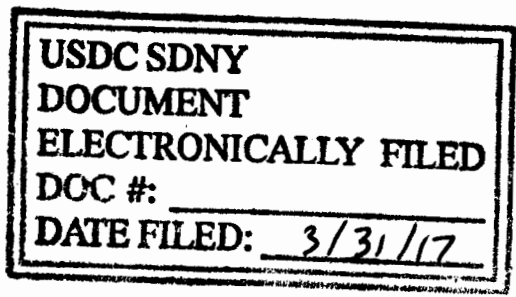


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



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YUNIOR AQUINO, on behalf of :  
himself, individually, and :  
on behalf of all others :  
similarly situated, et al., :

Plaintiffs, :

-against- :

FORT WASHINGTON AUTO BODY :  
CORP., et al., :

Defendants. :

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16 Civ. 390 (HBP)

OPINION  
AND ORDER

PITMAN, United States Magistrate Judge:

This matter is before me on a joint application to approve a settlement between plaintiff Ismael Santana and defendants and a separate settlement between the remaining plaintiffs and defendants. All parties have consented to my exercising plenary jurisdiction pursuant to 28 U.S.C. § 636(c).

This is an action brought by seven individuals who were or are employed by defendants. Plaintiffs allege that they were not paid for overtime work and did not receive proper wage statements. Plaintiffs assert their claims under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201 et seq., and various provisions of the New York Labor Law (the "NYLL"). The action was commenced as a collective action with respect to the FLSA

claim, and the parties stipulated to the matter proceeding as a collective action.

Defendants deny plaintiffs' allegations. They contend that plaintiffs' salaries covered all hours worked and included an additional amount for their overtime hours. Defendants also dispute the number of hours that plaintiffs claim to have worked. Moreover, defendants assert that Santana was a manager and, thus, exempt from the federal and state overtime requirements.

I held a lengthy settlement conference on September 29, 2016 that was attended by Santana and his counsel. At the conference, Santana claimed he was owed either \$58,133.86 or \$239,802.19 in unpaid wages, depending on whether the wages he received were intended to compensate him for all hours worked or only for the first forty hours. After a protracted discussion of the strengths and weaknesses of the parties' respective positions, Santana and defendants agreed to resolve his claim for a total settlement of \$38,500.00. The parties have also agreed that \$230.21 of the settlement figure will be allocated to reimburse Santana's counsel for their out-of-pocket costs, \$15,400.00 (or 40%) of the remaining \$38,269.79 will be paid to Santana's counsel and that the balance of \$22,869.79 will be paid to Santana.

The remaining plaintiffs and defendants have agreed to a total settlement of \$170,000.00, to be distributed among the plaintiffs on a pro rata basis. The parties have also agreed that, after deduction of out-of-pocket costs, plaintiffs' counsel will receive one-third of each plaintiff's recovery as attorneys' fees. The amounts claimed by each of the remaining plaintiffs,<sup>1</sup> the gross amount of the settlement fund allocable to each plaintiff and the net amount that will be received by each plaintiff after deduction for legal fees and costs are as follows:

<u>Plaintiff</u>	<u>Amount Claimed</u>	<u>Gross Allocable Share</u>	<u>Allocable Share of Costs</u>	<u>Allocable Share of Fees</u>	<u>Net Allocable Share</u>
Yunior Aquino	36,909.88	37,878.62	277.78	12,626.21	24,974.63
Ramon Sanchez	39,654.37	40,695.13	298.43	13,565.04	26,831.66
Dominguez Celso	29,784.87	30,566.61	224.15	10,188.87	20,153.59
Dony Almanzar	29,447.62	30,220.50	221.62	10,073.50	19,925.38
Jairo Pujols	6,433.33	6,602.18	48.41	2,200.73	4,353.04
Antonio Diaz	23,422.22	24,036.96	176.27	8,012.32	15,848.37
<b>TOTAL</b>	<b>165,652.29</b>	<b>170,000.00</b>	<b>1,246.66</b>	<b>56,666.67</b>	<b>112,086.67</b>

This settlement was reached prior to the settlement conference I conducted between Santana and defendants.

A preliminary review of both proposed settlements reveals problems. First, I cannot approve the agreement between

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<sup>1</sup>The amount claimed by each of the plaintiffs purportedly includes the allegedly unpaid overtime (assuming that the wages paid represented straight time pay for all hours actually worked), liquidated damages and statutory damages for alleged violations of New York's Wage Theft Prevention Act.

