 2008] ["Settlement assures immediate payment of substantial amounts to [c]lass [m]embers, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road."].) The Court having considered all of the above finds that the Settlement is fair and reasonable and in the best interest of the Class.

i. Service Awards

5. On November 20, 2019, the Court appointed Named Plaintiff to represent the Class. (Ex A, NYSCEF Doc No 89 [Order Granting Preliminary Approval].)

6. The Court finds, based upon Named Plaintiff's affidavit and Newhouse's affirmation, that a service award of $3,000 for Named Plaintiff to be reasonable, given the contributions she has made to assist with the lawsuit. (Ex D, NYSCEF Doc No 92 [Named Plaintiff Aff] ¶¶ 3-13; Memo in Supp, NYSCEF Doc No 96 [Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement] at 14.)

7. Service awards have been used by state courts to compensate "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[.]" (*Cox v Microsoft Corp.*, 26 Misc 3d 1220(A), *4 [Sup Ct 2007].) Service awards have been found to be "particularly appropriate in the employment context[]" where "the plaintiff is often a former or current employee of the defendant, and thus, by lending his [or her] name to the litigation, he [or she] has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers. (*Frank v Eastman Kodak Co*., 228 FRD 174, 187 [WDNY 2005] [internal citations omitted].)

8. According to the moving papers, Named Plaintiff dedicated a significant amount of her personal time in order to recover unpaid wages for herself and on behalf of her co-workers. (Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement at 15-16, citing Named Plaintiff Aff ¶¶ 5-9.) Named Plaintiff claims that she met with her lawyers before starting the lawsuit and, throughout the lawsuit, has frequently communicated with her lawyers by phone and e-mail, answered various questions, provided documents and information (to her lawyers and to ASNY's lawyers), and also testified during an all-day deposition. Named Plaintiff claims that she took a full day off of work in order to sit for the all-day deposition. (Named Plaintiff Aff ¶¶ 3-13; *see also* 2d Supp Aff Newhouse ¶¶ 21-37.) Named Plaintiff's efforts, which helped move the litigation along, "exemplify the very reason courts award service fees." (*Compare Fernandez v Legends Hospitality, LLC*, 2015 WL 3932897, at *4 [Sup Ct June 22, 2015] [acknowledging that the named plaintiff expended considerable time and effort to assist counsel with the case, "such as informing counsel of detailed factual information regarding their employment with Defendants initially and as the case progressed, providing counsel with relevant documents in their possession, participating in litigation strategy. . . ."] *and Mancia v HSBC Sec. (USA) Inc.*, 2016 WL 833232, at *3 [Sup Ct Feb.

19, 2016] *with Reyes, et al. v 600 West 169th Rest. Inc. d/b/a Coogan's, et al*., 2019 WL 7212476 [Sup Ct Dec. 20, 2019] [This Court declined granting service fees where named plaintiffs made no showing as to the reasonable value of legal services rendered.].) Additionally, Named Plaintiff took on a demonstrated personal risk in filing this lawsuit. Indeed, after the commencement of the instant matter, Named Plaintiff was named as a defendant in a lawsuit filed by Defendant ASNY. (*Id.* ¶¶ 10-12; *see Frank*, 228 FRD at 187.) Named Plaintiff argues that the lawsuit named her as a defendant for retaliatory reasons, which is disputed by Defendant ASNY. (Ex D, NYSCEF Doc No 92 [Named Plaintiff Aff] ¶¶ 10-12.) Moreover, the requested payment is within the range of fees awarded by courts in New York. (*See Fernandez*, 2015 WL 3932897, at *4 [awarding service payments totaling $15,000 to named plaintiffs from a settlement fund of $274,998 in a wage and hour class action]; *Spagnuoli v Louie's Seafood Rest., LLC*, 2018 WL 7413304, at *6 [EDNY Sept. 27, 2018] [awarding service payments totaling $7,500 to named plaintiffs from a settlement fund of $87,500 in a wage and hour class action] ["Such service awards are common in class action cases and are important to compensate plaintiffs and opt-in plaintiffs . . .."]; *Hastings v Regeis Care Ctr., LLC*, 2018 WL 6488279, at *2-3 [NY Sup Ct, Bronx County, 2018] [awarding $35,000 in service fees from a fund of $850,000 in a wage and hour class action].) Lastly, this request is unopposed by Defendants and no Class Members have objected to it. (Memo in Supp, NYSCEF Doc No 96 [Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement] at 14.)

