IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02454-NYW

ASWINRAJ MANOHAR and
PACKIARAJ VEERAN,

Plaintiffs,

v.

SUGAR FOOD LLC d/b/a Jai Ho,
SUGAR BHAVAN LLC d/b/a Jai Ho Boulder,
SUGAR DOSA LLC d/b/a Jai Ho Park Meadows,
SATHYA NARAYA, an individual, and
SUJATHA NARAYAN, an individual,

Defendants.

ORDER ON MOTION FOR APPROVAL OF FAIR LABOR STANDARDS ACT SETTLEMENT

Magistrate Judge Nina Y. Wang

This civil action is before the court on Plaintiffs' Unopposed Motion for Approval of Fair Labor Standards Act Settlement ("Motion for Approval"). [#61, filed July 14, 2017]. Under the authority of 28 U.S.C. § 636(c) and the Order of Reference dated January 3, 2017 [#22], the court has considered the Motion for Approval, the associated brief, and the applicable case law. For the following reasons, the Motion is **DENIED without prejudice**.

BACKGROUND

On September 29, 2016, Plaintiff Aswinraj Manohar initiated this lawsuit for violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, the Colorado Wage Claim Act ("CWCA"), Colo. Rev. Stat. § 8-4-101, *et seq.*, and the Colorado Minimum Wage Order for

unpaid and underpaid wages he earned while employed at Defendants' Indian restaurants as a server and cashier and for "general front of the house" duties. [#1]; *see also* [#40]. On December 16, 2016, Defendants filed an Answer that included one counterclaim consisting of nine paragraphs. [#15 at 7-8].

On February 9, 2017, Mr. Manohar amended his Complaint with leave of court to add Plaintiff Packiaraj Veeran. [#39, #40]. The First Amended Complaint pleads one claim for FLSA violations asserted by both Plaintiffs against all Defendants, and one claim for violations of the CWCA asserted by both Plaintiffs against Defendants Sugar Food LLC d/b/a Jai Ho, Sugar Bhavan LLC d/b/a Jai Ho Boulder, and Sugar Dosa LLC d/b/a Jai Ho Park Meadows (the "Corporate Defendants"). *See* [#40 at 7, 9]. Plaintiffs plead that Defendants were their employers at all times relevant to this lawsuit. On February 23, 2017, Defendants filed an Answer in which Defendant Sugar Bhavan, LLC d/b/a Jai Ho Boulder ("Sugar Bhavan") asserted three Counterclaims for Conversion, Civil Theft, and Breach of Fiduciary Duty against Plaintiff Manohar. [#41]. On March 16, 2017, Plaintiff Manohar filed a motion to dismiss arguing that the Counterclaims constitute "improper retaliation in violation of the FLSA and CWA's anti-retaliation provisions," and "must be dismissed as they do not arise out of a common nucleus of operative facts with Plaintiffs' FLSA/CWA wage claims." [#45]. Sugar Bhavan (and "the other Defendants to the extent impacted") filed a Response on April 6, 2017. [#57]. Plaintiff Manohar filed a Reply on April 20, 2017. [#58]. Before the motion to dismiss could be fully adjudicated, however, the Parties notified the court that the matter had been settled.

On June 30, 2017, the Parties filed a Notice of Settlement stating that they had "reached a mutually-acceptable settlement in this action." [#59]. On July 14, 2017, Plaintiffs filed the

Motion for Approval and accompanying brief. [#61]. The same day, the court denied the motion to dismiss Counterclaims as moot in light of the Motion for Approval, permitting leave for Plaintiffs to renew their motion should the settlement fail. [#64]. The court exercises jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

ANALYSIS

Within the context of a lawsuit brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations, and upon consideration of whether the proposed settlement is fair, the district court may enter a stipulated judgment approving the agreement and dismissing the action. *Baker v. Vail Resorts Management Co.,* No. 13–cv–01649–PAB–CBS, 2014 WL 700096 (D. Colo. Feb. 24, 2014) (citing *Lynn's Food Stores, Inc. v. United States,* 679 F.2d 1350, 1353 (11th Cir. 1982)). Approval is appropriate upon demonstration that (1) the litigation involves a *bona fide* dispute, (2) the proposed settlement is fair and equitable to all parties concerned, and (3) the proposed settlement contains a reasonable award of attorneys' fees. *Baker*, 2014 WL 700096, at *1 (citing *Lynn's Food Stores,* 679 F.2d at 1354).

