

FILED  
Clerk  
District Court

MAR 11 2019

for the Northern Mariana Islands  
By   
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

KATRINA DEL GALLEGO DEMAPAN, *et al.*,

Plaintiffs,

vs.

ZENG'S AMERICAN CORP., *et al.*,

Defendants.

Case No.: 18-cv-00010

**DECISION AND ORDER DENYING  
MOTION FOR APPROVAL OF FLSA  
SETTLEMENT AND MOTION TO FILE  
SETTLEMENT AGREEMENT UNDER  
SEAL**

On February 13, 2019, the parties filed a stipulated motion for approval of a Fair Labor Standards Act (“FLSA”) settlement and amended stipulated request to file the settlement agreement under seal or for in camera review only. (ECF No. 44). The motion came on for a hearing on March 5, 2019. For the reasons stated below, the motion for approval of the settlement agreement is DENIED, and the request to file the agreement under seal is DENIED as moot.

Congress passed the Fair Labor Standards Act in 1938 to protect workers from “substandard wages and oppressive working hours.” *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). “Recognizing that there are often great inequalities in bargaining power between employers and employees, Congress made the FLSA's provisions mandatory; thus, the provisions are not subject to negotiation or bargaining between employers and employees.” *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982). Therefore, unlike other civil settlements, an agreement to dismiss an FLSA claim must be approved by either the Secretary of Labor or a district court. *Kerzich v. County of Tuolumne*, 335 F. Supp. 3d 1179, 1183 (E.D. Cal. 2018).



1 without the sealing of the settlement agreement. As such, the request to seal the agreement is DENIED  
2 AS MOOT.

3 **II. FLSA Settlement Agreement**

4 The Court now turns to the terms of the settlement agreement before it that was submitted for  
5 in camera review. An FLSA settlement should only be approved if (1) there is a bona fide dispute  
6 regarding the existence and extent of FLSA liability, and (2) the settlement is a fair and reasonable  
7 resolution to that dispute. *Kerzich*, 335 F. Supp. 3d at 1184. The guarantees of the FLSA cannot be  
8 contracted away; therefore, no settlement should be approved if there is certainty about the amount  
9 owed to the plaintiffs under the FLSA, “because it would shield employers from the full cost of  
10 complying with the statute.” *Id.*

11 Once the court has determined that there is a bona fide dispute, it must then determine if the  
12 settlement agreement is fair and reasonable. *Id.* While the Ninth Circuit has not established a test for  
13 evaluating FLSA settlements, courts often apply the Rule 23 factors used to assess class action  
14 settlements. *Id.* Here, the applicable factors include the strength of the plaintiffs’ case; the risk,  
15 expense, complexity, and likely duration of further litigation; the amount offered in the settlement; the  
16 extent of discovery completed and the stage of the proceedings; the experience and views of counsel;  
17 and the reaction of the [plaintiffs] to the proposed settlement. *Id.* Applying a totality of the  
18 circumstances approach to the specifics of the case, the “district court must ultimately be satisfied that  
19 the settlement’s overall effect is to vindicate, rather than frustrate, the purposes of the FLSA.” *Id.* at  
20 1185 (quoting *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016)).  
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1 Attorney's fees are part of FLSA settlements and the court must also assess them for  
2 reasonableness and fairness, particularly as to the possibility that the fee tainted the reasonableness of  
3 the settlement for the plaintiff. *Farthing v. Taher, Inc.*, 2017 WL 5310681, at \*2 (C.D. Cal. 2017). In  
4 addition, if a settlement agreement includes non-FLSA provisions, those too are subject to review.  
5 "[A]greements with broad releases going beyond the FLSA violations are frequently rejected." *Ferreri*  
6 *v. Bask Technology, Inc.*, 2106 WL 6833927, at \*5 (S.D. Cal. 2016). An FLSA settlement that includes  
7 non-FLSA releases must receive independent consideration in order to survive a presumption of  
8 unfairness. *Id.* (citing *Selk*, 159 F. Supp. 3d at 1178).