9. This Court notes that—in a prior, unrelated class action matter—it declined to approve a service award to the named plaintiffs. (*See Reyes, et al. v 600 West 169th Rest. Inc. d/b/a Coogan's, et al*., 2019 WL 7212476 [Sup Ct Dec. 20, 2019].) However, in the instant matter, the facts and circumstances are different, and the Court holds differently herein. Moreover, this Court now agrees, as argued by the Plaintiffs, that CPLR 909 does not automatically preclude the issuance of service awards and is to be evaluated on a case-by-case basis and is appropriate in the instant case. Although CPLR 909 was amended in 2011 after *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375 (2010), and now provides to allow both representatives "and/or . . . any other person that the court finds has acted to benefit the class" to recover attorneys' fees, the legislature did not at the same time provide for the payment of a service/incentive award or preclude such a payment. Notwithstanding this lack of an express provision in the CPLR, courts have continued to grant service/incentive awards to compensate named plaintiffs for their efforts expended "for the benefit of the class as a whole." (*Hastings*, 2018 WL 6488279, at *2.) Moreover, notwithstanding that the statute does not expressly provide for service/incentive awards, the statute also does not prohibit such an award. Given the practice of the courts to grant these awards, the fact that the legislature has not acted to amend the statute to prohibit such awards might be taken to show legislative intent in support of such incentive awards. (*But see Matter of Leadingage New York, Inc. v Shah*, 153 AD3d 10, 23-24 [3d Dept 2017], *affd*, 32 NY3d 249 [2018] ["[L]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences."].) Further, this Court is unaware of any post-amendment appellate court ruling holding that CPLR 909 prohibits the granting of a service award. The Court is aware that such an issue presented to the Appellate Division would be rare, especially

in the context of the parties seeking the approval of a class action settlement — there being no incentive by the defendant to object. Considering that the legislature has provided for class actions and favors class actions in situations as the current matter, it would appear to align with the legislative purpose to encourage individuals to step forward to assist in the prosecution of such cases and that a service award be considered under certain circumstances. Moreover, unlike the settled rule that the legislature must expressly grant attorney fees to be paid by the losing party, there is no such requirement for incentive payments. (*Cf. U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004] ["It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule."].) Accordingly, for all of these reasons, the Court finds that there is no outright prohibition for the issuance of a service award and such an award is appropriate in the instant case.

ii. Fee & Cost Payments

10. On November 20, 2019, the Court appointed Virginia & Ambinder LLP as Class Counsel. (Ex A, NYSCEF Doc No 89 [Order Granting Preliminary Approval]; *see also* NYSCEF Doc No 74 [Settlement Agreement].)

11. The Court awards Class Counsel its litigation costs of $2,222 and attorney fees of $70,277 for a total rounded sum of $72, 500. (*In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F Supp 2d 259, 272 [SDNY 2012] ["It is well-settled that attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients."].) A portion of the attorneys' fee of $70,277.77, namely $34,467.64, will come from the Gross Payment of $103,402.93. To note, $34,467.64 is one third of the Gross Payment of $103,402. In addition, Defendants will pay an additional amount of $38,032.36 toward the attorney fee from the Gross Settlement Amount, which has no impact on the amount of individual Plaintiffs' recovery, which comes from the Gross Payment. (Settlement Agreement at 11.)

12. CPLR 909 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 based on the reasonable value of legal services rendered[.]" A Court may calculate reasonable attorney's fees by either the lodestar/multiplier method (multiplying the hours reasonably billed by a reasonable hourly rate) or based on a percentage of the recovery. (*Fiala*, 27 Misc 3d at 610.) 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), at *4; *McDaniel v County of Schenectady*, 595 F3d 411, 417 [2d Cir 2010] [explaining that the trend is toward the percentage method in the Second Circuit for reasons including counsel's incentive to bill as many hours as possible]; *Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 48 [2d Cir 2000] [explaining that the lodestar

method creates "a temptation for lawyers to run up the number of hours for which they could be paid."].)