Santana and defendants because it contains an impermissible general release. In pertinent part, the release provides:

[T]he Parties, with respect solely and only to conduct that has arisen on, or prior to, the date that this Agreement is executed, knowingly and voluntarily, fully and forever, release . . . all actions, causes of action . . . including but not limited to those arising under: the Fair Labor Standards Act ("FLSA"); the New York Labor Law ("NYLL"); the FLSA's and NYLL's implementing regulations; any alleged violation of federal, state or local laws prohibiting discrimination . . . ; any other federal, state or local civil or human rights laws . . . [;] the Employee Retirement Income Security Act; the Fair Credit Reporting Act, as amended; the Sarbanes-Oxley Act; any public policy, contract, tort or common law obligation . . . ; any claim for wages or other compensation under any federal or state wage payment laws, and their implementing regulations; any claim for compensation, bonus, incentive pay, vacation pay, sick pay, separation or severance payments of any kind, or any other payments or benefits; and any obligation for costs, fees or other expenses, including but not limited to, claims for minimum wages, overtime and liquidated damages.

(Letter from Kevin A. Guaranda, Paralegal, to the undersigned, dated Nov. 16, 2016 ("Guaranda Letter"), Ex. 1 ¶ 4). "[T]he Parties" are defined as Santana and "[defendants], their parents, subsidiaries, affiliates, successors and assigns, divisions, vendors, customers, their past and present officers, owners, shareholders, directors, principals, employees, former employees, representatives, service providers, counsel and/or agents . . . and each of their respective successors and assigns" (Guaranda Letter, Ex. 1, at 1).

Courts routinely reject general releases in FLSA cases that run only in favor of the defendant and are not limited to wage-and-hour issues. See Leon-Martinez v. Central Café & Deli, 15 Civ. 7942 (HBP), 2016 WL 7839187 at \*1 (S.D.N.Y. Dec. 19, 2016) (Pitman, M.J.) (collecting cases); see also Boyle v. Robert M. Spano Plumbing & Heating, Inc., 15 Civ. 2899 (KMK), 2016 WL 1688014 at \*3 (S.D.N.Y. Apr. 27, 2016) (Karas, D.J.) (approving "broad" release because it was limited to "'conduct set forth in the Lawsuit including, claims arising under or pursuant to the Fair Labor Standards Act, 29 U.S.C. §[§] 201 et seq. and New York Labor Law, and its governing regulations'"). The authorities are more divergent, however, when the general release is mutual, such as the release here. On the one hand, "[a] mutual release will ensure that both the employees and the employer are walking away from their relationship . . . without the potential for any further disputes." Souza v. 65 St. Marks Bistro, 15 Civ. 327 (JLC), 2015 WL 7271747 at \*5 (S.D.N.Y. Nov. 6, 2015) (Cott, M.J.). Additionally, "[a] general release of the kind proposed in this case, with [a] former employee[] who ha[s] no ongoing relationship with the employer, makes sense in order to bring complete closure." Souza v. 65 St. Marks Bistro, supra, 2015 WL 7271747 at \*5. On the other hand, "despite the formal reciprocity of such releases, their practical effect in some cases may be

lopsided because they may stand to benefit only the employer defendant, who realistically may be less likely than the employee plaintiff to have latent claims against its adversary"; the employer's release may "appear[] an empty gesture." Gurung v. White Way Threading LLC, 16 Civ. 1795 (PAE), 2016 WL 7177510 at \*2 (S.D.N.Y. Dec. 8, 2016) (Engelmayer, D.J.).

A general release between Santana and defendants is permissible because Santana is no longer employed by defendants and defendants' release would not necessarily be an empty gesture.<sup>2</sup> However, the issue with the release here, like the one in Lopez v. Poko-St. Ann L.P., 176 F. Supp. 3d 340, 344 (S.D.N.Y. 2016) (Moses, M.J.), is that it would bar claims not only against defendants themselves, but also against defendants' vendors, customers, former employees and other unrelated persons or entities. The reverse is also true: these unrelated persons or entities would be barred from suing Santana. "As written, this language could be applied to absurd effect." Lopez v. Poko-St. Ann L.P., supra, 176 F. Supp. 3d at 344. For example, Santana would not be able to sue one of defendants' customers for breach

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<sup>2</sup>At the settlement conference, defendants made certain statements suggesting that they may have had claims against Santana. In light of the confidential nature of the settlement conference, I shall not disclose the content of those statements on the record.

of contract or for an assault. Similarly, that customer would not be able to sue Santana for defamation or intentional infliction of emotional distress. Such a result is not only absurd, but impossible, because defendants cannot release claims for people or entities over which they have no control.

