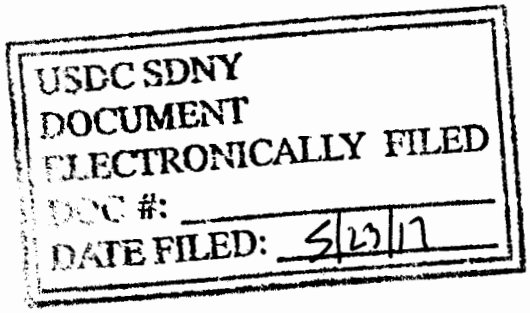

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.

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 (Docket Item ("D.I.") 29, 31). 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. In addition, defendants assert that Santana was a manager and, thus, was 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 amount will be allocated to reimburse Santana's counsel for their out-of-pocket costs, $12,833.33 (or approximately one-third) of the remaining

$38,269.79 will be paid to Santana's counsel and the balance of $25,436.46 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 the total settlement amount as attorneys' fees. The amounts claimed by each of the remaining plaintiffs,[1] 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:

Plaintiff	Amount Claimed	Gross Allocable Share	Allocable Share of Costs	Allocable Share of Fees	Net Allocable Share
Yunior Aquino	25,395.48	37,878.62	277.78	12,626.21	24,974.63
Ramon Sanchez	27,274.21	40,695.13	298.43	13,565.04	26,831.66
Dominguez Celso	18,318.07	30,566.61	224.15	10,188.87	20,153.59
Dony Almanzar	19,242.86	30,220.50	221.62	10,073.50	19,925.38
Jairo Pujols	955.56	6,602.18	48.41	2,200.73	4,353.04
Antonio Diaz	12,155.56	24,036.96	176.27	8,012.32	15,848.37
TOTAL	**103,341.74**	**170,000.00**	**1,246.66**	**56,666.67**	**112,086.67**

[1]The amount claimed by each of the plaintiffs includes the allegedly unpaid overtime (assuming that the wages paid represented straight time pay for all hours actually worked) and liquidated damages. It does not include statutory damages for alleged violations of New York's Wage Theft Prevention Act.

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

I refused to approve an earlier draft of the settlement agreement between Santana and defendants because it contained a general release (D.I. 30). Specifically, the provision not only barred all claims against defendants themselves, but also against unaffiliated persons or entities. I ordered the parties to limit the persons or entities covered by the general release. I also noted that Santana's counsel sought a 40% contingency fee and that such a high fee required justification and documentation.

I also refused to approve an earlier draft of the settlement agreement between the remaining plaintiffs and defendants (D.I. 30). While counsel had listed each plaintiff's maximum potential recovery in their submission seeking settlement approval, they provided a calculation of damages within the FLSA's three-year statute of limitations only, not within the NYLL's six-year statutory period. I ordered the parties to resubmit a damages calculation for the six-year period that preceded the filing of the complaint so that I could assess whether the estimate of plaintiffs' maximum potential recoveries was accurate.

The parties have addressed each of these issues; they have limited the general release and reduced the contingency fee

sought in Santana's settlement agreement, and they have submitted a damages calculation for the six-year period that preceded the filing of the complaint for the remaining plaintiffs.

Court approval of an FLSA settlement is appropriate

> "when [the settlement] [is] reached as a result of contested litigation to resolve bona fide disputes." Johnson v. Brennan, No. 10 Civ. 4712, 2011 WL 4357376, at *12 (S.D.N.Y. Sept. 16, 2011). "If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settlement." Id. (citing Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982)).

Agudelo v. E & D LLC, 12 Civ. 960 (HB), 2013 WL 1401887 at *1 (S.D.N.Y. Apr. 4, 2013) (Baer, D.J.) (alterations in original). "Generally, there is a strong presumption in favor of finding a settlement fair, [because] the Court is generally not in as good a position as the parties to determine the reasonableness of an FLSA settlement." Lliguichuzhca v. Cinema 60, LLC, 948 F. Supp. 2d 362, 365 (S.D.N.Y. 2013) (Gorenstein, M.J.) (internal quotation marks omitted). "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." Beckman v. KeyBank, N.A., 293 F.R.D. 467, 476 (S.D.N.Y. 2013) (Ellis, M.J.), citing Lynn's Food Stores, Inc. v. United States, supra, 679 F.2d at 1353-54. The presumption of fairness in this case is bolstered by the caliber of the parties' attorneys. Based upon their performance at the

settlement conference that was held, it is clear to me that all parties are represented by counsel who are extremely knowledgeable regarding all issues in the case and who are well suited to assess the risks of litigation and the benefits of the proposed settlements.