9 a. Bona Fide Dispute

10 Here, the parties dispute the threshold coverage issue. The FLSA covers employees who were  
11 engaged in commerce or the production of goods for commerce (individual coverage) and employees  
12 of enterprises engaged in interstate commerce (enterprise coverage). *Zorich v. Long Beach Fire Dep't*  
13 *& Ambulance Serv., Inc.*, 118 F.3d 682, 684 (9th Cir. 1997). The parties disagree as to whether  
14 Plaintiffs are covered under either form of coverage. (*See* Stipulated Mot. at 5.) Specifically, regarding  
15 enterprise coverage, the parties dispute the method of measuring Defendants' gross receipts. (*Id.*) The  
16 Court finds there is a bona fide dispute regarding an element of the FLSA claim and, therefore,  
17 settlement is appropriate.  
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19 b. Fairness and Reasonableness

20 Having determined there is a bona fide dispute, the Court now examines the terms of the  
21 settlement agreement for fairness and reasonableness. The settlement amount is fair insofar as it  
22 represents full satisfaction of the Plaintiffs' calculation of their unpaid wages and liquidated damages  
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1 under the FLSA, as well as older non-FLSA unpaid wages of two Plaintiffs not covered by the FLSA.  
2 The parties have agreed to an initial payment of \$50,000 and 24-month installment plan for the balance  
3 of the \$200,000 settlement. Individual Defendants have provided security in the form of two  
4 mortgages in their leasehold and subleasehold interests in property in Saipan. The terms regarding  
5 payment are reasonable and fair to all parties.

6 The settlement agreement contains a broad release of claims. The parties mutually release each  
7 other from all claims of whatever kind or nature, existing in the past, present and future related to the  
8 employment of Plaintiffs by Defendants. “Courts review the scope of any release provision in a FLSA  
9 settlement to ensure that class members are not pressured into forfeiting claims, or waiving rights,  
10 unrelated to the litigation.” *Selk*, 159 F. Supp. 3d at 1178 (citation omitted). This release goes far  
11 beyond the FLSA and non-FLSA contractual unpaid wage claims asserted in this lawsuit. “When a  
12 FLSA settlement provides that opt-in members will receive unpaid wages and related damages, but  
13 nothing more, a release provision should be limited to the wage and hour claims at issue.” *Id.* at 1178  
14 (citing to *Moreno v. Regions Bank*, 729 F. Supp. 2d 1346, 1352 (M.D. Fla. 2010). “The employer  
15 who obtains a pervasive release receives either nothing (if no claim accrues) or a windfall at the  
16 expense of the unlucky employee. In either instance, the employee bears the risk of loss, and the  
17 employer always wins—a result that is inequitable and unfair in the circumstance.” *Moreno*, 729 F.  
18 Supp. 2d at 1352. Here, Plaintiffs are waiving potential discrimination, harassment, and workers  
19 compensation claims, among others, all outside the scope of the lawsuit before the Court.  
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22 Notwithstanding the above, a broad release may survive a presumption of unfairness if  
23 plaintiffs “receive independent consideration, or provide specific evidence that they fully understand  
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1 the breadth of the release.” *Selk*, 159 F. Supp. 3d at 1178 (citations omitted). The parties submit that  
2 two Plaintiffs have received independent consideration in the form of payment for back wages from  
3 beyond the look back period of the FLSA. This still leaves two Plaintiffs uncompensated for a broad  
4 waiver of their rights. The parties further argue that the mutuality of the release is additional  
5 consideration. However, as discussed above, pervasive releases generally place the risk of loss on the  
6 employee, not the employer. The Court therefore finds that the release provision of settlement  
7 agreement is neither fair or reasonable because it goes beyond the scope of the claims before the Court  
8 and releases unrelated claims without independent consideration for all Plaintiffs.

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10 c. Attorney’s Fees

11 Next, the Court turns to the calculation of attorney’s fees. The FLSA has a fee-shifting  
12 provision. 29 U.S.C. § 216(b) (“The court in such action shall, in addition to any judgment awarded  
13 to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of  
14 the action.”) This provision is designed to allow employees access to courts without the burden of  
15 litigation costs. *See Kerzich*, 335 F. Supp. 3d at 1188 (listing cases discussing the purpose of the fee-  
16 shifting in FLSA cases). Attorney’s fees in FLSA cases are typically determined using the lodestar  
17 method by calculating hours expended and hourly rates. *Id.* at 1185–86. Contingency fees are  
18 permitted; however, the court must still determine the reasonableness of the fee, regardless of any  
19 contract between the plaintiffs and their attorney. *See Silva v. Miller*, 307 F. App’x 349, 351–52 (11th  
20 Cir. 2009) (“To turn a blind eye to an agreed upon contingency fee in an amount greater than the  
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1 amount determined to be reasonable after judicial scrutiny runs counter to FLSA's provisions for  
2 compensating the wronged employee.”)

