UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PETER ZANIEWSKI, WAYNE MALICKI, SCOTT SALLERSON, KEVIN BOYCE, CHRISTOPHER HEERSINK and MIGUEL VEGA individually and on behalf of other similarly situated Assistant Store Managers Plaintiffs,	:	CIVIL ACTION NO.: 3:11-CV-01535-CSH
v.	:	
PRRC, Inc., d/b/a Price Rite Defendant	:	JANUARY 30, 2013

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION AND PROCEDURAL OVERVIEW

Plaintiff Peter Zaniewski filed this class and collective action in October 2011 claiming that he and other Assistant Store Managers employed by Defendant PRRC, Inc. d/b/a Price Rite ("PRRC" or "Defendant") were improperly classified as "exempt," and thus were not paid any overtime compensation in violation of the Federal Fair Labor Standards Act ("FLSA") and analogous Connecticut state law. Plaintiff Zaniewski was thereafter joined by other former PRRC employees Kevin Boyce, Christopher Heersink, Wayne Malicki and Scott Sallerson (collectively "Plaintiffs") who also asserted similar claims, including claims under analogous Massachusetts and New York law. PRRC answered Plaintiffs' complaint and denied these allegations in their entirety.

On March 20, 2012, the Court conditionally certified the federal claims and directed notice of the litigation to be sent to all persons who had worked as Assistant Store Managers for PRRC during the preceding three year period. Doc. 78. Following notice, twenty-three notice

recipients filed consents to join in the action, including Plaintiff Miguel Vega, who had worked as an Assistant Store Manager in Pennsylvania.

During the period October 2011 through June 2012, the Parties engaged in substantial investigation and written discovery, took depositions of key witnesses, and engaged in extensive motion practice. In late April 2012, after six months of intense litigation, the Parties initiated settlement discussions. Those discussions culminated in a two-day mediation with Professor Lynn Cohn of Northwestern University Law School, a greatly respected mediator with extensive experience in class action settlements. The mediation was preceded by detailed analyses of potential liability, assessments of the merits of the case, assessments of the likelihood of class certification, and written submissions to Professor Cohn. (Declaration of Danuta B. Panich, ¶¶ 2-5.) With the assistance of Professor Cohn and the participation of several counsel for each Party, as well as Party representatives, on September 6, 2012 the Parties reached agreement on conceptual terms for a proposed class-wide resolution at the conclusion of the mediation. (Declaration of Danuta B. Panich, ¶ 5.)

Pursuant to the Parties' proposed settlement agreement, a Fourth Amended Complaint, adding Plaintiff Vega and asserting claims under Pennsylvania law, was filed on October 5, 2012. Doc. 114.

On October 15, 2012, the Parties filed a Joint Motion to Preliminarily Approve Class Action Settlement. Doc. 115. The Settlement Agreement was submitted to the Court as Exhibit A to the Parties' motion. Doc. 155-3 and -4.

On October 22, 2012, the Court held a hearing on the Parties' Joint Motion for Preliminarily Approval. The Court granted the motion, and on October 23, 2012, an order was

entered:

- preliminarily approving the Settlement Agreement;
- preliminarily certifying, for settlement purposes only and in order to provide notice to affected individuals, Fed.R.Civ.P. 23 settlement classes as to the Connecticut, New York, Massachusetts and Pennsylvania state law claims;
- approving the form of notice to affected individuals and authorizing mailing of the notice of settlement;
- appointing Peter Zaniewski, Wayne Malicki, Kevin Boyce, Christopher Heersink, Scott Sallerson and Miguel Vega as the class representatives for the proposed settlement classes;
- appointing Plaintiffs' counsel of record in this matter as class counsel and Richard E. Hayber as lead class counsel for the proposed settlement classes; and
- setting a fairness hearing for February 1, 2013.

Doc. 118.

In accordance with the schedule set forth in the Settlement Agreement, Defendant's counsel sent notice of the proposed settlement to federal and state officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715(b), and provided to Plaintiffs' counsel a list of known settlement class members, their last known addresses, and, for each, their weeks worked within the applicable limitations period and applicable salary. (Declaration of Danuta B. Panich, ¶ 6.) This information was necessary for the application of the distribution formula set forth in the Settlement Agreement. Following review and discussion among counsel, the list and information was finalized for purposes of notice to known Settlement Class Members. On

November 26, 2012, Defendant's counsel timely mailed notice to all known Settlement Class Members. Notice was in the form approved by the Parties and this Court. (Declaration of Danuta B. Panich, ¶ 7.)

Seventeen notices were returned. In all but two cases, the parties were able to ascertain the correct, current address, and timely resent the notices. (Declaration of Danuta B. Panich, ¶¶ 8-9.)

Two class members challenged the weeks worked attributed to them. Investigation of the challenges verified the class members' claims and appropriate adjustment in the distribution calculations were made. (Declaration of Danuta B. Panich, ¶ 11.)

Six individuals not included on the class list were subsequently identified as having been employed as Assistant Store Managers during the relevant period. Upon verification of their claims, the Parties' counsel agreed to include said individuals in the proposed settlement classes. After appropriate adjustments in the distribution calculations were made, each was sent a notice in the form approved by the Court. (Declaration of Danuta B. Panich, ¶ 12.)

No objections to the Settlement have been received by the Parties. No State Settlement Class member has given notice that he or she wished to opt-out of the settlement. (Declaration of Danuta B. Panich, ¶¶ 13-14.)

Through the instant motion the parties seek final approval of the settlement. In particular, the Parties jointly and respectfully request that the Court:

1. Give final approval to the Settlement Agreement previously filed with the Court;

2. For settlement purposes only, certify Fed.R.Civ.P. 23 settlement classes as to the Connecticut, New York, Massachusetts and Pennsylvania state law claims;

3. For settlement purposes only, grant final certification of this action as a collective action pursuant to 29 U.S.C. §216(b) with regard to each person who has opted-in to this proceeding and has not been dismissed from the proceeding;

4. Appoint Peter Zaniewski, Wayne Malicki, Kevin Boyce, Christopher Heersink, Scott Sallerson and Miguel Vega as the Class Representatives for the proposed Settlement Classes;

5. Appoint Plaintiffs' counsel of record in this matter as Class Counsel and Richard E. Hayber as Lead Class Counsel for the proposed Settlement Classes;

6. Authorize Defendant to retain Dahl Consulting as Claims Administrator;

7. Order payments to the Settlement Class Members in accordance with the Settlement Agreement and the Settlement Schedule previously provided by Defendant to Class Counsel;

8. Make permanent the injunction issued pursuant to the All Writs Act, 28 U.S.C. § 1651(a), enjoining all Settlement Class Members, as defined in the Settlement Agreement, from initiating, continuing, or proceeding with lawsuits asserting Wage and Hour Claims, as defined in the Settlement Agreement, against Defendant on behalf of any class or collective of Assistant Store Managers;

9. Order the claims of all Settlement Class Members settled and released;

10. Grant Plaintiffs' counsel's Application for Fees and Costs;

11. Grant Plaintiffs' Motion for Payment of Incentive Awards; and

12. Dismiss this action with prejudice.

The proposed settlement, which the Parties previously submitted to the Court, sets forth

the entire agreement between Plaintiffs and PRRC. It represents a fair, reasonable and adequate resolution of this case. This settlement was the product of protracted arms-length negotiations. Plaintiffs and the absent Settlement Class Members were represented by lawyers with significant litigation and class-action experience. Moreover, purely for settlement purposes, the proposed State Settlement classes meet all the requirements of Fed.R.Civ.P. 23(a) and (b)(3), which is applicable to settlement classes. Similarly, purely for settlement purposes, the proposed FLSA collective action meets all requirements of 29 U.S.C. § 216(b).

The Parties' Notice provided Settlement Class Members with the best notice practicable and allowed for a full and fair opportunity to consider the settlement, object to the settlement, or challenge the information upon which their portion of the settlement payments would be calculated. No objections have been submitted to the parties. Only two challenges were received, and were promptly resolved.

The Notice also provided State Settlement Class Members an opportunity to opt-out. No State Settlement Class Member has exercised that right.

