UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAOLA SANCHEZ, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

KAMBOUSI RESTAURANT PARTNERS, LLC, *et ano.*,

Defendants.

No. 15 Civ. 05880 (CM)(HBP)

ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

McMahon, C.J.:

On February 2, 2016, the Court preliminarily approved the settlement and authorized distribution of notice to the class. Docket No. 30. Class members have now been notified of the terms of the settlement and their right to participate in or object to the settlement. No Class Member has objected to the settlement, and thirty-two Class Members have opted to participate in the settlement.

For the reasons stated below, the Court: (1) certifies the settlement class described below; (2) approves as fair and adequate the Joint Stipulation of Settlement (the "Settlement

Stipulation") attached as Exhibit A to the accompanying Declaration of Evan Hudson-Plush ("Hudson-Plush Decl."); and (3) approves the Fair Labor Standards Act ("FLSA") settlement.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

On July 27, 2015, the Plaintiffs filed a class action complaint on behalf of current and former employees of the Royal Coach Diner (the "Diner") in the Bronx who have worked as waiters, bussers, counter servers, and dishwashers ("Class Members"). Docket No. 6 (Compl. ¶1). The complaint alleged that Defendants violated the FLSA and the New York Labor Law ("NYLL") by failing to pay its employees in accordance with federal and state law. The primary allegations were that the Diner paid the Class Members below the minimum wage permitted for tipped workers, that the Diner did not in any event qualify for the "tip credit" permitting this lower minimum wage, and that it failed to pay time-and-a-half for overtime hours. Compl. ¶¶ 1-10; Hudson-Plush Decl. ¶14. The complaint also alleged that Defendants failed to pay spread-of-hours pay or to maintain adequate records or provide adequate paystubs, and retaliated against Plaintiff Cuautle for his involvement in a New York State Department of Labor investigation. Compl. ¶¶117-29.

Defendants denied all material allegations and asserted various affirmative and other defenses.

On July 29, 2015, seven additional opt-in plaintiffs joined the litigation. Hudson-Plush Decl. ¶15.

[1] Unless otherwise indicated, all capitalized terms have the definitions set forth in the Settlement Stipulation.

B. Investigation and Settlement Discussions

Prior to filing the lawsuit, Class Counsel conducted a thorough investigation into the merits of potential claims and defenses. Hudson-Plush Decl. ¶11. The investigation involved conducting interviews with more than ten putative class and collective members concerning their employment with Defendants. *Id.* Class Counsel also reviewed and analyzed paystubs, cash receipts for wages, and other employment documents provided by the putative class and collective members. *Id.* Class Counsel additionally conducted extensive legal research into the possible claims, damages and class certification issues, and in-depth background corporate research on the Diner. *Id.* ¶¶12-13.

After serving the complaint, on or about September 3, 2015, the parties agreed to engage in a dialogue with a neutral mediator to explore a voluntary resolution of the claims asserted in the Complaint. *Id.* ¶16. The parties also entered into a tolling agreement to toll the limitations period on the absent class members' claims. *Id.* In order to facilitate the mediation process, the parties voluntarily exchanged documents and payroll data. *Id.* ¶17. Using these documents and data, Class Counsel refined their unpaid wage calculations. *Id.* In preparation for the mediation and at the request of the mediator, Class Counsel also prepared and submitted a detailed mediation statement which explained the Plaintiffs' claims, outlined the Defendants' vulnerabilities, acknowledged legal and factual risk, and described the Plaintiffs' damages calculations. *Id.*

On October 29, 2015, the parties and eleven plaintiffs (the four named and seven that had opted-in) attended a full-day mediation session in Manhattan with Mediator Ruth Raisfeld, Esq., a well-known and experienced mediator in complex wage and hour law. *Id.* ¶18. The mediation began at 10:00 a.m. and concluded at approximately 9:00 p.m. *Id.* Although the parties did not reach an agreement, they made significant progress and agreed to participate in a second

mediation session. *Id.* On November 20, 2015, the parties, including all of the named plaintiffs and a majority of the opt-in plaintiffs, appeared at a second all-day mediation session before Mediator Raisfeld. *Id.* ¶19. The mediation began at 10:00 a.m. and concluded at approximately 6:00 p.m. At the mediation, the parties reached an agreement in principle on the settlement amount and executed a "settlement term sheet." *Id.*

Over the course of the next month, the parties negotiated the remaining terms of the settlement and memorialized them into the Settlement Stipulation executed by the parties on December 21, 2015. *Id.* ¶21; Hudson-Plush Decl. Ex. A. On January 28, 2015, the Plaintiffs filed a Notice of Motion for Preliminary Approval of Class and Collective Action Settlement. *Id.* ¶22; Docket Nos. 26-29. On February 2, 2016, the Court preliminary certified a settlement class and approved the Settlement Stipulation as well as the dissemination of notice to the class. *Id.* ¶23; Docket No. 30.