Recently, as noted by the Parties, a court in this District called into question whether an FLSA settlement requires court approval, absent any special circumstance. *See Ruiz v. Act Fast Delivery of Colorado*, Civil No. 14-cv-00870-MSK-NYW, ECF 132, (D. Colo. Jan. 9, 2017) (unpublished).[1] Upon consideration of a motion to approve a settlement in an FLSA matter, the

[1] The court notes that the *Ruiz* court does not stand alone on this issue. Courts outside of this District have similarly questioned whether judicial approval of FLSA settlements is required or even approrpiate, observing that parties may, with certain exceptions, manage the resolution of

Ruiz court found that, with few exceptions, such settlements do not require court approval. *Id.* Because the issue is not yet settled by the Tenth Circuit, this court proceeds with applying the standard utilized by courts in this District to consider whether it can approve the settlement.

I. *Bona Fide* Dispute

For the court to discern whether a *bona fide* dispute exists, the parties must present: (1) a description of the nature of the dispute; (2) a description of the employer's business and the type of work performed by the employee; (3) the employer's reasons for disputing the employee's right to a minimum wage or overtime; (4) the employee's justification for the disputed wages; and (5) if the parties dispute the computation of wages owed, each party's estimate of the number of hours worked and the applicable wage. *Baker*, 2014 WL 700096, at *1.

This court finds that the Parties adequately describe their dispute. As stated above, Plaintiffs worked at Defendants' Indian restaurants as servers, cashiers, cooks, and for "general front of the house" duties. [#40 at ¶ 2]; *see also* [#62 at 3]. They claim that Defendants failed to pay them minimum wage and overtime as required under the FLSA. In the brief filed in support

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their cases independent of judicial intervention under application of Rule 41 of the Federal Rules of Civil Procedure. *See Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 375 (E.D.N.Y. 2013); *Martinez v. Bohls Bearing Equipment Co.*, 361 F. Supp. 2d 608, 618-31 (W.D. Tex. 2005). Recently, in *Cheeks v. Freeport Pancake House, Inc.*, the Second Circuit addressed the issue in a matter of first impression and held that parties cannot enter into private settlements of FLSA claims without either the approval of the district court or the Department of Labor. 796 F.3d 199 (2d Cir. 2015) (determining that the FLSA is an "applicable federal statute" within the meaning of Rule 41, and thus an exception to the operation of Rule 41). In reaching its decision, the *Cheeks* court considered the potential for abuse in FLSA settlements against the FLSA's underlying purpose "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work," and the Supreme Court's consistent efforts to "interpret[] the Act liberally and afford[] its protections exceptionally broad coverage." *Id.* at 206 (citations omitted). To this court's knowledge, the Tenth Circuit has not yet entered the debate or otherwise provided guidance as to whether the FLSA falls within the federal statute exception to Rule 41.

of the Motion for Approval, the Parties note that Defendants believe they are exempt from the FLSA due to the Act's minimum monetary threshold, and that, even if the FLSA applies, Plaintiffs were properly classified as exempt employees. [#62 at 4]. Plaintiffs contend that the Indian restaurants are involved in a single integrated enterprise, Defendants' enterprise generates sufficient revenue to satisfy the monetary threshold, they did not qualify as exempt employees, and Defendants paid them a flat salary that did not account for the hours they worked in excess of 40 hours per week. [*Id.*] The Parties assert that through the exchange and analysis of document discovery and review of witness accounts, they focused settlement discussions on "the eight weeks of alleged non-payments" for Plaintiff Manohar, and the "seven weeks of wholly unpaid wages" for Plaintiff Veeran because each side understood the potential difficulties and risks in identifying the overtime hours worked. [*Id.* at 4-5]. After negotiating the method of calculating the Parties' regular rate and hours worked, the Parties arrived at a settlement figure of $17,500.00 to compensate Plaintiff Manohar, and a figure of $7,500.00 for Plaintiff Veeran. [*Id.* at 5]. Based on the information the Parties provide through the Amended Complaint and the Motion for Approval and associated brief, as well as consideration of the docket as a whole, the court finds that a *bona fide* dispute led to the settlement negotiation and resulting terms.

