

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 :
 MARISOL MEDINA, :
individually and on behalf of all others :
similarly situated, :
 :
 Plaintiff, :
 :
 - against - :
 :
 NYC HARLEM FOODS INC., et al., :
 :
 Defendants. :
 :
 -----X

21-CV-1321 (VSB)

OPINION & ORDER

Appearances:

James Bouklas
Bouklas Gaylord LLP
Jericho, New York
Counsel for Plaintiff

Elizabeth Rolande Gorman
John Joseph Byrnes, III
Milber, Makris, Plousadis & Seiden, LLP
Woodbury, New York
Counsel for Defendants

VERNON S. BRODERICK, United States District Judge:

Plaintiff Marisol Medina (“Plaintiff”) brings this putative class action pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”), the New York State Labor Law (“NYLL”), the New York Code of Rules and Regulations (“NYCRR”), and The New York Wage Theft Prevention Act, against Defendants NYC Harlem Foods Inc, Bronx 163 Foods Inc., Bronx Market Foods Inc, NYC 143 Foods Inc, NYC 96 Foods Inc, NYC 89 Foods Inc, NYC Park Foods Inc, NYC 125 Foods Inc, NYC 159 Foods Inc, NYC 155 Foods Inc, Sunnyside Bk

Qsr Inc, NYC 116 Bk Qsr Inc, NYC 116 Foods Inc, NYC 121 Foods Inc, NYC 114 Foods Inc, Bronx Prospect Foods Inc., NYC 145 Foods Inc., NYC Lenox Foods Inc., NYC 178 Foods Inc., Bronx 138 Foods Inc., Rv Eastchester Foods Inc., NYC 148 Foods Inc., NYC Lexington Foods Inc., NYC 161 Foods Inc., Bronx 170 Foods Inc., Andhra Foods Inc., Somya Foods, Inc., RVN Foods Inc., and Srinivasa Rao Tummalapenta (collectively, “Defendants”). Before me is Plaintiff’s motion seeking an order (1) granting preliminary approval of the proposed settlement; (2) conditionally certifying the settlement class and appointing Plaintiff as the class representative of the settlement class; (3) appointing Plaintiff’s counsel as class counsel; and (4) approving Plaintiff’s notice of settlement. Because I find that the parties have failed to cure any of the deficiencies in the proposed settlement agreement identified in my Opinion & Order of April 21, 2022 (“Opinion” or “O&O”), and because I find that the proposed settlement agreement remains unreasonable, Plaintiff’s motion is DENIED.

I. Factual Background and Procedural History

In this Opinion & Order, I presume familiarity with this action’s procedural history and with my Opinion, (Doc. 87), so I only provide a brief overview here. Plaintiff is a New York resident and “manual worker” for Defendants, which “jointly own and operate fast food establishments throughout New York State,” specifically, Dunkin Donuts franchises. (*See* Doc. 1 (“Compl.”) ¶¶ 2, 32, 62, 76; Doc. 83-4.) Plaintiff alleges various violations of both the FLSA and NYLL. (*See id.* ¶¶ 96–143.) Plaintiff brings her action under Rule 23 of the Federal Rules of Civil Procedure on behalf of “similarly situated employees who worked for Defendants in New York as non-exempt hourly workers.” (*Id.* ¶ 45; *see also id.* ¶¶ 44–60.)

Plaintiff initiated this action on February 15, 2021. (*See generally id.*)¹ The parties

¹ Although the Complaint was filed on February 15, 2021, it is dated February 12, 2020. (Compl. at 20.)

engaged in mediation, and on January 12, 2022, they reached a settlement. On March 14, 2022, Plaintiff filed a motion for preliminary approval of the class action settlement agreement, (Doc. 83), along with a declaration in support, (Doc. 86), the proposed settlement agreement, (Doc. 86-1), the proposed claim form, (Doc. 86-2), the proposed class notice, (Doc. 86-3), the proposed preliminary approval order, (Doc. 86-4), and a memorandum of law in support, (Doc. 85).² The parties jointly moved for preliminary approval of the settlement. (*See id.* at 1.) Plaintiff also filed an unopposed motion for certification of the class, appointment of Plaintiff as class representative, and appointment of Bouklas Gaylord LLP as class counsel. (*See id.*) The parties separately filed a letter advising me that they disagreed as to the length of “the time frame for Class Members to submit claim forms, to object, or to opt-out of the settlement,” but would “abide by whatever time frame is set by the Court.” (Doc. 84.)