C. CAFA Notice

On February 10, 2016, Garden City Group, the Claims Administrator, sent notices to the federal and state authorities required by the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1715(d); Hudson-Plush Decl. ¶36. The 90-day CAFA notice period concluded on May 10, 2016. Hudson-Plush Decl. ¶36. No government official has responded to the CAFA notice. *Id.*

II. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

A. The Settlement Amount

The Settlement Stipulation provided for escalators in the settlement amount depending on the number of participating plaintiffs. Under the terms of the Settlement Stipulation, Defendants will pay nine hundred thousand dollars ($900,000) if eighteen or more Class Members participate (the "Maximum Settlement Amount"). Hudson-Plush Decl. ¶¶24-25; Ex. A (Settlement Stipulation) § 1(u), 2. Thirty-two members have opted to participate by returning

Valid Claim Forms. Hudson-Plush Decl. ¶25. The Maximum Settlement Amount covers Class Members' payments, attorneys' fees and costs, settlement administrator's fees and costs, participating Class Members' share of payroll taxes, and damages designated to three plaintiffs for alleged retaliation suffered in retribution for asserting their wage claims. *Id.* ¶26.

B. Eligible Employees Who May Obtain Payment

Employees who are entitled to receive settlement payments include two partially overlapping groups of Class Members. The first group, the New York Rule 23 Class Members, includes all waiters, bussers, dishwashers, and counter servers employed by Defendants between July 27, 2009 and February 2, 2016, the date of the Court's preliminary approval of the Settlement Stipulation. The second group, the FLSA Settlement Collective Members, includes all waiters, bussers, dishwashers, and counter servers employed by Defendants between July 27, 2012 and February 2, 2016. *Id.* ¶27; Ex. A § 5; Docket No. 30. To participate in the settlement and receive a distribution, Class Members must have submitted a timely Valid Claim Form. Hudson-Plush Decl. Ex. A. § 13(f).

C. Release of Claims Limited Only to Participating Class Members

Only Participating Class Members will release any claims. That is, the Settlement Stipulation provides that only Class Members who submitted a Valid Claim Form and joined in the settlement will release their state and federal wage and hour claims from June 27, 2009 through February 2, 2016. *Id.* ¶32; Ex. A. § 16. Any Class Member that did not submit a Valid Claim Form will not participate in the settlement and will not waive any claims whatsoever. *Id.* Ex. A §16.

D. Allocation Formula and Class Member Payments

Participating Class Members will be paid pursuant to an allocation formula used to determine the percentage share of the Net Settlement Amount to which the Class Member is

entitled. *Id.* ¶28; Ex. A § 6. The formula is based upon the number of weeks the Class Member worked at the Diner and the position or positions they held during those weeks. *Id.* ¶28.[2] Here, Class Counsel estimates that each Class Member will receive approximately 38% of the maximum possible unpaid wages that could be recovered if this case were litigated through trial. *Id.* ¶30. If the Defendants prevailed on their anticipated defense that they qualify for the tip credit, the amount represents more than 74% of the maximum possible unpaid wages that could be recovered for waiters, counter-servers, and bussers, and more than 40% for dishwashers. *Id.* The average net payment (net of attorney's fees and costs and claims administrator's fees and costs) is greater than $16,000 and payments range up to a high of $39,222. Hudson-Plush Decl. ¶31. No funds revert to the Defendants. *Id.* ¶42.

E. Attorneys' Fees and Litigation Costs

Class Counsel has filed a concurrent Motion for Attorneys' Fees and Costs.

F. Settlement Claims Administrator

The Settlement Claims Administrator is the Garden City Group ("GCG"). Hudson-Plush Decl. ¶34; Ex. A §§ 1(e), 9. The Claims Administrator's actual fees and costs will be paid from the Maximum Settlement Amount. Ex. A § 10.