13. Public policy favors a common fund attorneys' fee award in wage-and-hour class actions. (*See Johnson v Brennan*, 2011 WL 4357376, at *19 [SDNY 2011] ["If not, wage-and-hour abuses would go without remedy because attorneys would be unwilling to take on the risk."]; *see also Sand v Greenberg*, 2010 WL 69359, at *3 [SDNY 2010] ["But for the separate provision of legal fees, many violations of the Fair Labor Standards Act would continue unabated and uncorrected."].)

14. "Common fund recoveries are contingent on a successful litigation outcome." (*Guaman v Ania-Bar NYC*, 2013 WL 445896, at *7 [SDNY 2013].) Such "contingency 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*, 2010 WL 3322580, at *8 [SDNY 2010] [internal emendation and citation omitted].) Many individual litigants "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*. [internal citation and emendation omitted].)

15. The requested fee of $34,467.64 to Class Counsel, is 33.33% or one third of the Gross Payment[8] of $103,402.93. Additionally, as stated in the papers, Defendants have agreed to pay an additional $38,032.36 to Class Counsel from the Gross Settlement Amount,[9] totaling attorney's fee to $70,277.77. (Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement at 7.) Although no Class Members have objected to the requested fees or costs, (Kulak Aff ¶ 11), the requested fee of $70,277.77 is more than one third of the Gross Payment and also is more than one third of the Gross Settlement Amount. For that reason, the Court will assess the reasonableness of the fee under the lodestar method.

16. The Court finds that based on the papers submitted, the requested fee award is reasonable under the lodestar analysis. Under the lodestar method, the court determines the reasonable hourly rate for attorneys' fees and multiplies this rate by the reasonable number of hours expended. The basic fee generated by this multiplication is known as the "lodestar fee." (*Rahmey v Blum*, 95 AD2d 294, 303 [2d Dept 1983].) This fee is "predicated essentially on objective factors." (*Id*. at 303.) "A strong presumption exists that the lodestar calculation represents the 'reasonable' fee, even when that calculation is disproportionate to the amount of damages awarded to the successful plaintiff." (*Hine v Mineta*, 253 F Supp 2d 464, 467 [EDNY 2003] [internal citations omitted].) The lodestar fee may then, in a court's discretion, be augmented or reduced based on case-specific factors, such as: (1) the novelty and difficulty of the questions presented; (2) the skill requisite to perform the legal services properly; (3) the preclusion of other employment by the attorney due to acceptance of the case; (4) whether the fee is fixed or contingent;

[8] *See supra* note 5 for a definition of Gross Payment.
[9] *See supra* note 4 for a definition of Gross Settlement Amount.

(5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the amount involved and the results obtained; (8) the undesirability of the case; and (9) awards in similar cases. (*Rahmey*, 95 AD2d at 303-304; *Goldberger v Integrated Resources, Inc.*, 209 F3d 43, 47 [2d Cir 2000].) It is noted that there may be some overlap among these factors as well as among these factors and the lodestar fee. (*Copeland v Marshall*, 641 F2d 880, 890 [DC Cir 1980].)

17. Class Counsel submits invoices showing 468.56 hours worked by various members of its firm on this matter for a lodestar of $115,068.24. (Newhouse Aff ¶ 11.) To determine the hourly rate, a court should "attempt to approximate the market rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." (*Kalloo v Unlimited Mech. Co. of NY*, 977 F Supp 2d 209, 212 [EDNY 2013].) The rates used by the court should be the "current rates rather than historic hourly rates." (*Reiter v MTA NY City Tr. Auth.*, 457 F3d 224, 232 [2d Cir 2006].)