On April 21, 2022, I issued the Opinion rejecting the proposed settlement agreement as unreasonable. (*See generally* O&O.) I directed the parties to either file “a revised settlement agreement within twenty-one (21) days of the date of this Order that cures the deficiencies in the provisions as discussed above,” or file “a joint letter within twenty-one (21) days of the date of this Order that indicates the parties’ intention to abandon settlement, at which point I will set a date for a status conference.” (*Id.* at 20.)

On April 28, 2022, Plaintiff filed a new joint motion for preliminary approval of the class action settlement agreement, (Doc. 88), along with a memorandum of law in support, (Doc. 89), a declaration in support, (Doc. 90), the proposed settlement agreement, (Doc. 90-1), the proposed claim form, (Doc. 90-2), the proposed class notice, (Doc. 90-3), and the proposed preliminary

² The supporting materials were originally filed on March 14, 2022 as exhibits to Doc. 83, but were refiled on April 20, 2022 at Docs. 85 and 86.

approval order, (Doc. 90-4). Plaintiff also moved for certification of the class, appointment of Plaintiff as class representative, and appointment of Bouklas Gaylord LLP as class counsel, all of which Defendants did not oppose. (See Doc. 89.) The parties further filed a letter purportedly addressing whether the submission is fair and reasonable under *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2nd Cir. 2015). (Doc. 91 (“*Cheeks* Letter”).) The parties filed another letter again advising me that they disagreed as to the length of “the time frame for Class Members to submit claim forms, to object, or to opt-out of the settlement,” but would “abide by whatever time frame is set by the Court.” (Doc. 92.)

II. Legal Standard

Under the FLSA, employees may pursue collective actions to recover unpaid wages where the employees are “similarly situated” and give consent to become a party in a writing filed with the court. See 29 U.S.C. § 216(b). A district court may implement § 216(b) by “facilitating notice to potential plaintiffs of the pendency of the action and of their opportunity to opt-in as represented plaintiffs.” *Myers v. Hertz Corp.*, 624 F.3d 537, 554 (2d Cir. 2010) (internal quotation marks omitted).

Parties may not privately settle FLSA claims absent the approval of the district court or the Department of Labor. See *Cheeks*, 796 F.3d at 200; *Samake v. Thunder Lube, Inc.*, 24 F.4th 804, 807 (2d Cir. 2022). In the absence of Department of Labor approval, the parties must satisfy this Court that their settlement is “fair and reasonable.” *Velasquez v. SAFI-G, Inc.*, 137 F. Supp. 3d 582, 584 (S.D.N.Y. 2015) (internal quotation marks omitted). To determine whether a settlement is fair and reasonable under the FLSA, I must

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.

Wolinsky v. Scholastic Inc., 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012) (internal quotation marks omitted).

“In addition, if attorneys’ fees and costs are provided for in the settlement, district courts will also evaluate the reasonableness of the fees and costs.” *Fisher v. SD Prot. Inc.*, 948 F.3d 593, 600 (2d Cir. 2020). In requesting attorneys’ fees and costs, “[t]he fee applicant must submit adequate documentation supporting the [request].” *Id.* The Second Circuit has described a presumptively reasonable fee as one “that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case.” *Restivo v. Hessemann*, 846 F.3d 547, 589 (2d Cir. 2017) (citation omitted). A fee may not be reduced “merely because the fee would be disproportionate to the financial interest at stake in the litigation.” *Fisher*, 948 F.3d at 602 (quoting *Kassim v. City of Schenectady*, 415 F.3d 246, 252 (2d Cir. 2005)). An award of costs “normally include[s] those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients.” *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987) (citation omitted).

“When a district court concludes that a proposed settlement in a FLSA case is unreasonable in whole or in part, it cannot simply rewrite the agreement, but it must instead reject the agreement or provide the parties an opportunity to revise it.” *Fisher*, 948 F.3d at 597.

III. Discussion

In my Opinion, I identified four “fatal deficiencies that render the agreement unreasonable.” (O&O at 6.) In their new submissions, the parties have not addressed any of them. As an initial matter, the new settlement agreement is word-for-word the same as the

previous settlement agreement that I rejected. (*Compare* Doc. 86-1 (“First Settlement Agreement”) with Doc. 90-1 (“Second Settlement Agreement”).) I specifically directed the parties that, unless they intended to abandon settlement, they needed to file “a revised settlement agreement . . . that cures the deficiencies in the provisions as discussed” in my Opinion. (O&O 20.) The parties’ choice to submit an identical settlement agreement was in direct contravention of my order.³

The first deficiency that is not addressed is that the proposed settlement procedures do not comply with the FLSA. (*See* O&O at 6–9.) In my Opinion, I explained that under the FLSA, “the Settlement Agreement must provide potential FLSA collective members an opportunity to opt into the litigation, rather than binding them to the Settlement Agreement if they fail to opt out.” (*Id.* at 9.) I also warned that “I will not approve a settlement agreement in this matter that does not comply with the FLSA.” (*Id.* at 8.) The Second Settlement Agreement does not “provide potential FLSA collective members an opportunity to opt into the litigation,” and the parties’ submissions provide no explanation for this deficiency. (*See generally* *Cheeks* Letter.)

The second deficiency is that the parties still have not provided adequate information to facilitate my review under *Cheeks*. (*See* O&O at 9–12.) I previously explained that “to ascertain the fairness of the Settlement Agreement,” I needed more information about the “range of possible recovery,” the parties’ “anticipated burdens and expenses in establishing their respective claims and defenses,” and “the seriousness of the litigation risks faced by the parties.” (*Id.*

³ Plaintiff’s new memorandum in support of preliminary approval is also identical to the previous memorandum Plaintiff filed. (*Compare* Doc. 85 with Doc. 89.) To the extent that the parties are asking for me to reconsider my Opinion, I decline because the parties have not met the standard for reconsideration. *See Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (“[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.”).

(quoting *Wolinsky*, 900 F. Supp. 2d at 335).) The parties failed to provide any of this information. As for the “range of possible recovery,” the parties only repeat their prior inadequate assertion that “the Gross Settlement Amount equates to each dollar in unpaid wages, and Spread of Hours pay as well as a portion of the unpaid notice, timely pay, and uniform maintenance violations.” (*Cheeks* Letter at 2). (*See* O&O at 10 (“The parties give no damages breakdown and no indication of what ‘portion of the unpaid notice, timely pay, and uniform maintenance violations’ is purportedly covered by the Gross Settlement Amount. This is plainly insufficient.”).) Furthermore, the parties still have not identified any of the Defendants’ defenses, and make only general and pro forma arguments about litigation risks. (*See, e.g., Cheeks* Letter at 3 (“[W]hile Plaintiff remains confident in her position that violations of overtime pay occurred, Defendants remain confident in their position that such violations did not occur. . . .”).) Courts in this District routinely reject settlements due to the parties’ failure to provide this basic information required for a complete *Cheeks* review. *See, e.g., Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 176–77 (S.D.N.Y. 2015); *Fernandez v. 219 Dominican Valle Corp.*, 19 Civ. 9513 (JPC), 2021 WL 240721, at *3 (S.D.N.Y. Jan. 25, 2021); *Sanchez Gonzalez v. Tribeca Hummus Inc.*, 18 Civ. 10664 (ER), 2020 WL 409750, at *1 (S.D.N.Y. Jan. 24, 2020); *Mamani v. Licetti*, No. 13–CV–7002 (KMW)(JCF), 2014 WL 2971050, at *2 (S.D.N.Y. July 2, 2014); *see also Le v. SITA Info. Networking Computing USA, Inc.*, No. 07–CV–86 (JS)(MLO), 2008 WL 724155, at *1 (E.D.N.Y. Mar. 13, 2008).