G. Notice and Class Members' Response to the Settlement

Pursuant to the Court's February 2, 2016 Order preliminarily approving the settlement, GCG mailed the Notice to fifty potential Class Members. Hudson-Plush Decl. Ex. C (Declaration of Loree Kovach ("Kovach Decl.") ¶7 & Ex. 1 (Notice)). On April 1, 2016, Garden

[2] Class Members received a dollar value for each week worked at the Diner, which resulted in the total amount claimed and was used to calculate the percentage share of the Fund to which the Class Member was entitled. Because the dollar value of the total amount claimed was greater than the Net Settlement Amount, each Class Members' dollar value used to calculate the percentage share of the Fund was reduced on a *pro rata* basis. Hudson-Plush Decl. ¶29.

City Group sent out a reminder postcard to Class Members who had not yet filed a Valid Claim Form. Kovach Decl. ¶17 & Ex. 3. After the Notice was mailed, GCG received seven Notices that were returned as undeliverable by the Post Office without a forwarding address. *Id.* ¶12. Garden City Group performed address traces for these undeliverable Notices and re-mailed them to Class Members for whom they could locate a new address. *Id.* ¶12-13. In the end, a total of four Notices were undeliverable. *Id.* ¶14.

In addition to the mailed notice, GCG issued a publication notice in *El Diario*, *The Bronx Times*, and *El Diaro de Mexico* on February 19 and 22, 2016. Kovach Decl. ¶8 & Ex. 2. Notice was also posted at the Diner on February 12, 2016, Hudson-Plush Decl. ¶37, and GCG established a website in English and Spanish that was viewable during the claims period that provided links to the Notice and information about the settlement, Kovach Decl. ¶11. GCG also maintained a toll-free information line that received thirty-eight calls which resulted in the mailing of ten additional Notices. *Id.* ¶¶9-10.

The Notice advised Class Members that, in addition to participating in the settlement, they could object to the settlement, object and participate in the settlement, or decide not to participate in the settlement. *Id.* Ex 1 at p.1. The time has expired for Class Members to participate or object pursuant to the Settlement Stipulation. Hudson-Push Decl. ¶40. A total of 32 Class Members have returned Valid Claim Forms; this represents 35% of Defendants' class list, which listed 92 individuals. *Id.* ¶41. No Class Member objected to the settlement. *Id.*

DISCUSSION

I. THE SETTLEMENT CLASS IS CERTIFIED

Courts examine whether the proposed settlement class should be certified under Rule 23 prior to determining whether to approve a class settlement. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). On February 2, 2016, the Court preliminarily certified the

settlement class. *See* Docket 30. The Court now grants final certification of a New York state law class of waiters, bussers, dishwashers, and counter servers employed by the Defendants at the Diner between July 27, 2009 and February 2, 2016 because all of the Rule 23 certification requirements have been met.

Under Rule 23, a class action "may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b)." *Johnson v. Brennan*, No. 10 Civ. 4712 (CM), 2011 WL 4357376, at *4 (S.D.N.Y. Sept. 16, 2011). To certify a class under Rule 23(a), the Plaintiffs must demonstrate numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a); *see also Asare v. Change Grp. of New York, Inc.*, No. 12 Civ. 3371 (CM), 2013 WL 6144764, at *5 (S.D.N.Y. Nov. 18, 2013). Rule 23(b)(3) requires that "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Asare*, 2013 WL 6144764, at *5 (citing Fed. R. Civ. P. (23)(b)(3)). In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility' in evaluating class certification." *Johnson*, 2011 WL 4357376, at *4.

A. Numerosity

Defendants estimated that there were approximately eighty to one-hundred putative Class Members in the class that Plaintiffs seek to certify, and the class list they produced listed ninety-two individuals. Hudson-Plush Decl. ¶39. This satisfies the numerosity requirement in the Second Circuit. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("numerosity is presumed at a level of 40 members"); *see also Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011).

B. Commonality

The commonality requirement tests "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Plaintiffs can meet "the commonality requirement where the individual circumstances of class members differ, but their injuries derive from a unitary course of conduct by a single system." *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 175 (S.D.N.Y. 2014). Even "a single common legal or factual question will suffice" to meet the commonality requirement. *Id.*; *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 162 (S.D.N.Y. 2014).