18. Newhouse, a Partner at Virginia & Ambinder and attorney since 2012, was the attorney primarily handling this action and billed at 121.5 hours at $325 per hour. (Newhouse Aff ¶¶ 18-19 and NYSCEF Doc no 93, Ex E [Billing Records].) After being named a partner, Newhouse billed an additional 48.4 hours at $390 per hour. (*Id.*) Two senior partners, James Murphy and LaDonna Lusher, billed a combined 7.4 hours at a rate of $495 per hour. (Newhouse Aff ¶ 20 and Ex E.) Associates Milana Dostanitch and Joel Goldenberg billed a combined 154.5. hours at $275 and $200, respectively. (Newhouse Aff ¶¶ 21-23 and Ex E.) The remaining hours were billed by paralegals at $125 per hour. (Newhouse Aff ¶ 24 and Ex E.) Such requested hourly rates have been approved by courts as early as in 2013. (Memo in Supp, NYSCEF Doc No 96 [Memo in Supp of Plaintiffs' Motion for Final Approval of the Proposed Settlement] at 10 [internal citations omitted].) Further, Class Counsel negotiated to reduce their fee from $115,068.24 to $70,277.77. The lesser fee of $70,277.77 is $44,790.47 below Class Counsel's lodestar. (Newhouse Aff ¶ 12.) This fee request is unopposed by any Class Members. Counsel requested a fee amount greater than a one-third ratio but approximately $44,790.47 less than the amount that it claims under the lodestar method. Based on this Court's lodestar analysis, this Court finds that the attorney fee award of $70,277.77 is well within the realm of what is fair and reasonable.

19. Further, similar fee structures have been granted by courts where the class members contributed a percentage of their individual recovery toward a portion of class counsel's fee and the remainder of class counsel's fee was paid by the defendants. (*See, e.g.*, NYSCEF Doc Nos 105-108, *Tomasz Wojnowski v. Three Generations Contracting, Inc.*, 603337/2006 [each class member contributed 16.5% of their individual allocation toward class counsel's fee]; *Adam Pieta v. Citnalta Construction Corp.*, 650582/2012 [class members contributed 36.6% of class counsel's fee].)

20. After much consideration—and supplemental documentation—this Court finds that Class Counsel's fee award is appropriate in this particular circumstance in light of Class Counsel's lodestar calculation and that it does not reduce the amount to be awarded to the

individual claimants considering the allocation of overtime hours. Here, the Court also factored into its analysis that Plaintiffs' Counsel undertook this action on a fully contingent basis in the face of significant risk with regard to class certification, merits, and damages. The work that Plaintiffs' Counsel has performed litigating and settling this case demonstrates their commitment to the class and to representing the best interests of the Class considering the uncertainty of the applicable law. Plaintiffs' Counsel have extensive experience representing employees in complicated class actions. Public policy considerations also weigh strongly in favor of the fee request: the instant fee award encourages sophisticated firms like Class Counsel to take on difficult actions — representing some of the most vulnerable workers — and simultaneously discourages employers from taking advantage of their workers. (2d Supp Aff Newhouse 3-17*; see also Johnson*, 2011 WL 4357376, at *19.)

iii. Settlement Administrator Fee

21. Having considered the affidavit of Kulak, the Court approves the settlement administration costs in the amount of $6,787.30. (Kulak Aff) The Court finds the affidavit to be sufficient to justify the requested fee and to be fair and reasonable.

C. Settlement Procedure

22. The Effective Date of the Settlement shall be thirty (30) days after the service of a copy of this order with notice of entry, if no appeal is taken from this order. If a party appeals this order, the Effective Date of the Settlement shall be the day after all appeals are finally resolved in approval.

23. Counsel shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within five (5) days of the filing date of the instant decision and order.

24. Within ten (10) days of the Effective Date, the Claims Administrator shall pay, from the Settlement, the Settlement Checks, as defined in the Settlement, to qualified Class Members, in accordance with the allocation plan described in the Settlement. (Settlement Agreement at 12-13.)

25. Upon completion of payment to the qualified Class Members and no later than within twenty (20) days of the Effective Date, the Claims Administrator shall pay, in a second installment, Class Counsel's attorneys' fees and costs, and shall pay the service award and the Breach of Contract claim fee to Named Plaintiff.

26. The Court approves the appointment of MSLLC as the Settlement Administrator and, upon completion of the payments in the above paragraph, approves the payment of $6,787.30 to be payable to MSLLC for the cost of Settlement Administration as part of the second installment.

27. Upon the Effective Date, the Action will be dismissed with prejudice in its entirety and all members of the Settlement Class who have not excluded themselves from the

settlement shall be conclusively deemed to have released and discharged Defendants from, and shall be permanently enjoined from, directly or indirectly, pursuing and/or seeking to reopen, any and all claims that have been released pursuant to the Settlement.

28. The Court retains continuing jurisdiction to enforce the terms of the Settlement Agreement.

29. The foregoing constitutes the decision, order and judgment of this Court.

06/23/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE