IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HAMEL TOURE and ANDREA BURCH, individually and on behalf all others similarly situated, Plaintiffs, v. AMERIGROUP CORP. and AMERIGROUP NEW YORK, LLC d/b/a Amerigroup Community Care, Defendants.	10 Civ. 5391 (RLM)

~~[PROPOSED]~~ FINAL ORDER AND JUDGMENT GRANTING PLAINTIFFS' MOTIONS FOR CERTIFICATION OF SETTLEMENT CLASS, FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AND APPROVAL OF FLSA SETTLEMENT, FOR APPROVAL OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND FOR SERVICE AWARDS

Plaintiffs and the class members are approximately 943 current and former Medicaid Marketing Representatives ("Marketing Representatives") who worked for Amerigroup Corporation and Amerigroup New York, LLC (collectively, "Amerigroup" or "Defendants") in New York. The Marketing Representatives' job duties involved signing up eligible New Yorkers for free or low-cost government-subsidized health insurance at locations throughout New York, including at doctors' offices, hospitals, and pharmacies.

On November 22, 2010, Plaintiff Hamel Toure ("Toure") filed a class and collective lawsuit on behalf of Amerigroup Marketing Representatives who worked in New York. Toure alleged that Amerigroup violated the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") by misclassifying Marketing Representatives as exempt "outside

salespeople" and failing to pay them overtime when they worked more than 40 hours in a workweek. Toure sought recovery of overtime wages, attorneys' fees and costs, interest, and liquidated damages. On April 18, 2011, Andrea Burch ("Burch") filed a class and collective lawsuit, making the same claims as the *Toure* complaint. On May 25, 2011, the cases were consolidated as *Toure v. Amerigroup Corp.*, No. 10 Civ. 5391.

On August 22, 2011, the parties entered into a stipulation under which they agreed to conditionally certify the FLSA collective, send a Court-approved notice to FLSA collective members, engage in targeted discovery, and mediate in an effort to settle the claims on a class-wide basis. District Judge Roslynn Mauskopf ~~This Court~~ approved the parties' stipulation on August 24, 2011 and authorized the notice to collective members to be mailed. Approximately 114 individuals joined the case as opt-in plaintiffs. In February 2012, the parties consented to have the case handled for all purposes by a United States magistrate judge, and the case was assigned to the undersigned magistrate judge.

After engaging in discovery, the parties reached a settlement totaling $4,450,000. On April 20, 2012, the Court preliminarily approved the settlement, conditionally certified the settlement class, appointed Outten & Golden LLP and Morgan & Morgan, P.A. as Class Counsel, and authorized notice of the settlement to be mailed to class members. ECF No. 92. No class members objected to the settlement or requested exclusion from it.

On July 23, 2012, Plaintiffs filed a Motion for Certification of Settlement Class, Final Approval of Class Action Settlement, and Approval of FLSA Settlement ("Motion for Final Approval"). The same day, Plaintiffs also filed a Motion for Approval of Attorneys' Fees and Reimbursement of Expenses ("Motion for Attorneys' Fees") and a Motion for Service Awards ("Motion for Service Awards").

The Court held a fairness hearing on August 6, 2012. No objections to the proposed settlement were presented at the hearing. Having considered the Motion for Final Approval, the Motion for Attorneys' Fees, the Motion for Service Award, the supporting

declarations, the arguments presented at the August 6, 2012 fairness hearing, and the complete record in this matter, for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Certification of the Settlement Class

1. The Court finds that all of the requirements of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure are satisfied for settlement purposes.

2. The Court finally certifies the following class under Fed. R. Civ. P. 23(e), for settlement purposes only ("Settlement Class"):

> All individuals who work or worked for Amerigroup Corp. and Amerigroup New York, LLC in the Medicaid Marketing Representative I, II, III and Team Lead positions or in another similar job title whose primary job function was facilitated enrollment of members in Medicaid health plans in New York between November 22, 2004 through the date on which the Court grants Preliminary Approval of the settlement and who worked for Defendants for at least four (4) workweeks.

Approval of the Settlement Agreement

3. The Court hereby grants the Motion for Final Approval and approves the settlement on behalf of the class as set forth in the Settlement Agreement and this Order under Federal Rule of Civil Procedure 23(e).

4. 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). To determine whether a settlement is procedurally fair, courts examine the negotiating process leading to the settlement. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). To determine whether a settlement is substantively fair, courts determine whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), abrogated on other grounds by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000).

5. Courts examine procedural and substantive fairness in light of the "strong judicial policy in favor of settlement[]" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted); *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions"). "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

6. "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." *Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) (internal quotation marks omitted). The Court gives weight to the parties' judgment that the settlement is fair and reasonable. *See Torres v. Gristede's Operating Corp.*, Nos. 04 Civ. 3316, 08 Civ. 8531, 08 Civ. 9627, 2010 WL 5507892, at *3 (S.D.N.Y. Dec. 21, 2010).

Procedural Fairness

7. The Court finds that the settlement is procedurally fair, reasonable, adequate, and not a product of collusion. *See* Fed. R. Civ. P. 23(e); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Here, the settlement was reached after Class Counsel had conducted a thorough investigation of the facts and engaged in significant discovery, and after extensive negotiations between the parties. Class Counsel interviewed approximately 50 opt-in Plaintiffs regarding their duties and hours worked, and deposed two Rule 30(b)(6) witnesses, who testified

about the job duties of Marketing Representatives, Defendants' compensation policies and practices, and Defendants' decision to classify Marketing Representatives as exempt. Defendants also produced documents and deposed the two named Plaintiffs and several opt-in Plaintiffs. From these sources, Class Counsel was able to evaluate the strengths and weaknesses of the claims.

8. To help resolve the case, the parties enlisted the services of an experienced employment mediator, Linda Singer. Arm's-length negotiations involving counsel and a mediator raise a presumption that the settlement achieved meets the requirements of due process. *See Wal-Mart Stores*, 396 F.3d at 116; *Morris v. Affinity Health Plan, Inc.*, No. 09 Civ. 1932, 2012 WL 1608644, at *5 (S.D.N.Y. May 8, 2012); *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *6 (S.D.N.Y. Apr. 16, 2012).

Substantive Fairness

9. The settlement is substantively fair. All of the factors set forth in *Grinnell*, 495 F.2d at 463, which provides the analytical framework for evaluating the substantive fairness of a class action settlement, weigh in favor of final approval.

10. 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 recovery; 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.

11. Litigation through trial would be complex, expensive, and long. Therefore, the first *Grinnell* factor weighs in favor of final approval.

12. The class's reaction to the settlement has been positive. No class member objected or excluded himself from the settlement. "The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008); *Willix v. Healthfirst, Inc.*, No. 07 Civ. 1143, 2011 WL 754862, at *4 (E.D.N.Y. Feb. 18, 2011).

13. The parties have completed enough discovery to recommend settlement. The pertinent question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Torres*, 2010 WL 5507892, at *5 (internal quotation marks omitted).

14. The risk of establishing liability and damages further weighs in favor of final approval. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). One purpose of a settlement is to avoid the uncertainty of a trial on the merits. *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969). Here, the fact-intensive nature of Plaintiffs' claims and Defendants' affirmative defenses presents risk. The settlement eliminates this uncertainty.

15. The risk of obtaining and maintaining class status throughout trial also weighs in favor of final approval. A motion to certify and/or decertify the class would require extensive briefing, possibly followed by an appeal. Settlement eliminates the risk, expense, and delay inherent in this process.

16. The settlement eliminates any risk of collection.

17. The substantial amount of the settlement weighs in favor of final approval. The determination of whether a settlement amount is reasonable "does not involve the use of a

mathematical equation yielding a particularized sum." *Frank*, 228 F.R.D. at 186 (internal quotation marks omitted). "Instead, there is a range of reasonableness with respect to a settlement – a range which recognizes 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.* (internal quotation marks omitted).

Approval of FLSA Settlement

18. The Court hereby approves the FLSA settlement.

19. The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement. *McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984); *Sewell*, 2012 WL 1320124, at *10; *Torres*, 2010 WL 5507892, at *6.

20. Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *Clark*, 2010 WL 1948198, at *7. "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." *Torres*, 2010 WL 5507892, at *6 (internal quotation marks omitted). If the proposed settlement reflects a reasonable compromise over contested issues, the settlement should be approved. *Clark*, 2010 WL 1948198, at *7.

21. The Court finds that the FLSA settlement was the result of contested litigation and arm's-length negotiation.

Dissemination of Notice

22. Pursuant to the Preliminary Approval Order, the Notice was sent by first-class mail to each identified class member at his or her last known address (with re-mailing of returned Notices). The Court finds that the 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 on August 6, 2012. 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.

Award of Fees and Costs to Class Counsel and Award of Service Awards to Class Representatives and Certain Opt-In Plaintiffs

23. On April 20, 2012, the Court appointed Outten & Golden LLP and Morgan & Morgan, P.A. as Class Counsel because they met all of the requirements of Federal Rule of Civil Procedure 23(g).

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

25. Class Counsel have 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. *See, e.g.*, *Westerfield v. Wash. Mut. Bank*, Nos. 06 Civ. 2817, 08 Civ. 0287, 2009 WL 5841129, at *3 (E.D.N.Y. Oct. 8, 2009) ("Courts have repeatedly found [Outten & Golden] to be adequate class counsel in employment law class actions."); *Aponte*, 2011 WL 2207586, at *12 (finding that Morgan & Morgan "are qualified, experienced, and capable of acting as lead counsel" in wage and hour class action).