This case involves numerous common issues. Plaintiffs and Class Members all assert the identical claims that Defendants failed to pay them the proper minimum wage for all hours worked and that Defendants did not pay overtime wages in violation of state wage and hour laws. The common issues include: (1) whether Defendants' compensation practices violated the New York Labor Law; (2) whether Defendants employed Plaintiffs and the Class Members; (3) whether Defendants paid Plaintiffs and Class Members the proper minimum wage rate for all hours worked; (4) whether Defendants properly compensated Plaintiffs and Class Members for hours worked in excess of forty per week; (5) whether Defendants failed to provide accurate wage notices and wage statements to Plaintiffs and Class Members; and (6) whether Defendants properly paid Plaintiffs and Class Members spread-of-hours pay pursuant to NYLL. Courts in the Second Circuit have found that these questions meet Rule 23(a)'s commonality requirement. *See Yuzary v. HSBC Bank USA, N.A.*, No. 12 Civ. 3693 (PGG), 2013 WL 5492998, at *3 (S.D.N.Y. Oct. 2, 2013) (common issues include whether Defendant "failed to pay them overtime wages in violation of state wage and hour laws, and failed to keep accurate records of time worked"); *Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825 (PKC), 2011 WL

2207586, at *9 (S.D.N.Y. June 2, 2011) (common question whether "defendant has failed to compensate class members for work performed in excess of forty hours per workweek"); *Johnson*, 2011 WL 4357376, at *5 (commonality met where common issues include whether Defendant "failed to pay spread-of-hours pay").

C. Typicality

Rule 23 requires that the named-plaintiffs' claims be typical of the claims of the class. The typicality requirement is met where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *In re Flag Telecom Holdings*, 574 F.3d 29, 35 (2d Cir. 2009). Typicality "should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, No. 05 Civ. 4116 (RWS), 2007 WL 103073, at *6 (S.D.N.Y. Jan. 12, 2007) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)). Typicality does not require the named plaintiffs' claims "to be identical," to all class members, *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 182 (W.D.N.Y. 2005), and when the "same unlawful conduct was directed at or affected both the named plaintiff and the prospective class, typicality is usually met." *Aponte*, 2011 WL 2207586, at *10.

Here, the Plaintiffs' claims arise from the same factual and legal circumstances that form the foundation of the Rule 23 Class Members' claims; typicality is therefore satisfied. Plaintiffs and all Class Members are or were employed by the Defendants at the same location and were subject to the same corporate pay practices, resulting in the same alleged minimum, overtime, spread-of-hours, and notice violations. Each category of worker also had virtually identical job duties and shared the same job titles (waiter, busser, counter-server, and dishwasher). *See Romero v. La Revise Assocs., L.L.C.*, 58 F. Supp. 3d 411, 418 (S.D.N.Y. 2014) (noting that "all

the class members claim similar violations of the NYLL by defendants"); *Toure v. Cent. Parking Sys.*, No. 05 Civ. 5237 (WHP), 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (typicality satisfied where all class members alleged that "when they worked more than forty hours per week they were not paid overtime").

D. Adequacy of the Named Plaintiffs

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequate representation is a two-part test: "class counsel must be qualified and able to conduct the proposed litigation, and the class representatives must not have interests antagonistic to those of the other class members." *Lizondro-Garcia*, 300 F.R.D. at 175.

There has been no assertion or evidence put forth here that the named Plaintiffs have any interests that are antagonistic to or at odds with those of class members. *See Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 216 (S.D.N.Y. 2015) (finding adequacy where named plaintiffs prosecuted the action, "obtained a significant settlement, and have no known conflicts with any class member"); *Johnson*, 2011 WL 4357376, at *5 ("no evidence that Plaintiffs' and class members' interests are at odds"). Similarly, for the reasons set forth in Plaintiffs' supporting papers, Class Counsel also meets the adequacy requirement of Rule 23(a)(4). *See* Hudson-Plush Decl. ¶¶2-10.