Additionally, I note that, after deduction of out-of-pocket costs, Santana's counsel seeks 40% of the settlement amount as attorneys' fees. "[C]ourts in this District have declined to award more than one third of the net settlement amount as attorney's fees except in extraordinary circumstances." Santos v. EL Tepeyac Butcher Shop Inc., 15 Civ. 814 (RA), 2015 WL 9077172 at \*3 (S.D.N.Y. Dec. 15, 2015) (Abrams, D.J.), citing Zhang v. Lin Kumo Japanese Rest. Inc., 13 Civ. 6667 (PAE), 2015 WL 5122530 at \*4 (S.D.N.Y. Aug. 31, 2015) (Engelmayer, D.J.) and Thornhill v. CVS Pharm., Inc., 13 Civ. 507 (JMF), 2014 WL 100135 at \*3 (S.D.N.Y. Mar. 20, 2014) (Furman, D.J.); accord Rangel v. 639 Grand St. Meat & Produce Corp., No. 13 CV 3234 (LB), 2013 WL 5308277 at \*1 (E.D.N.Y. Sept. 19, 2013) (approving attorneys' fees of one-third of FLSA settlement amount, plus costs, pursuant to plaintiff's retainer agreement, and noting that such a fee arrangement "is routinely approved by courts in this Circuit"); Febus v. Guardian First Funding Grp., LLC, 870 F. Supp. 2d 337, 340 (S.D.N.Y. 2012) (Stein, D.J.) ("[A] fee that is one-third of

the fund is typical" in FLSA cases); accord Calle v. Elite Specialty Coatings Plus, Inc., No. 13-CV-6126 (NGG) (VMS), 2014 WL 6621081 at \*3 (E.D.N.Y. Nov. 21, 2014); Palacio v. E\*TRADE Fin. Corp., 10 Civ. 4030 (LAP) (DCF), 2012 WL 2384419 at \*6-\*7 (S.D.N.Y. June 22, 2012) (Freeman, M.J.). Counsel justifies this fee by explaining that Santana's recovery was far from uncertain, and could have been zero, because defendants claimed Santana was a manager and exempt from the federal and state overtime requirements. However, counsel has not provided any time records reflecting that this issue required more attention and effort than usual. If counsel believe a 40% contingency is justified, they should support this belief with documentation. See Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (noting that settlement provision that would have set attorneys' fees between 40% and 43.6% of settlement, "without adequate documentation to support such a fee award," is an example of "the potential for abuse in [FLSA] settlements"), cert. denied, 136 S. Ct. 824 (2016), citing Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 173-82 (S.D.N.Y. 2015) (Kaplan, D.J.); Lopez v. Poko-St. Ann L.P., supra, 176 F. Supp. 3d at 342-43 (refusing to approve attorneys' fees totaling more than 40% of settlement amount, even though there was an issue of whether plaintiffs were exempt, without information on "the actual time and effort of



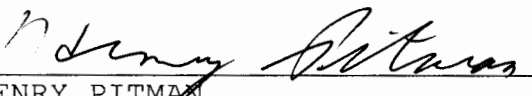
plaintiffs' counsel"; also noting that early resolution of matter was factor against awarding the fees sought).

Second, I cannot approve the settlement between the remaining plaintiffs and defendants because counsel has not provided sufficient information for me to determine whether the settlement is fair and reasonable. Specifically, while counsel listed the plaintiffs' maximum potential recovery, which purportedly included actual overtime owed (assuming that the wages paid represented straight time pay for all hours actually worked), liquidated damages and statutory penalties, counsel provided a damages calculation only for the three-year period that preceded the filing of the complaint (the FLSA's statute of limitations). This damages calculation is not complete because it does not include the six-year period that preceded the filing of the complaint (the NYLL's statute of limitations). Therefore, counsel are directed to re-submit a damages calculation for the six-year period that preceded the filing of the complaint so that I can assess whether the estimates of plaintiffs' maximum potential recoveries are accurate.

Accordingly, within 30 days of the date of this Order, the parties are to provide the information sought and a revised settlement agreement between Santana and defendants that limits the persons or entities covered by the general release.

Dated: New York, New York  
March 31, 2017

SO ORDERED

  
HENRY PITMAN  
United States Magistrate Judge

Copies transmitted to:

All Counsel of Record