II. Fair and Equitable Settlement Agreement

"To be fair and reasonable, an FLSA settlement must provide adequate compensation to the employees and must not frustrate the FLSA policy rationales." *Baker*, 2014 WL 700096, at *2. The "prime purpose" in enacting the FLSA "was to aid the unprotected, unorganized and lowest paid...employees who lack[ ] sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707, n.18 (1945).

See also Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2162 (2012) ("Congress enacted the FLSA in 1938 with the goal of protect[ing] all covered workers from substandard wages and oppressive working hours.") (citation omitted). "Normally, a settlement is approved where it is the result of "contentious arm's-length negotiations, which were undertaken in good faith by counsel…and serious questions of law and fact exist such that the value of an immediate recovery outweighs the mere possibility of further relief...." *Felix v. Thai Basil at Thornton, Inc.*, No. 14–cv–02567–MSK–CBS, 2015 WL 2265177, at *2 (D. Colo. May. 6, 2015) (citation omitted).

The Tenth Circuit considers the following factors in determining whether to approve a class action settlement under Fed. R. Civ. P. 23(e): (1) whether the parties fairly and honestly negotiated the settlement; (2) whether serious questions of law and fact exist which place the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted litigation; and (4) the judgment of the parties that the settlement is fair and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). Courts in this District apply the same four factors to their review of a settlement agreement resolving FLSA claims in a collective and individual action. *See Pliego v. Los Arcos Mexican Restaurants, Inc.*, 313 F.R.D. 117, 130 (D. Colo. 2016); *Morton v. Transcend Service, Inc.*, No. 15–cv–01393–PAB–NYW, 2017 WL 977812, at *2 (D. Colo. Mar. 13, 2017). *See also Albu v. Delta Mechanical Inc.*, No. 13–cv–03087–PAB–KMT, 2015 WL 4483992, at *3 (D. Colo. June 30, 2015) ("Courts considering both individual and collective settlements under the FLSA turn to the factors for evaluating the fairness of a class action settlement under Fed. R. Civ. P. Rule 23(e)") (citations omitted)).

Under the terms of the proposed Settlement Agreement, Defendants agree to pay $17,500.00 to Plaintiff Manohar, $7,500.00 to Plaintiff Veeran, and $20,000.00 to Plaintiffs' attorneys for fees and costs. [#62 at 5-6; #62-1]. The base hourly rate used to calculate these sums is consistent with the rate originally identified in the Computation of Damages section of the Scheduling Order. *See* [#27 at 4-7]. Counsel represent that settlement negotiations "took place over the course of several months with zealous and informed advocacy on both sides." [#62 at 9]. Indeed, the court can attest from its own proximity to the litigation that the Parties' claims and counterclaims were hotly disputed. The Parties are represented by counsel who assert that the terms of settlement are fair and reasonable, and the court finds no reason to question this assessment. The court also finds, based on the Parties' representations of their respective positions described above and upon its own review and familiarity with the case, that serious questions of law and fact exist which render the ultimate outcome of the litigation uncertain. In light of the Parties' approach to settlement, including their review of discovery, weighing of risks and potential benefits associated with proceeding with litigation, and negotiation of the manner by which to calculate damages, I find that the value of recovery at this stage in the case outweighs the possibility of future relief for Plaintiffs. Indeed, Plaintiffs acknowledge that while "the range of potential recovery…at trial would possibly have been greater than the settlement, it is also possible that the potential recovery would have been less, and potentially nothing at all." [#62 at 10]. They assert that the settlement delivers "value now…and provides certainty of result," whereas they would otherwise face unknown outcomes with respect to summary judgment and a jury trial and, if liability were determined, proving the exact amount of damages. The court agrees with the Parties' assertion that the settlement is fair and reasonable and reflects

an adequate compromise that considers the attendant risks for each party associated with proceeding with this litigation.