E. Certification is Proper Under Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry "tests whether proposed classes are

sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

1. Common Questions Predominate

To establish predominance, Plaintiffs must show that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-08 (2d Cir. 2007) (internal quotation marks omitted). The key "is whether liability can be determined on a class wide basis, even when there are some individualized damage issues.'" *Asare*, 2013 WL 6144764, at *7. In situations where "plaintiffs are 'unified by a common legal theory' and by common facts, the predominance requirement is satisfied." *Id.*

Here, Class Members' common factual allegations and common legal theory predominate over any factual or legal variations among class members. The class-wide allegations asserted by the Plaintiffs include, among others, that Defendants violated federal and state wage and hour laws by not paying Class Members the minimum hourly wage required by law and by not paying Class Members overtime for working more than forty hours per week. *See* Hudson-Plush Decl. ¶14. This Court has called these common questions of liability "about the most perfect questions for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007); *see also Bravo v. Palm W. Corp.*, No. 14 Civ. 9193 (SN), 2015 WL 5826715, at *3 (S.D.N.Y. Sept. 30, 2015).

2. A Class Action is the Superior Mechanism

Rule 23(b)(3) also requires that the class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23 sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: the class

members' interests in individually controlling the prosecution or defense of separate actions; whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation in the forum. Fed. R. Civ. P. 23 (b)(3).[3]

In this case, Plaintiffs and many Class Members are low-wage, Spanish-speaking workers with limited resources with which to prosecute individual actions. Concentrating the litigation in this court is desirable because the wrongful conduct occurred within the jurisdiction of this court and almost all of the putative Class Members reside in this jurisdiction. Hudson-Plush Decl. ¶39. Furthermore, employing the class device would preserve judicial resources by avoiding the waste and delay of potentially repetitive proceedings. Therefore, a class action is the most suitable mechanism to fairly, adequately, and efficiently resolve Plaintiffs' and Class Members' claims.[4] *See Iglesias-Mendoza*, 239 F.R.D. at 373 (superiority met where "class members are almost exclusively low-wage workers with limited resources and virtually no command of the English language or familiarity with the legal system"); *see also Asare*, 2013 WL 6144764, at *8.

II. THE PROPOSED SETTLEMENT IS APPROVED

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); *Henry v. Little Mint, Inc.*, No. 12 Civ. 3996 (CM), 2014 WL 2199427, at *6 (S.D.N.Y. May 23, 2014) (fairness based on substantive and procedural evidence); *Tiro v. Pub. House Investments, LLC*, No. 11 Civ. 7679 (CM), 2013 WL 4830949, at *5 (S.D.N.Y. Sept. 10, 2013). These factors are

[3] The manageability factor in Rule 23(b)(3) is not applicable in the context of a proposed settlement. *Amchem Products, Inc.*, 521 U.S. at 620.

[4] One Class Member has brought an individual action concerning his claims within this District. *See Torres v. Kopy Diner LLC*, Docket No. 16-cv-2265 (S.D.N.Y. Mar. 28, 2016).

examined "in light of the strong judicial policy in favor of settlement of class action suits." *Tiro*, 2013 WL 4830949, at *5. When a settlement is negotiated prior to class certification (as here), it is subject to a heightened degree of scrutiny in the fairness inquiry. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

A. The Proposed Settlement is Procedurally Fair

To determine procedural fairness, "courts examine the negotiating process leading to the settlement." *Johnson*, 2011 WL 4357376, at *7. A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Henry*, 2014 WL 2199427, at *6 (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). In the absence of fraud or collusion, courts are "hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Asare*, 2013 WL 6144764, at *8.

Here, the settlement is procedurally fair. To settle this case, Plaintiffs conducted a thorough investigation into the claims and defenses, and the parties engaged in informal discovery to evaluate the strengths and weaknesses of the case. Hudson-Plush Decl. ¶¶11-17. After the exchange of documents, including payroll data, the parties prepared detailed mediation statements and participated in two full-day mediation sessions with an experienced class-action wage and hour mediator (Ruth Raisfeld, Esq.). *Id.* ¶¶17-19. After the second full day mediation session, the parties reached an agreement in principle and executed a term sheet containing the essential elements of a settlement. During the next month, the parties negotiated the remaining terms of the settlement and memorialized them in the Settlement Stipulation. *Id.* ¶¶19, 21; Ex. A.

As the settlement was reached through vigorous, arm's length negotiations and after experienced counsel had evaluated the merits of the claims, the settlement is procedurally fair. *Johnson*, 2011 WL 4357376, at *8 ("These arm's-length negotiations involved counsel and

[Ruth Raisfeld] a mediator well-versed in wage and hour law, raising a presumption that the settlement achieved meets the requirements of due process."); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 618 (S.D.N.Y. 2012) (same); *Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271 (LTS), 2011 WL 9380874, at *3 (S.D.N.Y. Sept. 21, 2011); *deMunecas v. Bold Food, LLC*, No. 09 Civ. 00440 (DAB), 2010 WL 3322580, at *4 (S.D.N.Y. Aug. 23, 2010).

B. The Proposed Settlement Is Substantively Fair

Courts in the Second Circuit frequently consider the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (abrogated on other grounds), when considering the fairness of a class settlement. The nine *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 recovery; (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. In this case, all of the *Grinnell* factors weigh in favor of final approval of the Settlement Stipulation.

1. Litigation Through Trial Would Be Long and Costly (*Grinnell* Factor 1)

By agreeing to a settlement before further litigation, extensive discovery, or motion practice, the Plaintiffs seek to avoid the inherent expense and delay in litigating a class action lawsuit, and instead ensure recovery for the class. As courts recognize, most "class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *Johnson*, 2011 WL 4357376, at *8 (quoting *In re Austrian & German*

Bank Holocaust Litig., 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000)). This class action is no exception. The complaint asserts three claims under federal law and six claims under New York state law, against both a corporate entity and an individual, on behalf of low-wage, predominately immigrant, workers. There are four categories of workers (waiters, bussers, dishwashers, and counter-servers), each of which were compensated differently, some on, some "off the books," and provided with varying levels of tips. These factors, among others, would make this a complex case to litigate.

Further litigation would cause additional expense and delay. Although the parties engaged in informal discovery, extensive discovery would be required to establish liability and damages. Discovery would require numerous depositions which would require the additional expense of interpreters since most putative Class Members are not fluent in English. In addition, further litigation would likely lead to motion practice. Defendants would be required to either answer the Complaint or file a dispositive motion. Plaintiffs would move to certify the class under Rule 23 and possibly later move for summary judgment on liability. A fact-intensive trial could follow to determine damages and/or liability. A trial would require lengthy testimony by Defendants, Plaintiffs, and other Class Members and preparation for trial would consume significant resources. Meanwhile, this settlement makes monetary relief available to Class Members in a prompt and efficient matter, and yet does not require any Class Member that does not wish to participate to waive any claims. *See Yuzary*, 2013 WL 5492998, at *5 (early settlement "allows class members to recover without unnecessary delay"). The first *Grinnell* factor therefore weighs in favor of approval. *See Johnson*, 2011 WL 4357376, at *9.

2. The Reaction of the Class to the Settlement Has Been Favorable (*Grinnell* Factor 2)

Reaction of the class to the settlement is "perhaps the most significant factor to be weighed in considering its adequacy." *Id.* (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002)). The "lack of class member objections may itself be taken as evidencing the fairness of a settlement." *Id.*

Here, the Notice was disseminated via mail, publication notice, a notice-posting at the Diner, as well as through a website active during the claims period. Kovach Decl. ¶¶5-14; Hudson-Plush Decl. ¶37. The Notice explained how Class Members could object to the settlement and informed them that they would not waive any claims if they decided not to participate in the settlement. Kovach Decl. Ex. 1. Thirty-two Valid Claim Forms were returned and no Class Member objected to the settlement. *Id.* ¶¶15, 19. This represents a participation rate of 35% with no objections. In a settlement structured so that only those that submit claims participate, the participation rate and lack of objections here show that the second *Grinnell* factor weighs in favor of final approval. *See Acevedo v. Workfit Med. LLC*, No. 6:14 Civ. 06221 (EAW), 2016 WL 2962930, at *5 (W.D.N.Y. May 20, 2016) (approving settlement with 21% participation rate, a "high participation rate" for claims-made settlement, and no objections); *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 100 (E.D.N.Y. 2015) (approving 20% participation rate with no objections and noting typical participation rate of 10% to 15%); *Asare*, 2013 WL 6144764, at *10 (50% participation rate with no objections); *Wright v. Stern*, 553 F. Supp. 2d 337, 344–45 (S.D.N.Y. 2008) ("fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness).

3. Discovery Has Sufficiently Advanced to Permit the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3)

Although completing class discovery and preparing this case through trial would require hundreds of additional hours, the informal discovery the parties have completed is sufficient to resolve the action and approve the settlement. When considering this factor, "the question is whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths and defenses asserted by the defendants, and the value of plaintiffs' causes of action for purposes of settlement." *Raniere*, 310 F.R.D. at 218.