The settlement provides each Class Member with substantial monetary benefits in proportion to the amount of time worked within the applicable class period and each Class Member's respective salary. Settlement payments range from $280.00 for a Class Member who worked only two weeks during to the relevant class period to more than $25,000.00. (Declaration of Danuta B. Panich, ¶ 15.) In total, $1,373,417.00 will be paid out to 163 Settlement Class Members (assuming that Class Counsel's Application for Fees and Plaintiffs' Motion for Incentive Payments are approved *in toto*). (Declaration of Danuta B. Panich, ¶ 17.) The settlement payments, either individually or in the aggregate, are favorable to settlement class

members when compared with other published settlements of similar claims and their potential recovery. (Declaration of Danuta B. Panich, ¶¶ 18-19.) As a result, the settlement is fair, adequate, and reasonable, particularly given the uncertainties, delay, and costs of litigation.[1]

For the foregoing reasons, the parties jointly and respectfully request that the Court grant the Parties' motion in its entirety.

II. SUMMARY OF THE PLAINTIFFS' CASE

The claims at issue in the case are well described in the Fourth Amended Complaint, and are even more thoroughly briefed in the many motions filed with the Court. In their most basic form, Plaintiffs allege that PRRC misclassified them and all Assistant Store Managers employed by PRRC as exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA"), Connecticut Minimum Wage Act ("CMWA"), New York Minimum Wage Act ("NYMWA"), Massachusetts Minimum Fair Wage Law ("MMFWL") and Pennsylvania Minimum Wage Act ("PMWA"); as a result, Assistant Store Managers were not paid overtime compensation for hours worked over forty hours per week. In particular, Plaintiffs claim that Defendant had a uniform policy and practice of requiring Assistant Store Managers to work over 40 hours per week for a salaried amount without paying them overtime compensation and instructed all Assistant Store Managers to perform non-managerial duties during their overtime hours. Moreover, Plaintiffs allege that the Assistant Store Managers' primary focus was non-managerial and that they did not have discretion or actual authority in the performance of any managerial

[1] A complete list of Settlement Class Members will be submitted to the Court for *in camera* review. A list of the payments to be made to the Settlement Class Members pursuant to the Settlement, assuming that the Application for Fees, and Motion for Incentive Awards is granted, will also be made available for the Court's review, if the Court deems it appropriate. However, due to the sensitive nature of the information contained in these documents, the Parties respectfully request that the documents not become part of the public record.

functions. Plaintiffs therefore sought unpaid overtime wages, liquidated damages, attorneys' fees, interest and costs, an order enjoining Defendant from continuing the practices alleged to be illegal, and such other and further relief as the Court deemed just and equitable.

Plaintiffs are represented by Richard E. Hayber together with his associates of The Hayber Law Firm, LLC and Anthony J. Pantuso, III of The Quinn Law Firm ("Plaintiffs' Counsel"). Plaintiffs' Counsel have extensive experience in prosecuting and litigating wage-and-hour actions such as this. Further, Plaintiffs' Counsel have the resources to effectively prosecute large-scale wage actions.

Defendant at all times has denied Plaintiffs' allegations and denied that it violated the law in any way. Defendant also opposed certification of even the FLSA collective action on the grounds that numerous differences existed among the Assistant Store Managers. Through the Settlement, PRRC has not admitted any wrongdoing or liability on its part and PRRC continues to deny that it did anything wrong or in violation of the law.

The Settlement is an effort by both Parties to avoid a long and costly litigation. PRRC has reserved its right to contest Plaintiffs' claims on all procedural and substantive grounds should the Settlement not be approved.

IV. SUMMARY OF COLLECTIVE AND CLASS ACTION SETTLEMENT

Following negotiations spanning months of time and an intensive two-day mediation, the parties reached agreement on the terms and structure of a collective and class action settlement. The terms are fully set forth in the Settlement Agreement previously filed with the Court and are summarized as follows:

1) **Venue for approval:** Connecticut District Court (this case).

2) **Total Settlement Amount:** $2,060,216.00.