The court considers next whether the settlement agreement undermines the purpose of the FLSA, "which is to protect employees' rights from employers who generally wield superior bargaining power." *Morton*, 2017 WL 977812 at *2. Factors that may cause a court to reject a proposed settlement include (1) the presence of other employees similarly situated to the claimant, (2) a likelihood that the claimant's circumstance will recur, and (3) a history of FLSA non-compliance by the same employer or others in the same industry or geographic region. *Id.* (citing *Dees v. Hydrady, Inc.*, 706 F. Supp. 2d 1227, 1244 (M.D. Fla. 2010)). None of these concerns are present here. The settlement agreement is written for Plaintiffs individually, and there are no allegations of similarly situated employees. There is no indication that the alleged violations could recur; indeed, the settlement agreement includes a "No Re-employment" provision by which Plaintiffs "acknowledge and agree that their employment relationship with [Defendants] has been permanently and irrevocably severed," and further agree that they will not apply for employment with Defendants at any time in the future. [#62-1 at 3]. Finally, there is no indication that Defendants have a history of flouting FLSA requirements. I find that the settlement agreement does not run afoul of the policy concerns underpinning the FLSA.

III. Attorney Fees

Finally, the court considers whether the amount provided for in the settlement agreement for Plaintiffs' attorney's fees is reasonable. The settlement sets aside a separate sum of $20,000 for attorney's fees and costs. [#62-1 at 1]. As acknowledged by the Parties, there is a general preference that parties reach an agreement regarding the fee award. *Hensley v. Eckerhart*, 461

U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."). However, the court must nonetheless conduct an independent examination of whether the fees are reasonable. *See Silva v. Miller*, 307 F. App'x 349, 351–52 (11th Cir. 2009) (holding that contingency contract between counsel and plaintiff did not abrogate court's duty to review the reasonableness of legal fees in an FLSA settlement). Courts may determine the reasonableness of a fee request by calculating the "lodestar amount," which represents the number of hours reasonably expended multiplied by a reasonable hourly rate. *See Hensley*, 461 U.S. at 433. The lodestar amount may be adjusted according to the amount in controversy, the length of time required to represent the client effectively, the complexity of the case, the value of the legal services to the client, awards in similar cases, or other factors. *See Tallitsch v. Child Support Servs., Inc.*, 926 P.2d 143, 147 (Colo. App. 1996).

The Parties ask the court to approve $19,044.41 in attorney fees and $955.59 in costs. They assert that the amount is "considerably less than Plaintiffs' counsel's lodestar, plus out-of-pocket costs." [#62 at 11]. For support, they cite to the redacted retainer agreement between Plaintiffs and their counsel whereby Plaintiffs agreed to pay counsel the greater of 35 percent of any recovery obtained on their behalf in this lawsuit or a computed hourly rate. [*Id.*; #62-2]. They represent that 35 percent of the recovery, after considering costs, amounts to less than half of counsel's lodestar; and "the lodestar after costs amount[d] to almost the entirety of Plaintiffs' recovery," and reference the redacted billing and costs records attached to the brief filed in support of the Motion to Approve. [*Id.*; #62-3].

A "reasonable rate" is defined as the prevailing market rate in the relevant community for an attorney of similar experience. *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1078 (10th Cir. 2002). A party seeking an award of attorney's fees must establish the reasonableness of each dollar and each hour for which the party seeks an award. *Jane L. v. Bangerter*, 61 F.3d 1505, 1510 (10th Cir. 1995). In order to satisfy their burden, Plaintiffs must produce "satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984). The court may adjust the rates suggested by counsel based on its own familiarity with the range of prevailing rates in the Denver, Colorado market. *Guides, Ltd.*, 295 F.3d at 1079. In addition, the Local Rules of Civil Practice for this District require that a motion for attorney's fees be supported by affidavit. *See* D.C.COLO.LCivR 54.3. Though not presented as a motion for attorney's fees, this court extends the requirement in this context because the Parties are seeking the court's approval of a privately negotiated amount for attorney's fees and costs.