Here, the parties' discovery meets this standard. Class Counsel conducted a thorough investigation into the merits of the potential claims and defenses before filing the complaint and before the all-day mediation sessions. Hudson-Plush Decl. ¶¶11-13. Prior to initiating the action, Counsel interviewed more than ten putative class members (here, more than ten percent of the entire class) to gather information relevant to the claims in the litigation, including facts surrounding Defendants' tip credit policies, tip credit notice policies, and the compensation and job duties of the individuals who received tips. *Id.* ¶11. Class Counsel also reviewed documents and payroll information provided by the putative class members. After filing the Complaint, Defendants produced payroll and other data through informal discovery. Plaintiffs' Counsel calculated damages on a class-wide basis, and evaluated the strengths and weaknesses of the claims. *Id.* ¶17. After analyzing the information, the parties prepared detailed mediation statements and proceeded to use this information to engage in two full-day mediation sessions. *Id.*

Courts have regularly granted final approval of class settlements in cases where the parties engaged in this level of discovery; this factor also weighs in favor of preliminary

approval. *See, e.g.*, *Raniere*, 310 F.R.D. at 218 (approving settlement where "less than the extensive" discovery permitted plaintiffs to "estimate" damages and evaluate weaknesses in case); *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713 (PGG), 2010 WL 2399328, at *5 (S.D.N.Y. Mar. 3, 2010) (approving settlement where the "two dull-day mediation sessions allowed them to further explore the claims and defenses").

4. Plaintiffs Would Face Real Risks if the Case Proceeded (*Grinnell* Factors 4 and 5)

When evaluating the risks of establishing liability, a court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *Johnson*, 2011 WL 4357376, at *10. Although a case may be strong, if "settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *Asare*, 2013 WL 6144764, at *11.

A trial on the merits would involve real risks for the Plaintiffs as to liability and damages. Plaintiffs would have to overcome the Diner's anticipated defenses that the Diner qualified for the tip credit, that the Plaintiffs did not work as many hours as they assert, and that the Diner otherwise compensated them lawfully. They would have the additional hurdle of proving their hours and rates of pay in the face of incomplete or inaccurate payroll records from the Diner. Moreover, Plaintiffs would need to meet the standards necessary to show that Defendant Paxos is individually liable.

Establishing Defendants' liability and proving damages would be time-consuming, costly, and require significant factual development. Class Counsel are realistic and understand that the resolution of liability issues, the outcome of trial, and the inevitable appeals process are inherently uncertain in terms of both outcome and duration. Given that the proposed settlement alleviates this uncertainty, this factor weighs in favor of final approval. *See Johnson*, 2011 WL

4357376, at *10; *Raniere*, 310 F.R.D. at 218; *Viafara v. MCIZ Corp.*, No. 12 Civ. 7452 (RLE), 2014 WL 1777438, at *7 (S.D.N.Y. May 1, 2014); *Henry*, 2014 WL 2199427, at *9.

5. Maintaining a Class Through Trial Entails Risk (*Grinnell* Factor 6)

The risk of maintaining a class through trial is present in any class action. *Asare*, 2013 WL 6144764, at *12. Plaintiffs would need to obtain full Rule 23 certification of the NYLL claims and would face the challenge in meeting the stringent requirements of Rule 23(b)(3) certification. Defendants, for instance, may have argued that the different job classifications and pay rates and methods for the waiters, bussers, and dishwashers would have meant that plaintiffs could not satisfy the commonality requirement and hence a Rule 23 class action was not appropriate. Plaintiffs anticipate that they could have overcome this defense and obtained full certification, but only after extensive and costly discovery and motion practice. Additionally, although there is a low burden to conditionally certify the FLSA class, Defendants could have moved for decertification prior to trial. At this point, settlement eliminates these risks, expenses, and delay; therefore, this factor favors final approval.

6. Defendants' Ability to Withstand a Greater Judgment (*Grinnell* Factor 7)

In this case, the Defendants are a small family-owned diner located in the Bronx. During both of the all-day mediation sessions, the Parties negotiated the settlement while taking into account Defendants' ability to pay, and the Defendants repeatedly raised their financial status relative to their ability to settle for higher amounts of money. Hudson-Plush Decl. ¶19. This factor also favors final approval. *See Henry*, 2014 WL 2199427, at *9 (noting that "parties negotiated heavily over the settlement amount taking into account Defendants' ability to pay" and ability to "remain in business").