3) **Notice to the Settlement Class Members:** last known address with address verification (notice was successfully given to all but two Settlement Class Members); form of notice was approved by the Court and fully apprised each member of his or her rights to object, challenge, and opt-out, as well as the anticipated payment he or she would receive.

4) **Manner of distribution:** Each Participating Settlement Class Member (i.e., all Settlement Class members, since none opted-out of the Settlement) will receive an amount calculated by Price Rite (or a Claims Administrator retained by Price Rite) pursuant to the formula below (his or her "Distribution Amount"):

   a. Using Price Rite's records, calculate for each Settlement Class Member the salary earned during the Workweeks that each Settlement Class Member completed as an Assistant Store Manager during the Applicable Class Period;

   b. Aggregate all the salaries calculated above;

   c. For each Participating Settlement Class Member, divide the figure calculated for that Participating Settlement Class Member by the aggregate figure to arrive at the fraction of the Net Settlement Amount that a Participating Settlement Class Member is eligible to receive under this Agreement;

   d. Multiply the Net Settlement Amount by the fraction calculated as described to determine the amount that the Participating Settlement Class Member is eligible to receive.

Any funds allocated to un-located or non-participating Settlement Class Members shall revert to Defendant.

5) **Administration:** Administration costs have not exceeded, and are not expected to exceed $15,000. Accordingly, no administration costs are deducted from the

Total Settlement Amount.

6) **Service Payments to Settlement Class Representative:** $10,000 service payments to each Settlement Class Representative to be paid from the Total Settlement Amount if approved by the Court.

7) **Attorneys' fees and costs:** 33 1/3 % of the total Settlement Fund have been requested as reasonable attorneys' fees and out-of-pocket costs and expenses directly related to the Action (which includes all such fees and costs incurred to date, as well as all such fees and costs expected to be incurred in monitoring the Settlement).

8) **Settlement Class Certification**: The proposed settlement calls for the certification of settlement classes in addition to the collective conditionally certified under the Fair Labor Standards Act. These settlement classes are as follows:

Connecticut Class: All Assistant Store Managers employed at any time from October 6, 2009 through September 29, 2012;

Massachusetts Class: All Assistant Store Managers employed at any time from December 9, 2009 through September 29, 2012;

New York Class: All Assistant Store Managers employed at any time from November 30, 2005 through September 29, 2012; and

Pennsylvania Class: All Assistant Store managers employed between October 5, 2009 and September 29, 2012.

The Settlement Class Periods are consistent with the claims asserted and the limitations periods within the respective jurisdictions.

9) **Releases and Termination of Proceeding:** All Settlement Class Members will be subject to the Settlement and its associated release. As set forth in the Settlement Agreement and the Notice, upon the Effective Date of the Settlement, all settlement class members will be deemed to have, and by operation of the Settlement will have, released all federal, state and local law claims pertaining to hours of work or payment of wages while employed in the position of Assistant Store Manager. Upon the Effective Date of the Settlement, this case will be dismissed with prejudice.

V. ARGUMENT

A. Certification of a Rule 23 Settlement Class Is Appropriate

In granting Preliminary Approval, this Court found that, for settlement purposes, the Parties' proposed Settlement Class is proper under Rule 23. Since the Court's Order, no objections to the Settlement or to class certification were received. Moreover, no one opted out of the State Settlement Class. For the reasons summarized below, certification of the State Settlement Class for settlement purposes is appropriate. This is particularly true since "courts must take a liberal rather than a restrictive approach" when deciding certification in the context of a proposed settlement. *Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157-158 (E.D.N.Y. 2009).

1. The Settlement Class Satisfies All Rule 23(a) Requirements

Numerosity: While there is no "bright line" rule with regard to what number of class members satisfies the numerosity requirement, classes of more than forty people are typically sufficient. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Stewart v. Abraham*, 275 F.3d 220, 226-227 (3d Cir. 2001). Here, the State Settlement Classes

are composed of 163 people. (Declaration of Danuta B. Panich, ¶ 16.) Common sense dictates that individual joinder of that many individuals is impracticable. *Moskowitz v. Lopp*, 128 F.R.D. 624, 628 (E.D. Pa. 1989).