In Wolinsky v. Scholastic Inc., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012), the Honorable Jesse M. Furman, United States District Judge, identified five factors that are relevant to an assessment of the fairness of an FLSA settlement:

> In determining whether [a] proposed [FLSA] settlement is fair and reasonable, a court should consider the totality of circumstances, including but not limited to the following factors: (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.

(Internal quotation marks omitted). The settlement here satisfies these criteria.

First, Santana's net settlement represents approximately 44% of his claimed damages. Defendants argue that Santana was exempt from the overtime requirements and is, therefore, entitled to no damages for overtime work. As discussed in more detail below, given the risks this issue presents, Santana's

settlement amount is reasonable. Additionally, each of the remaining plaintiffs will receive between 98% and 456% of their claimed damages after deduction of costs and fees. Thus, the net settlement amount provides the remaining plaintiffs with a substantial percentage of their claimed damages.

Second, the settlement will entirely avoid the burden, expense and aggravation of litigation. Defendants did not maintain accurate time records; instead, the plaintiffs signed in and out every day. Defendants also claim that plaintiffs regularly conducted personal matters while at work and took frequent breaks. Trial preparation would require several depositions to explore these issues, and the settlement avoids the necessity of conducting those depositions.

Third, the settlement will enable plaintiffs to avoid the risk of litigation. Plaintiffs here were paid partially in cash, which defendants claim accounted for plaintiffs' overtime wages. In addition, defendants dispute the number of hours plaintiffs worked. Additionally, as noted above, defendants take the position that Santana, as a manager, was an exempt employee and, therefore, not entitled to overtime. The Secretary of Labor's regulations implementing the FLSA state that managers generally qualify as exempt employees. Callari v. Blackman Plumbing Supply, Inc., 988 F. Supp. 2d 261, 275-77 (E.D.N.Y.

2013); Indergit v. Rite Aid Corp., 08 Civ. 9361 (PGG), 08 Civ. 11364 (PGG), 2010 WL 1327242 at *4-*5 (S.D.N.Y. Mar. 31, 2010) (Gardephe, D.J.). However, the law is also clear that an employee's title, by itself, is not determinative of whether he or she is exempt from the overtime requirements; instead, the court must examine the nature of the employee's duties. Reiseck v. Universal Commc'ns of Miami, Inc., 591 F.3d 101, 105 (2d Cir. 2010); Moran v. GTL Constr., LLC, 06 Civ. 168 (SCR), 2007 WL 2142343 at *2 (S.D.N.Y. July 24, 2007) (Robinson, D.J.). Litigation would, therefore, require testimony as to the nature of Santana's duties, which would raise issues of credibility. Thus, whether Santana and the other plaintiffs would recover at trial is far from certain. See Bodon v. Domino's Pizza, LLC, No. 09-CV-2941 (SLT), 2015 WL 588656 at *6 (E.D.N.Y. Jan. 16, 2015) (Report & Recommendation) ("[T]he question [in assessing the fairness of a class action settlement] is not whether the settlement represents the highest recovery possible . . . but whether it represents a reasonable one in light of the many uncertainties the class faces . . . ." (internal quotation marks omitted)), adopted sub nom. by, Bodon v. Domino's Pizza, Inc., 2015 WL 588680 (E.D.N.Y. Feb. 11, 2015); Massiah v. MetroPlus Health Plan, Inc., No. 11-cv-05669 (BMC), 2012 WL 5874655 at *5 (E.D.N.Y. Nov. 20, 2012) ("[W]hen a settlement assures immediate payment

of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable . . . ." (internal quotation marks omitted; assessing fairness of class action settlement)).

Fourth, I am confident that the settlements are reasonable based on their being agreed to by plaintiffs' counsel. Plaintiffs' counsel was exceptionally well prepared at the settlement conference between Santana and defendants and was fully familiar with the claims and the pertinent legal and factual issues. Given the exceptional diligence and zeal with which plaintiffs' counsel represented Santana, I am confident that the settlements are fair.

Fifth, there are no factors here that suggest the existence of fraud or collusion.

Each settlement agreement also provides that, after deduction of out-of-pocket costs, one-third of the total settlement amount will be paid to plaintiffs' counsel as a contingency fee. Contingency fees of one-third in FLSA cases are routinely approved in this circuit. 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.) ("[C]ourts in this District have declined to award more than one third of the net settlement amount as attor-

ney's fees except in extraordinary circumstances."), 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 1100135 at *3 (S.D.N.Y. Mar. 20, 2014) (Furman, D.J.); 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.).

Accordingly, for all the foregoing reasons, I approve the settlements in this matter. In light of the settlements, the

action is dismissed with prejudice and without costs. The Clerk of the Court is respectfully requested to mark this matter closed.

Dated: New York, New York
May 23, 2017

SO ORDERED

HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel of Record