The Motion for Approval raises several issues that preclude the court from determining whether the settlement of Plaintiffs' attorney's fees is reasonable. First, the "draft" is just that, a "draft," with no explanation of how it would differ from a "final" invoice. There is no indication that Plaintiffs' counsel has reviewed the "draft" invoice to independently assess whether the charges are appropriate, which is an exercise the court expects an attorney to complete before attesting that the requested fees are reasonable. In addition, the invoice reflects no indication of who performed what tasks. *See* [#62-3]. The court assumes that more than one attorney performed services on this case because there are two separate billing rates of $400.00 and

$325.00, in addition to a billing rate of $125.00, but neither the invoice nor the Motion identifies those professionals. *See* [*id.*; #62 at 6]. Second, Plaintiffs' counsel do not attach affidavits to the Motion for Approval so as to explain the respective experience of the attorneys or and paralegal(s) involved, or justify their billing rates. While the brief in support of the Motion for Approval asserts that the settlement "was the product of arms-length negotiations by experienced counsel," [#62 at 2], Plaintiffs' attorneys do not expound on the assertion or otherwise corroborate it. Third, Plaintiffs present no comparator data to establish that their rate is, in fact, consistent with the prevailing rate for practitioners with FLSA expertise in this District. Therefore, the court has no way to determine whether the rates upon which Plaintiffs' counsel calculates a "lodestar amount" are reasonable. *See Baker*, 2014 WL 700096, at *3 (finding that an hourly rate of $280, rather than $350, was a reasonable rate for an attorney with seven years' experience litigating an FLSA matter) (citing *Olivares v. UFP Lafayette, LLC*, No. 12–cv–01082–CMA–KLM, 2013 WL 2477124, at *1 (D. Colo. June 10, 2013) (approving $280 hourly rate for lead counsel and $200 hourly rate for associate attorney in FLSA case); *Horne v. Scott's Concrete Contractor, LLC*, No. 12–cv–01445–WYD–KLM, 2013 WL 3713905, at *10 (D. Colo. April 24, 2013) (finding $250 and $200 reasonable hourly rates for attorneys in FLSA case)). Fourth, upon review of the billing records, the court finds that many of the billing entries are problematic because they are undecipherable to someone who is unfamiliar with Plaintiffs' counsel's recordkeeping. In certain instances, they do not offer sufficient detail and/or they describe services for which attorney fees are not reasonable. *See, e.g.*, [#62-3 at 1 ("Email:

Email with TNH re: Complaint"); ("Updated his FM file/organized his TS file/EM the vcard to call staff"); ("Review ECF bounce and contents therein re: Complaint)]. [2]

In *Ruiz*, after concluding that the parties did not require judicial review to proceed with their FLSA settlement, the court found that it could not approve the settlement for several reasons, including the parties' failure to include a calculation of the total amount of unpaid wages and overtime arguably owed to the plaintiffs, the request for payment of incentive awards to the named plaintiffs, a general lack of documentation supporting the attorney fees and costs sought by plaintiffs' counsel, and the lack of indication that all opt-in plaintiffs had consented to the settlement. *Id.* In so finding, the *Ruiz* court contemplated that the parties could elect to proceed with their settlement independent of the court's review, but if they chose to renew the motion for approval of settlement they would be required to address the court's concerns. *Id.*

This court notes that the Parties before it may similarly elect to take such a course of action, and proceed independently in the resolution of this matter without judicial approval of the settlement. However, should the Parties continue to seek judicial review of their proposed settlement agreement, they must cure the deficiencies as described by the court herein.

Accordingly, **IT IS ORDERED** that:

(1) The Unopposed Motion for Approval of Fair Labor Standards Act Settlement [#61] is **DENIED;**

[2] The identity of THN is not readily apparent to the court. Similarly, in other entries, the attorney refers to both THN and PAD, suggesting there were at least three attorneys working on this matter. *See* [#62-3 at 3].

(2) On or before **August 9, 2017**, the Parties shall either **DISMISS** this action pursuant to their settlement and Federal Rule of Civil Procedure 41; or **RENEW** their motion for approval of settlement consistent with the instruction provided herein.

DATED: July 26, 2017

BY THE COURT:

s/Nina Y. Wang_____
United States Magistrate Judge