Commonality: In granting conditional certification of this action as a collective action under the FLSA, this Court concluded that all ASMs shared a common question regarding the validity of their classification as exempt employees. This conclusion satisfies the commonality requirement of Rule 23(a)(2) for settlement purposes.

Typicality: For purposes of settlement, the overtime pay claims asserted by the named plaintiffs are typical of the claims of the Settlement Class: all were classified as exempt, if that classification was erroneous as to the class member, the member would have a claim for unpaid overtime wages. The typicality requirement of Rule 23(a)(3) is thus established for settlement purposes.

Adequacy of Representation: There is no evidence in the record of an improper conflict of interest between the named plaintiffs and their counsel and any members of the Settlement Class. Moreover, Class Counsel's experience litigating wage and hour class and collective actions has enabled them to vigorously represent the interests of the Settlement Class throughout the litigation and settlement of this action. The requirements of Rule 23(a)(4) are thus satisfied for settlement purposes.

2. The Requirements of Rule 23(b)(3) are met for Settlement Purposes

In granting conditional certification, the Court noted the existence of a common policy binding the ASMs together and creating the central issue in the case: whether Defendant misclassified its ASMs as exempt employees. This finding serves to satisfy, for settlement

purposes, the predominance requirement of Rule 23(b)(3).

The absence of objections to the Settlement and the fact that not a single ASM opted out of the Settlement demonstrates that there is significant interest in the collective resolution of the claims asserted in this litigation. Litigating this case in multiple forums would waste judicial resources and potentially create conflicting outcomes, based on Plaintiffs' previously submitted evidence of common working conditions. As such, there is superiority in maintaining this action as a class action as opposed to any alternate methods available.

Because the prerequisites for certification have been met, the Court should issue a final order certifying for settlement purposes the Settlement Classes as described in the Settlement Agreement previously filed with the Court.

B. The Federal Settlement Class Meets the Requirements for a Collective Action

In its Order dated March 20, 2012, this Court concluded that Plaintiffs had established sufficient similarity in situation to warrant collective treatment under Section 216(b) of the FLSA. That Order remains unchallenged. Accordingly, for purposes of settlement, the Court should reaffirm and make final its prior order certifying the Federal Class for settlement purposes.

C. The Settlements Should Be Approved as Fair, Adequate, and Reasonable

Settlements of FLSA actions generally require either Department of Labor or court approval. Likewise, Rule 23(e) of the Federal Rules of Civil Procedure requires court approval for any settlement of a class action. While the specific analysis differs with regard to Rule 23 class settlements and settlements of FLSA collective actions under Section 216(b) of the FLSA, the purpose of court approval is the same: to assure a fair, adequate, and reasonable settlement

of genuinely disputed claims. *Synfuel Techs., Inc. v. DHL Express (USA), Inc*., 463 F.3d 646, 652 (7th Cir. 2005) (final approval is appropriate where the court determines that a settlement is fair, adequate, and reasonable). Here, both the specific standards, as well as the general policy considerations, for approval of the Parties' settlement are satisfied. Since settlement of class action litigation is favored by federal courts (*see, e.g*., *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1149 (8th Cir. 1999); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)), it follows that such approval should be granted here.[2]

1. The Settlement Satisfies the FLSA Standard for Approval

The standard for approval of a private enforcement action under the FLSA like this case is straightforward: a district court may approve a fair and reasonable settlement if it was reached as a result of contested litigation to resolve a *bona fide* dispute under the FLSA. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-54 (11th Cir. 1982) (citing *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945)).

Typically, courts rely on the adversary nature of a litigated FLSA case resulting in settlement as indicia of fairness. *Id.* at 1354. Given the intense motion practice in advance of settlement negotiations, there is no room to doubt that this litigation was both adversarial and contested.

