SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

TOBIAS LUIS, SANTIAGO HERNANDEZ and EFRAIN CAMPOVERDE, Individually and on Behalf of the Putative Class Members, **Plaintiffs,** **-against-** **DISKAL INC. d/b/a GEORGIA DINER,** **Defendant.**	**Index No. 708875/2020** **Motion No. 2** **ORDER**

FILED
11/8/2021
COUNTY CLERK
QUEENS COUNTY

The above-captioned matter came before the Court on Plaintiffs' Motion for Final Approval of Class Settlement and Approval of Class Counsel's Fees and Costs ("Motion for Final Approval"):

I. Background and Procedural History

1. The parties' proposed settlement resolves all claims in the action entitled *Tobias Luis, et al., Individually and On Behalf of the Putative Class Members, v. Diskal Inc. d/b/a Georgia Diner,* Index No. 708875/2020, which is currently pending before this Court (the "Litigation").

2. The Plaintiffs in this action allege that Defendant: (1) violated Art. 19 of the NYLL §652(1) and the implementing regulations by failing to pay not less than the applicable minimum hourly wage to employees for all such hours worked each week (Count I); (2) violated Art. 19 of the NYLL, 12 N.Y.C.R.R. §142-2.2 and the implementing regulations by failing to pay one and one-half times employees' regular rates for all hours worked in excess of forty (40) per week (Count II); (3) violated Art. 19 of the NYLL, 12 N.Y.C.R.R. §142-2.4 and the implementing regulations by failing to pay one additional hour of minimum wage for each day on which the

Plaintiffs worked a spread of hours in excess of 10 (Count III); (4) failed to provide wage statements in accordance with Art. 6 §195(3) of the NYLL and 12 N.Y.C.R.R. §142-2.7 (Count IV); (5) failed to provide wage notices in accordance with Art. 6 §195(1) of the NYLL (Count V); and (6) violated NYLL §860 et seq. (the "NY WARN Act") by failing to provide adequate notice to the employees prior to their termination as a result of Defendant's closing the original location of the Georgia Diner (Count VI).

3. The above-captioned action was filed by Tobias Luis, Santiago Hernandez and Efrain Campoverde (the "Named Plaintiffs") in the Supreme Court of the State of New York, County of Queens on June 30, 2020 as a putative class action under NY CPLR §§901, *et seq.* The Named Plaintiffs are former employees of defendant Diskal Inc. d/b/a Georgia Diner ("Defendant"), who worked as restaurant employees for Defendant during the relevant statutory period.

II. Overview of Investigation and Discovery

4. During the pendency of the litigation, Class Counsel conducted substantial investigation and prosecution of the claims in the lawsuit, including, but not limited to, numerous discussions with the Named Plaintiffs, reviewing time and payroll information, exchanging informal document discovery, preparing for and attending a full-day mediation session, and engaging in significant settlement negotiations. (Pelton Aff. ¶¶ 10-14).

III. Settlement Negotiations

5. Over the course of the litigation, the parties engaged in informal and formal settlement negotiations. (*Id*. ¶ 11). The parties exchanged documents for review including time and payroll records as well as records and information pertinent to the closure of Georgia Diner and termination of Plaintiffs that Plaintiffs analyzed in compiling a damages analysis that was exchanged with Defendant, which Defendant analyzed in advance of the in-person mediation. (*Id.*

¶¶ 10-11). In addition, the parties prepared for and attended a full-day mediation session with the assistance of experienced employment mediator, Stephen Sonnenberg, Esq. (*Id.*).

6. At the mediation on September 3, 2019, the parties reached a preliminary agreement. (*Id.* ¶ 13).

7. Subsequently, the parties exchanged additional information and discovery and numerous drafts of the settlement agreement while continuing to negotiate over the terms of the settlement. The final terms of the settlement agreement were memorialized in a formal Settlement Agreement and Release (the "Settlement Agreement"), attached to the Pelton Aff. as Exhibit B.[1] (*Id.* ¶ 14).

8. At all times during the settlement negotiation process, negotiations were conducted at an arm's-length basis. (*Id.* ¶ 13).

9. The Settlement Agreement provides for the establishment of a settlement fund into which Defendant shall make a payment in the amount of $155,000.00 (the "Settlement Amount") to settle this Litigation. (Ex. B (Settlement Agreement) ¶ 3.2(A)). The Settlement Amount will be paid over two (2) equal installments, beginning with the Initial Installment to be made thirty (30) days after the Court's Order of Final Approval and the Second Installment to be made thirty (30) days after the Initial Installment. (*Id.* ¶ 3.2(B)).

10. The Settlement Fund covers (1) all court approved Settlement Costs for the publication and distribution of the settlement notice and payments and all costs and fees incurred by the claims administrator, including claims administration fees and employer payroll taxes; (2) all court approved attorneys' fees costs and disbursements payable to Class Counsel; and (3) all court approved Individual Settlement Amounts to be paid to all Class Members who do not opt out of

[1] All exhibits referenced herein are attached to the Pelton Aff.

the Settlement. (*Id.* ¶ 1.30). Defendants will not be required to pay more than $185,000.00, the Total Settlement Amount including the separate Individual Wage and Hour Settlement, in connection with the Settlement of this Litigation, this Agreement or this Settlement. (*Id.* ¶ 1.31).

11. Each Class Member will receive an equal allocation from the Settlement. (Ex. B (Settlement Agreement) ¶ 3.3(A)(3)).

12. The amounts paid to Class Members will be allocated fifty percent (50%) as W-2 wage payments and fifty percent (50%) as non-wage liquidated damages and interest. (*Id.* at ¶ 3.5(A)).

13. If any Settlement Checks are returned or remain uncashed within ninety (90) days after distribution to Class Members (the "Acceptance Period"), the Settlement Administrator shall notify Class Counsel and Defendants Counsel of the uncashed checks. (*Id.* ¶ 2.13). There shall be an additional thirty (30) day period for Class Members to request a replacement check. (*Id.*). Any amounts remaining uncashed or undistributed after the final distribution shall revert to Defendant, including any portion of the Settlement Fund allocated to those Class Members who did not provide an address to the Defendant during their employment and/or any portion of the Settlement Fund allocated to Class Members who are otherwise unreachable. (*Id.*).

IV. Preliminary Approval of Settlement and Dissemination of the Notice

14. On April 14, 2021, the Honorable Joseph Risi approved the parties' Motion for Preliminary Approval of Class Settlement. (Doc. No. 17).

15. Pursuant to the Court's Order (*see id.*), Class Counsel provided the Settlement Administrator with a list of Settlement Class Members which included, to the extent included in Defendants' records, the Settlement Class Members' names and addresses, as required by the Court's preliminary approval order. (Pelton Aff. ¶ 4). The Settlement Administrator performed an

advanced address search to locate addresses for Settlement Class Members and mailed the Notice and Claim Form to the Class Members on May 24, 2021. (*Id.* ¶¶ 4-5).

16. If a Class Member's Notice was returned by the USPS as undeliverable without a forwarding address, the Settlement Administrator performed an advanced address search using commercially reasonable means (Pelton Aff. ¶ 6). As of the date of this Order, one (1) Class Member was not located because the Settlement Administrator was unable to locate the Class Member's current mailing address. (*Id.*).

17. The Notices advised Class Members of applicable deadlines and other events, including the Final Approval Hearing, and how Class Members could obtain additional information regarding the case and settlement. (Pelton Aff. ¶ 7).

V. Final Approval of Class Settlement

18. The Court held a fairness hearing on August 19, 2021.

19. Having considered the Motion for Final Approval, the supporting declarations, the arguments presented at the fairness hearing, and the complete record in this matter, for good cause shown, the Court (i) grants final approval of the settlement memorialized in the Settlement Agreement, attached to the Pelton Aff. as Exhibit B; and (ii) approves an award of attorneys' fees in the amount of $50,621.36 (one-third (1/3) of the Settlement Amount after subtracting litigation costs) and reimbursement of litigation expenses in the amount of $3,135.90.

20. Under N.Y. C.P.L.R. §908, the Court must approve settlements of class actions. To grant final approval of a Settlement, the Court must determine whether the Proposed Settlement is "fair, reasonable and adequate." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 70, 808 N.Y.S.2d 766, 772 (2d Dept. 2006). As the statute does not define criteria for class-action settlement approval, New York state courts regularly "look[] to federal case law for guidance"

when evaluating class action settlements, in recognition that the two statutory schemes are similar. *Fiala*, 899 N.Y.S.2d at 537-38, 27 Misc.3d at 606 (Sup. Ct. NY Cty. 2010) (collecting cases); *see also City of New York v. Maul*, 14 N.Y.3d 499, 510, 903 N.Y.S.2d 304, 311 (2010) (federal Rule 23 jurisprudence is "helpful in analyzing CPLR 901 issues").

21. New York courts analyze both the investigation performed as to the merits of an action as well as the presence of bona fide settlement negotiations. *See, e.g.*, *Willson v. New York Life Ins. Co.*, No. 127804/1994, 1995 N.Y. Misc. LEXIS 652 at *83 (Sup. Ct. NY Cty. Nov. 8, 1995) (settlement approved where "negotiations were extensive, lengthy and conducted at arm's-length" and Plaintiffs "had ample opportunity to review the strengths and weaknesses of their case through extensive discovery"); *see also Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005) ("Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement").

22. In New York, "courts grant significant weight to the judgment of experienced counsel in determining the fairness of a class action settlement" and examine whether "the parties negotiated at arm's-length and engaged in a vigorous back and forth of their respective positions." *Bickerton v. Charles Rose, et al.* No. 650780/2012, 2013 N.Y. Misc. LEXIS 2762 at *4 (Sup. Ct. NY Cty. June 28, 2013); *see also Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-5669, 2012 U.S. Dist. LEXIS 166383 (E.D.N.Y. Nov. 20, 2012) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery").

A. Procedural Fairness

23. It is clear from the history of the case that the parties reached this settlement only after engaging in extensive investigation and discovery which allowed each side to assess the potential risks of protracted litigation, and robust settlement discussions, including numerous discussions via telephone and email and a full-day mediation with an experienced employment law mediator. The settlement was reached as a result of arm's-length negotiations between experienced, capable counsel after meaningful exchange of information and discovery.

B. Substantive Fairness

24. In evaluating a class action settlement, New York state courts generally consider the following factors: the plaintiff's likelihood of success if the litigation proceeds, the nature of the factual and legal issues at stake, the reaction of class members to the settlement, the judgment of counsel, the presence of good-faith bargaining, and the balance between class members' settlement recovery and what they could recover at trial and the risks of litigation. *See Klein*, 28 A.D.3d at 73.

25. Federal courts in the Second Circuit generally consider nine similar factors set forth in *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974). The *Grinnell* factors are (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recover; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

26. All factors under New York law, as well as the federal *Grinnell* factors, are satisfied by the Parties' settlement in this matter.

27. Litigation through trial would be complex, expensive, and long and would include additional discovery, extensive motion briefing, and a complex trial. The settlement avoids this delay and expenditure of judicial resources and provides substantial recovery for Settlement Class Members in a prompt fashion. Therefore, this factor weighs in favor of approval.

28. The response to the settlement has been positive. There have been zero (0) requests for exclusion and zero objections to the Settlement. (Pelton Decl. ¶ 8). The "favorable reception by the Class also constitutes strong evidence of the fairness of the settlement and supports judicial approval." *Lopez v. Dinex Group, LLC*, No. 155706/2014, 2015 N.Y. Misc. LEXIS 3657, at *6 (Sup. Ct. 1st JD Oct. 6, 2015) (internal quotations omitted). Thus, this factor weighs strongly in favor of approval.

29. Under the federal *Grinnell* factors, the proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176. Here, "based on the discovery, plaintiffs had an opportunity to review the strengths and weaknesses of their case." *Lasker v. Kanas*, No. 0103557/2006, 2007 N.Y. Misc. LEXIS 9269 at *20-21 (Sup. Ct. NY Cty., Sept. 26, 2007).

30. Class Counsel has interviewed several current and former employees of Defendants to gather information relevant to the claims in the litigation; obtained, reviewed, and analyzed documents from Defendants including but not limited to time and payroll data; exchanged formal

and informal discovery; fielded questions from Plaintiffs and Class Members; performed extensive legal research; and compiled and negotiated a damages analysis and discussed the same on the telephone and email; and attended a mediation session and follow-up calls. (Pelton Decl. ¶¶ 1014).

31. Here, the risk of establishing liability and damages further weighs in favor of final approval. A trial on the merits would involve risks because Plaintiffs would have to defeat Defendants' arguments that, *inter alia*, the Plaintiffs were paid in accordance with state law, that their records appearing to show payment of wages are true and accurate, and that proper employee notice of the restaurant's closure was provided in accordance with the NY WARN Act.

32. The risk of establishing a class and maintaining the class status through trial is also present. Plaintiffs have not filed a class certification motion yet such would likely be highly contested and would be subject to risk through trial of potential interlocutory appeal or decertification by Defendants. Settlement eliminates the risk, expense, and delay inherent in this process. *Massiah,* 2012 WL 5874655, at *5.

33. An examination of the adequacy of a settlement "requires 'balancing the value of the settlement against the present value of the anticipated recovery following a trial, discounted for the inherent risks of litigation." *Fiala,* 27 Misc.3d at 607, 899 N.Y.S.2d at 538. This determination "does not involve use of a 'mathematical equation yielding a particularized sum'" *Frank,* 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognized the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972))**.** These factors favor final approval.

VI. Dissemination of Notice

34. Pursuant to the Preliminary Approval Order, Defendants produced a Class List of Class Members who were terminated following the Defendant's closing and were not offered the opportunity to transfer pursuant to 12 NYCRR §921-4.1. Notice was sent to twenty-eight (28) Settlement Class Members at their last known address; Notices that were returned were remailed as possible, and the Settlement Administrator made reasonable efforts to update addresses. (Pelton Aff. ¶¶ 5-6). The Court finds that the mailed Notice fairly and adequately advised Class Members of the terms of the settlement, as well as the right of Class Members to opt out of the class, to object to the settlement, and to appear at the fairness hearing conducted August 19, 2021. Class Members were provided the best notice practicable under the circumstances. The Court further finds that the Notice and distribution of such Notice comported with all constitutional requirements, including those of due process.

VII. Award of Fees and Costs to Class Counsel

35. Class Counsel did substantial work identifying, investigating, prosecuting, and settling the Named Plaintiffs' and the Class Members' claims.

36. Class Counsel has substantial experience prosecuting and settling employment class actions, including wage and hour class actions, and are well-versed in wage-and-hour law and in class action law.

37. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the Class and to representing the Class's interests.

38. The Court hereby awards Class Counsel $50,621.36 in attorneys' fees or one-third (1/3) of the Settlement Fund after subtracting Class Counsel's actual litigation costs.

39. The Court finds that the amount of fees requested is fair and reasonable using the "percentage-of-recovery" method. In New York state, courts generally "prefer[] the percentage of

recovery method to determine an award of attorneys' fees in a class action," since the "lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement" and "gives attorneys an incentive to raise their fees by billing more hours." *Cox*, 26 Misc.3d 1222(A), 2007 N.Y. Misc. LEXIS 9126, at *7-8. Federal courts in this circuit have likewise recognized the advantages of the percentage of the recovery method. *See, e.g., Savoie v. Merchants Bank*, 166 F.3d, 456 460-61 (2d Cir. 1999); *Grinnell*, 495 F.2d at 471. The rationale for this method of recovery is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 444, 478 (1980)).

40. In recognition of the "significant risks undertaken by attorneys who work on contingency, the New York State Court of Appeals has also upheld contingency fees of one-third or higher, whether such fee arrangements are embodied in executed retainer agreements," as New York courts generally "enforce clear and complete documents, like the retainer agreement, according to their terms." *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *15 (quoting *In re Lawrence*, 23 N.E.3d 965, 24 N.Y.3d 320, 998 N.Y.S3d 698 (N.Y. 2014)). As such, the percentage of the recovery method "is closely aligned with market practices because it "mimics the compensation system actually used by individual clients to compensate their attorneys." *Asare*, 2013 U.S. Dist. LEXIS 165935 at *43-46

41. Class Counsel's request for one-third (1/3) of the settlement amount is reasonable and in line with decisions in this state and the federal circuit which have routinely awarded one-third of the settlement fund as attorneys' fees in wage and hour cases. *See, e.g., Lopez*, 2015 N.Y. Misc. LEXIS 3567 (one-third); *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494, 2015 U.S. Dist. LEXIS 65261, at *13 (S.D.N.Y. May 7, 2015) (one-third).

42. The attorney and paralegal hourly billing rates ranging from $125-$175 per hour for paralegals to $300 for associates and $350-$450 per hour for partners are within the range awarded in wage and hour cases in this state as well as the Second Circuit. *Guinea v. Garrido Food Corp*., No. 19-CV-5860 (BMC), 2020 U.S. Dist. LEXIS 5476, at *4-5 (E.D.N.Y. Jan. 11, 2020) (Pelton Graham's rates of "$350-$450 per hour for partner time, $250-$300 per hour for associate time, and $125-$175 per hour for paralegal time…are reasonable and consistent with rates allowed in this district."); *Torres v. Gristede's Operating Corp.*, No. 04-cv-3316, 2012 U.S. Dist. LEXIS 127890, at *7-*10 (S.D.N.Y. Aug. 6, 2012) (approving $525-$650 for partners, $375$400 for associates, $90-$185 for paralegals; *Prinzivalli v. Farley*, No. 114372/2009, 2016 N.Y. Misc. LEXIS 4999, at *23-25 (Sup. Ct. 1st JD May 3, 2016) ("awards in federal court… may provide guidance in determining a reasonable hourly rate).

43. The attorneys' fee award represents a 1.21 multiplier of Class Counsel's stated lodestar, and as such falls within the range granted by courts. (*See* Ex. D (Summary of Attorneys' Expense and Time Records)). *See, e.g.*, *Mancia v. HSBC Securities (USA) Inc.*, No. 9400/15, 2016 N.Y. Misc. LEXIS 496, at *16 (Sup. Ct. 2nd JD Feb. 19, 2016) (approving multiplier of 2.11); *Lopez*, No. 155706/14, 2015 N.Y. Misc. LEXIS 3657, at *19 (Sup. Ct. 1st JD Oct. 6, 2015) (approving 3.15 multiplier); *Fernandez v. Hospitality*, No. 152208/14, 2015 N.Y. Misc. LEXIS 2193, at *14 (Sup. Ct. 1st JD June 20, 2015) (approving 2.5 multiplier).

44. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of $3,135.90.00 which is to be paid from the settlement amount.

45. The attorneys' fees awarded and expenses reimbursed, shall be paid from the settlement amount.

46. Finally, the Court finds the Settlement Administrator fees of approximately $3,900.00 reasonable. Without the Settlement Administrators, Class Members would not receive their share of the settlement proceeds. The Settlement Administrator's work will include calculating the Class Member's tax withholdings and final allocation, maintaining the settlement fund, processing the settlement payments and communicating with Class Members regarding their payments. The Settlement Administrator has additional work to complete the administration. Courts regularly award administrative costs associated with providing notice to the class. *See Bickerton*, 2013 N.Y. Misc. LEXIS 2762 at *13 (awarding administration fees); *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *11 (approving administration fees "given the extensive work that has been and will continue to be done in administering the settlement"). The Settlement Administrator's fee should be paid from the Settlement Fund.

VIII. Conclusion and Dismissal

47. The Court approves the terms and conditions of the Settlement Agreement as fair, reasonable, and adequate pursuant to CPLR §908.

48. The parties shall proceed with the administration of the settlement in accordance with the terms of the Settlement Agreement.

49. The entire case is dismissed on the merits and with prejudice, with each side to bear its own attorneys' fees and costs except as set forth in the Settlement Agreement. This Final Order and Judgment shall bind, and have res judicata effect, with respect to all Settlement Class Members. See Ex. B, ¶ 1.5.

50. The Court approves and incorporates herein by reference the releases and waivers set forth in the Settlement Agreement which shall be binding upon the Class Members as set forth in such agreement. *See* Ex. B, ¶¶ 1.5, 1.25. 1.26, 2.11, & 4.

51. The Court approves and incorporates herein by reference the releases, waivers, and terms set forth in the Wage & Hour Settlement Agreement and Release. *See* NYSCEF Doc. 14.

52. Neither this Order, Settlement Agreement, nor any other documents or information relating to the settlement of this action shall constitute, be construed to be, or be admissible in any proceeding as evidence (a) that any group of similarly situated or other employees exists to maintain a class action under N.Y. C.P.L.R. §901, *et. seq.* or comparable federal law or rules, (b) that any party has prevailed in this case, or (c) that the Defendants or others have engaged in any wrongdoing.

53. Without affecting the finality of this Final Order, the Court will retain jurisdiction over the case following the entry of the Judgment and Dismissal until 30 days after the end of the time for class members to cash their settlement check has expired, as defined in the Settlement Agreement. The parties shall abide by all terms of the Settlement Agreement and this Order.

54. This document shall constitute a judgment for purposes of N.Y. C.P.L.R. §5001 *et seq.*

It is so ORDERED this **5th** day of **November, 2021**.

Hon. Joseph Risi, A.J.S.C.