Third, and perhaps most troublingly, the parties have not revised the termination provision. (*See* Second Settlement Agreement § 2.12(A)(2).) In essence, although the agreement “would formally create a settlement fund of \$1.3 million,” the termination provision “would empower Defendants to nullify the settlement if too many class members file claims.”

(O&O at 13, 15; *see id.* at 13–17; *see also* Second Settlement Agreement § 2.12(A)(2) (“Defendants may terminate this Agreement upon written notice to Class Counsel and the Settlement Claims Administrator if the value of the Net Filed Claims reaches 20% of the total value of the settlement (\$260,000). . . .”).) As I already told the parties, “I cannot countenance a class action settlement that makes its effectuation contingent on most claims going unrecovered and pits the interests of counsel against the interests of the class.” (O&O at 16.) Moreover, since the termination provision requires the parties to “meet and confer in good faith to negotiate terms to keep the resolution intact . . . if the value of the Net Filed Claims reaches 20% of the total value of the settlement (\$260,000),” (*id.*), I found that “the settlement amount is not set and is subject to the future desires and whims of the parties,” and I advised that “I cannot approve an uncertain settlement amount that is subject to further negotiation,” (*id.*). The termination provision is unchanged in the Second Settlement Agreement. What’s more, the parties have not addressed the termination provision at all in their submissions, despite my explicit direction to the parties to “provide case law supporting the type of settlement structure they present in any revised settlement agreement.” (*Id.* at 13 n.4; *see also id.* at 17 (“If the parties wished to structure the Settlement Agreement to limit the number of class members who would get paid, while still requiring all class members to waive their FLSA and NYLL claims against Defendants, the parties should have—at a minimum—provided me some legal and factual justification for such a settlement structure.”).) The parties’ silence on this issue is unacceptable.

Finally, Plaintiff’s counsel still has not provided any documentation supporting its attorneys’ fees award. (*See* O&O at 17–19.) As I said, I am “obligated to ‘carefully scrutinize the settlement and the circumstances in which it was reached, if only to ensure that the interest of plaintiffs’ counsel in counsel’s own compensation did not adversely affect the extent of the relief

counsel procured for the clients.’” (*Id.* at 17–18 (quoting *Wolinsky*, 900 F. Supp. 2d at 336 (internal quotation marks omitted)).) To alleviate any ambiguity, I will not approve any settlement agreement until Plaintiff’s counsel “submit[s] adequate documentation” supporting the fee request. *Fisher*, 948 F.3d at 600.

Because I deny Plaintiff’s motion for preliminary settlement approval, I again also deny Plaintiff’s request for conditional certification of the proposed class, appointment of class counsel, and approval of the proposed class notice. *See Sandoval v. Philippe N. Am. Restaurants, LLC*, No. 16-CV-0615 (VSB), 2017 WL 3841871, at *3 (S.D.N.Y. Aug. 31, 2017). If the parties intend to file a revised agreement and motion, the motion must also address the legal standard for certification of a FLSA collective action.

IV. Conclusion

I will not approve this settlement agreement unless it is substantially revised and/or unless the parties provide specific legal and factual justification for any aspects of the agreement that I have found unreasonable. For the foregoing reasons, Plaintiff’s motion, (Doc. 88), is DENIED without prejudice. The parties may proceed by either:

- 1) Filing a revised settlement agreement within twenty-one (21) days of the date of this Order that cures the deficiencies in the provisions as discussed above; or
- 2) Filing a joint letter within twenty-one (21) days of the date of this Order that indicates the parties’ intention to abandon settlement, at which point I will set a date for a status conference.

The Clerk's Office is respectfully directed to terminate the open motion at Document 88.

SO ORDERED.

Dated: September 26, 2022
New York, New York

A handwritten signature in black ink, reading "Vernon Broderick". The signature is written in a cursive style with a horizontal line underneath the name.

Vernon S. Broderick
United States District Judge