26. The work that Class Counsel have performed in litigating and settling this case demonstrates their commitment to the Class and to representing the Class's interests. Class Counsel have committed substantial resources to prosecuting this case.

27. The Court hereby grants Plaintiffs' Motion for Attorneys' Fees and awards Class Counsel $1,483,333 in attorneys' fees, or one-third of the fund (including any interest in the fund).

28. The Court finds that the amount of fees requested is fair and reasonable using the "percentage-of-recovery" method, which is consistent with the "trend in this Circuit." *See McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010); *Sewell*, 2012 WL 1320124, at *~~13 (S.D.N.Y. Apr. 16, 2012)~~ #10; *Willix*, 2011 WL 754862, at *6.

29. In wage and hour class action lawsuits, public policy favors a common fund attorneys' fee award. *See Frank*, 228 F.R.D. at 189. Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk. *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) (commending the general "sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest"). Adequate compensation for attorneys who protect wage and hour rights furthers the remedial purposes of the FLSA and the NYLL.

30. Class Counsel's request for one-third of the fund is reasonable and "consistent with the norms of class litigation in this circuit." *See, e.g., Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184-86 (W.D.N.Y. 2011); *Willix*, 2011 WL 754862, at *6; *Clark*, 2010 WL 1948198, at *8-9; *Khait v. Whirlpool Corp.*, No. 06 Civ. 6381, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010).

31. Class Counsel risked time and effort and advanced costs and expenses, with no

ultimate guarantee of compensation. A percentage-of-recovery fee award of one-third is consistent with the Second Circuit's decision in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 493 F.3d 110, 111-12 (2d Cir. 2007), *amended on other grounds by* 522 F.3d 182 (2d Cir. 2008), which held that a "presumptively reasonable fee" takes into account what a "reasonable, paying client" would pay. While *Arbor Hill* is not controlling here because it does not address a common fund fee petition, it supports a one-third recovery in a case like this one where Class Counsel's fee entitlement is entirely contingent upon success. *Willix*, 2011 WL 754862, at *7; *Clark*, 2010 WL 1948198, at *9.

32. All of the factors in *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) weigh in favor of a fee award of one-third of the fund.

33. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request. *Clark*, 2010 WL 1948198, at *9.

34. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of $32,000, which the Court deems to be reasonable. Courts typically allow counsel to recover their reasonable out-of-pocket expenses. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d 180, 183 n.3 (S.D.N.Y. 2003).

35. The awarded attorneys' fees and reimbursed costs shall be paid from the settlement fund.

36. The Court finds reasonable service awards of $10,000 each to named Plaintiffs Hamel Toure and Andrea Burch, and service awards of $5,000 each to opt-in Plaintiffs Julie Adeyi, Sucety Bendeck, David Berry, Allan Blinder, Michelle Chiang, and Wei Yang. These amounts shall be paid from the settlement fund.

37. Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs. *See Sewell,* 2012 WL 1320124, at *14-15; *Reyes*, 2011 WL 4599822, at *9; *Willix*, 2011 WL 754862, at *7.

38. Here, the service awards recognize the risks that the named Plaintiffs and opt-ins faced by participating in a lawsuit against their current or former employer and the efforts they made on behalf of the class, including producing documents, responding to interrogatories, and preparing for and having their depositions taken. *See Parker v. Jekyll & Hyde Entm't Holdings, L.L.C.*, No. 08 Civ. 7670, 2010 WL 532960, at *1 (S.D.N.Y. Feb. 9, 2010).

Conclusion and Dismissal

39. The "Effective Date" of the settlement shall be 30 days after the date of this Order if no party appeals this Order. If a party appeals this Order, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved.

40. Upon the Effective Date of the settlement this litigation shall be dismissed with prejudice.

41. Within 14 days of the Effective Date, the claims administrator shall distribute the funds in the settlement account by making the following payments in the order below:

a. Paying Class Counsel's attorneys' fees of $1,483,333 and costs of $32,000;

b. Paying service awards of $10,000 each to Plaintiffs Hamel Toure and Andrea Burch and $5,000 each to Julie Adeyi, Sucety Bendeck, David Berry, Allan Blinder, Michelle Chiang, and Wei Yang;

c. Paying the claim's administrator's fees; and

d. Paying the remainder of the fund to class members in accordance with the allocation plan described in the Settlement Agreement.

42. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.

It is so ORDERED this ___ day of _____, 2012.

SO ORDERED:
/s/
Roanne L. Mann
U.S. Magistrate Judge
Dated: 8/6/12

Honorable Roanne L. Mann
United States Magistrate Judge