3 Here, Plaintiffs and their attorney entered into a contingency agreement to divide the total  
4 settlement, including the attorney’s fees paid by Defendants under the fee-shifting provision but  
5 exclusive of costs. Plaintiffs’ attorney’s contingency fee is 33%. In assessing the reasonableness of  
6 contingency fees in FLSA settlements, many courts have found it helpful to rely on the Ninth Circuit’s  
7 25% benchmark for awarding attorney’s fees in common fund cases. *See Kerzich*, 335 F. Supp. 3d at  
8 1186–87; *Alder v. County of Yolo*, 2018 WL 770394, at \*2 (E.D. Cal. Jan. 22, 2018); *McKeen-Chaplin*  
9 *v. Provident Savings Bank*, 2018 WL 3474472, at \*2 (E.D. Cal. July 19, 2018). There are factors that  
10 may warrant an upward departure from this benchmark and courts have found 33% contingency fees  
11 reasonable in some FLSA cases. *See McKeen-Chaplin*, 2018 WL 3474472, at \*2-3 (approving a 33%  
12 contingency fee in a case that had been pending for more than five years during which attorney did  
13 not receive payment, including full discovery, two rounds of motions for summary judgment, appeals  
14 to both the Ninth Circuit and the Supreme Court, as well as incorporated payment for a separate case);  
15 *but see Mar v. Genuine Parts Co.*, 2017 WL 68287, at \*3 (E.D. Cal. Jan. 6, 2017) (rejecting a 33.3%  
16 contingency fee even though the 94 class members opted into the settlement and Defendants agreed  
17 to pay a portion of the payroll taxes).

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19 As shown in Exhibit A to the Settlement Agreement, the contingency fee proposed here would  
20 result in attorney’s fees totaling \$65,529. In comparison, using the lodestar calculation, attorney’s  
21 fees are \$28,150 (112.6 hours x \$250/hour), making the contingency fee more than twice the lodestar  
22 calculation. “In assessing whether the percentage requested is fair and reasonable, courts generally  
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1 consider the following factors: (1) the results achieved; (2) the risk of litigation; (3) the skill required;  
2 (4) the quality of work performed; (5) the contingent nature of the fee and the financial burden; and  
3 (6) the awards made in similar cases.” *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D.  
4 Cal. 2013). Here, there are several factors warranting an upward departure, including (1) the settlement  
5 amount; (2) the proposed payment plan; (3) the risk of non-payment assumed by the attorney; and (4)  
6 the quality of the work performed. First, Plaintiffs’ attorney obtained a very successful settlement for  
7 his clients, recovering 100% of their unpaid wages and 100% liquidated damages for their FLSA  
8 claims. Applying the contingency fee to this amount, Plaintiffs still receive 100% of their back wages,  
9 as well as 48.5% of their liquidated damages. There is nothing to indicate a conflict of interest exists  
10 between Plaintiffs and their attorney to taint the settlement amount. Second, Plaintiffs’ recovery is  
11 spread out over a two-year period, which extends their attorney’s representation until April 2021.  
12 Third, the risk of non-payment by the Defendants is shared equally by Plaintiffs and their attorney. If  
13 Plaintiffs’ attorney was to receive the entirety of the lodestar amount only at the time of settlement, he  
14 would receive more than 50% of the initial payment, and his clients alone would assume the risk of  
15 default on future payments. Finally, Plaintiffs’ attorney diligently researched public records to identify  
16 the correct defendants and establish his clients’ claims. (*See* ECF No. 24 ¶¶ 3–4.) The Court finds  
17 these factors warrant an upward departure under the circumstances, and approves the 33% contingency  
18 fee as fair and reasonable.  
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2 **III. Conclusion**

3 For the reasons stated above, the Court DENIES the motion for approval of the FLSA  
4 settlement agreement because of the overly broad release provision. The parties may file a motion for  
5 approval of an amended settlement agreement that addresses the deficiencies identified in this order  
6 on or before **March 26, 2019**.

7 It is so ordered on this 11th day of March, 2019.

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11 RAMONA V. MANGLONA  
12 Chief Judge  
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