7. The Settlement Fund is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

The $900,000 settlement is substantial given the risks of litigation discussed above, even in light of the maximum possible recovery. The determination of whether a settlement amount is reasonable "does not involve use of a mathematical equation yielding a particularized sum." *Henry*, 2014 WL 2199427, at *10. Instead, settlement should be within a "range of reasonableness . . . which recognize[s] 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.* Even a "cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Tiro*, 2013 WL 4830949, at *9 (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)).

Here, the settlement provides much more than "a fraction of the potential recovery." The average net payment (net of attorneys' and claims administrator's fees and costs) is greater than $16,000 and payments range up to a high of $39,222.39. Hudson-Plush Decl. ¶31.[5] Class Counsel estimates that each Class Member will receive approximately 38% of the maximum they could possibly recover in unpaid wages. Furthermore, as noted above, if the Diner prevailed on its anticipated defense that it qualified for the tip credit, the amounts represent more than 74% of the maximum possible unpaid wages that could be recovered for waiters, counter-servers and bussers, and more than 40% for dishwashers. Hudson-Plush Decl. ¶30. Although it

[5] These payments are higher on a per plaintiff basis than other court-approved wage and hour settlements involving restaurants. *See, e.g.*, *Trinidad v. Pret a Manger (USA) Ltd.*, No. 12 Civ. 6094 (PAE), 2014 WL 4670870, at *2 (S.D.N.Y. Sept. 19, 2014) (in restaurant FLSA case, maximum estimated settlement payment of $1,900 per plaintiff); *Kahlil v. Original Old Homestead Rest., Inc.*, 657 F. Supp. 2d 470, 478 (S.D.N.Y. 2009) (in restaurant FLSA case, settlement payment of $4,500 per plaintiff).

is possible that the Class could recover more at trial, where a "'settlement assures immediate payment of substantial amounts to class members," *Henry*, 2014 WL 2199427, at *10, as is the case here, a settlement is reasonable under this factor, "even if it means sacrificing 'speculative payment of a hypothetically larger amount years down the road.'" *Id.* Weighing the benefits of the settlement against the available evidence and the risks associated with proceeding in the litigation, the settlement amount is reasonable.

In sum, each of the *Grinnell* factors weigh in favor of final approval the settlement. Since the settlement, on its face, is "fair, adequate, and reasonable, and not a product of collusion," *Frank,* 228 F.R.D. at 184 (quoting *Joal A. v. Giuliani,* 218 F.3d 132, 138-39 (2d Cir. 2000)), the Court grants final approval of the settlement.

III. THE FLSA SETTLEMENT IS APPROVED

The Court approves the settlement of Plaintiffs FLSA claims.

FLSA settlements generally require judicial approval. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015); *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012). Courts "approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes." *Johnson*, 2011 WL 4357376, at *12 (emphasis in original). The adversarial nature of an FLSA suit is typically regarded "to be an adequate indicator of the fairness" of the settlement. *Tiro*, 2013 WL 4830949, at *10. Where an "FLSA settlement reflects a reasonable compromise over contested issues, it should be approved." *Siler v. Landry's Seafood House - N. Carolina, Inc.*, No. 13 Civ. 587 (RLE), 2014 WL 2945796, at *7 (S.D.N.Y. June 30, 2014). The standards for approving an FLSA settlement are lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns. *McMahon*, 2010 WL 2399328, at *6.

Courts consider multiple factors to determine whether an FLSA settlement is fair and reasonable, including: "(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 Stipulation is the product of arm's-length bargaining between experienced counsel'; and (5) the possibility of fraud or collusion." *Wolinsky*, 900 F. Supp. 2d at 335 (internal citation omitted).

Plaintiffs' FLSA settlement, which resolves *bona fide* disputes and was reached after vigorous arm's length negotiations facilitated by a mediator, is fair and reasonable for all of the reasons set forth above. Further litigation would be expensive and time consuming and extensive discovery would be required to establish liability and damages. Considering the numerous risks in this case and the uncertainty of future litigation, this settlement is a fair and reasonable result for the Plaintiffs.

CONCLUSION

For the reasons set forth above, the Court (1) grants final approval of the class settlement; (2) certifies the settlement class; and (3) approves the FLSA settlement.

Dated: August 5, 2016

U.S.D.J.

BY ECF TO ALL COUNSEL