Nor is there any doubt that the proposed settlement resolves a *bona fide* dispute. While Plaintiffs claim they were improperly classified, Defendant claims the classifications were

[2] As noted in *In re Union Carbide Corp. Consumer Products Business Securities Litigation*, 718 F.Supp. 1099, 1103 (S.D.N.Y. 1989):

> In evaluating the settlement of complex class actions, the courts have long recognized that such litigation s notably difficult and notoriously uncertain…and that compromise is particularly appropriate. The law favors settlements by the parties rather than by court disposition….(internal citations omitted)

proper, in addition to asserting numerous other defenses. Moreover, the resolution of the central issue in the case – whether Plaintiffs and other ASMs qualified as exempt executive employees – raises complex factual and legal issues. Exemptions are dependent upon specific facts and nuanced interpretations of the law. In the context of this case, the central issue is not susceptible to global determination or bright line tests. Thus, the standards for approval of FLSA settlements are met.

2. The Settlement Satisfies Rule 23(e) Standards for Approval

In order to approve a settlement, a district court must determine that the proposed settlement, "taken as a whole, is fair, reasonable, and adequate." *Maywalt v. Parker & Parsely Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). That determination is based on "two types of evidence": (1) substantive and (2) procedural. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) ("A court determines a settlement's fairness by looking at both the settlement terms and the negotiating process leading to settlement"). Consideration of both sets of factors mandates the conclusion that the settlement should be approved in this instance.

First, and perhaps most importantly, the proposed settlement was the product of multiple arms-length (and often contentious) bargaining sessions after extensive discovery and extensive motion practice by skilled counsel. Such arm's length negotiations conducted by competent counsel constitute prima facie evidence of a fair settlement. *Berenson v. Fanueil Hall Marketplace*, 671 F. Supp. 819,822 (D. Mass. 1987). See also, *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("presumption of fairness" applies if the Court finds that settlement negotiations were conducted at arm's length by experienced counsel, there was sufficient discovery to assess the merits of the case, and only a small percentage of class

members object). Moreover, this settlement was ultimately brokered by an experienced mediator. The involvement of this disinterested third party makes inescapable the conclusion that this settlement was the product of arm's length negotiation.

Second, the Notice and its distribution were more than adequate, thus providing another indicia of fairness. Rule 23 requires that the absent Settlement Class Members receive the "best notice practicable under the circumstances." See Fed. R. Civ. P. 23(c)(2)(B), *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974). The method and the content of the Notice to Settlement Class Members should be designed to fairly apprise them of the terms of the proposed settlement and the options available to them. See, *e.g.*, *Phil. Hous. Auth. v. Am.Radiators & Standard. Sanitary Corp.*, 323 F. Supp. 364, 378 (E.D. Pa. 1970). Along these lines, federal courts have made clear that individual mailings to each Settlement Class Member's last known address is a sufficient form of notice. See, *e.g.*, *White v. Nat'l Football League*, 41 F.3d 402,408 (8th Cir. 1994), abrogated on other grounds, *Amchem*, 521 U.S. at 618-20. Here, all but two of the 163 Settlement Class Members received the Notices.

Moreover, none of the Settlement Class Members objected to the Settlement. The number of objections is often viewed as a barometer of a settlement's adequacy and fairness. *Wal-Mart Store, Inc. v Visa USA, Inc*., 396 F.3d at 118 (noting that "[i]f only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement").

Third, an examination of the terms of the Settlement demonstrates its fairness, adequacy and reasonableness. No segments of the Settlement Class are receiving preferential treatment. All State Settlement Class Members have received the same notice. The settlement formulas and eventual release of claims is identical for all Settlement Class Members and is geared to the

specific experiences of individual class members. The settlement formula takes into account the number of weeks worked by the Settlement Class Members and their salaries during the Settlement Class Periods, which are dictated by the laws of the State in which they worked. Thus, the formula treats all class members equally, while making appropriate distinctions based on their individual potential damages. The settlement formula does not vary according to any improper variables unrelated to the relative strength of an individual Settlement Class Member's claims.

The amount of the settlement payments is substantial, whether considered individually or collectively. Indeed, based on pre-mediation estimates of potential overtime liability, class members are receiving approximately 75 cents out of every potential overtime dollar. (Declaration of Danuta B. Panich, ¶ 19.) Given the risks and delays of litigation, and Defendant's intent to mount a vigorous defense (as demonstrated by the Parties' prior motion practice), this level of recovery reflects most favorably on the adequacy and reasonableness of the settlement.

While the named plaintiffs are receiving incentive awards in recognition for their service as Settlement Class Representatives, the award is limited and well within the range of such awards commonly provided in litigation of this nature. Indeed, given the modest nature of this award, especially when compared to the overall amount of the settlement, there is nothing to suggest that this award is improper or undermines the apparent fairness of the settlement.

Finally, there is nothing to suggest that Class Counsel is receiving an excessive award. Through the instant agreement, PRRC has agreed to a so-called "stand-still" agreement concerning Plaintiffs' Counsel's fees, *i.e.*, PRRC has agreed not to oppose a petition for fees so long as it does not exceed a maximum amount. Federal courts have made clear that such

commonplace agreements are proper. *See, e.g.*, *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985), abrogated on other grounds, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618-20 (1997). The Settlement itself is not conditioned on the approval of this entire award. However, percentages of the fund similar to that requested by Class Counsel are within the mainstream of percentage awards approved by courts in the Second Circuit. *In re Priceline.com, Inc. Securities Litigation*, 2007 U.S. Dist. LEXIS 52538 (D. Conn. July 2007) (attached as Exhibit B) (30% award); *Maley v. Dell Global Techs Corp*., 186 F.Supp. 358, 369 (S.D.N.Y. 2002) (33 1/3% award); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005) (40% award). Here, through the submission of multiple motions in this matter, the Court is well aware of the level of commitment and resources devoted by Plaintiffs' Counsel in this matter.

It is important to note that the agreements concerning attorneys' fees and the service payments to Settlement Class Representatives, as well as all other aspects of the Settlement Agreement, have been fully disclosed to the Court and to each member of the Settlement Class. The Parties have submitted a copy of the complete Settlement Agreement to the Court. There are no undisclosed agreements concerning the division of the overall settlement among Class Counsel, the Settlement Class Representatives, or the Settlement Class. Thus, the Parties have operated with complete candor. That candor, and the complete lack of objection from any quarter, further supports the conclusion that this Settlement should be approved.

VI. CONCLUSION

As set forth above, all of the pertinent factors weigh in favor of granting final approval. Accordingly, the parties jointly and respectfully request that the Court:

1. Give final approval to the Settlement Agreement previously filed with the Court;

2. For settlement purposes only, certify Fed.R.Civ.P. 23 settlement classes as to the Connecticut, New York, Massachusetts and Pennsylvania state law claims;

3. For settlement purposes only, grant final certification of this action as a collective action pursuant to 29 U.S.C. §216(b) with regard to each person who has opted-in to this proceeding and has not been dismissed from the proceeding;

4. Appoint Peter Zaniewski, Wayne Malicki, Kevin Boyce, Christopher Heersink, Scott Sallerson and Miguel Vega as the Class Representatives for the proposed Settlement Classes;

5. Appoint Plaintiffs' counsel of record in this matter as Class Counsel and Richard E. Hayber as Lead Class Counsel for the proposed Settlement Classes;

6. Authorize Defendant to retain Dahl Consulting as Claims Administrator;

7. Order payments to the Settlement Classes in accordance with the Settlement Agreement;

8. Make permanent the injunction issued pursuant to the All Writs Act, 28 U.S.C. § 1651(a), enjoining all Settlement Class Members, as defined in the Settlement Agreement, from initiating, continuing, or proceeding with lawsuits asserting Wage and Hour Claims, as defined in the Settlement Agreement, against Defendant on behalf of any class or collective of Assistant Store Managers;

9. Order the claims of all Settlement Class Members settled and released;

10. Grant Plaintiffs' counsel's Application for Fees and Costs;

11. Grant Plaintiffs' Motion for Payment of Incentive Awards; and

12. Dismiss this action with prejudice.

Respectfully Submitted,

Dated: January 30, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on **January 30, 2013,** a copy of the instant **Memorandum of Law in Support of Joint Motion for Final Approval of Class Action Settlement** was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Danuta B. Panich
Danuta B. Panich

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