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

CHRISTOPHER BRUCE MACKOWN, on behalf of himself and all others similarly situated, **Plaintiff,** **v.** **TWENTY-FIRST CENTURY FOX, INC. and FOX ENTERTAINMENT GROUP, INC.,** **Defendants.**	**No. 13-CV-4406 (WHP)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS

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INTRODUCTION

On August 12, 2016, the Court preliminarily approved the parties' proposed settlements in *Glatt v. Fox Searchlight Pictures, Inc*., No. 11 Civ. 6784 ("*Glatt*"), and the related case, *MacKown v. Twenty-First Century Fox, Inc.*, No. 13 Civ. 4406 ("*MacKown*").

With this motion, the parties respectfully request that the Court: (1) grant final approval of the Settlement Stipulation, attached as Exhibit A to the Declaration of Juno Turner in Support of Plaintiffs' Motion for Final Approval of Settlement ("Turner Decl."); [1] and (2) grant final certification of the settlement class.

I. Litigation History

A. Glatt

On September 28, 2011, Eric Glatt and Alexander Footman filed a class and collective action lawsuit on behalf of unpaid interns at Fox Searchlight Pictures, Inc. ECF No. 1. After engaging in some discovery, they sought, and were granted leave to amend the complaint to add Plaintiffs Eden Antalik and Kanene Gratts, Defendant Fox Entertainment Group, Inc., and claims under California law. *Glatt* ECF No. 46.

The parties engaged in extensive discovery, including the exchange of documents and Electronically Stored Information ("ESI"), and depositions of the Plaintiffs, Defendants' corporate representatives, Defendants' employees, and non-party witnesses. Turner Decl. ¶ 13.

On February 15, 2013, Plaintiffs moved for certification of a New York class and nationwide FLSA collective of unpaid interns in Defendants' corporate offices, ECF No. 103, and for partial summary judgment for Glatt and Footman. *Glatt* ECF No. 89. Plaintiffs Glatt and Footman did not move for class and/or collective certification on behalf of unpaid interns engaged

[1] Unless otherwise stated, all exhibits are attached to the Turner Decl.

at one or more of Fox Searchlight's film productions. On February 15, 2013, Defendants cross-moved for summary judgment. *Glatt* ECF No. 93.

On June 11, 2013, the Court granted Plaintiffs' motion for class and collective certification and their motion for summary judgment with respect to Glatt and Footman, holding that they were employees and that Fox Searchlight was their employer under the FLSA and NYLL. *Glatt v. Fox Searchlight Pictures, Inc*., 293 F.R.D. 516, 525-30, 531-34 (S.D.N.Y. 2013). The Court denied Defendants' motion for summary judgment with regard to Glatt, Footman, and Antalik, but granted it with regard to Gratts, finding that her California claims were untimely. *Id*. at 523-25. The Court granted in part Defendants' motion for reconsideration by modifying the statute of limitations period for the conditionally certified collective, which would now be from January 18, 2010 through September 1, 2010. *Glatt* ECF No. 190. Notice was issued to putative members of the nationwide FLSA collective, allowing individuals to file consents to join the litigation, as well as to putative members of the Rule 23 class, providing them with the opportunity to exclude themselves from the litigation. Turner Decl. ¶ 19. When the notice period ended, 59 individuals joined the FLSA collective and 8 individuals excluded themselves from the Rule 23 class. *Id.* ¶ 20. The opt-in members would have timely claims only if the Court finds that Defendants willfully violated the FLSA or grants equitable tolling.

Defendants appealed the Court's class and collective certification decision and determination that Glatt and Footman were employees.[2] *Glatt* ECF No. 203. On July 2, 2015, the Second Circuit held, as a matter of first impression, that whether interns are "employees" under the FLSA depends on whether they or the company that engaged them is the "primary beneficiary" of the relationship. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 385 (2d Cir. 2015). The

[2] Defendants did not appeal the Court's determination that Fox Searchlight was a joint employer of Glatt and Footman, but Defendants reserved all rights to do so after entry of final judgment.

panel vacated the Court's grant of summary judgment to Glatt and Footman and remanded to apply the primary beneficiary standard. *Id.* at 385. It also vacated and remanded the Court's grant of class and collective certification. *Id.* at 386-87.

Plaintiffs sought *en banc* review or rehearing of the panel's decision. Turner Decl. ¶ 24. On January 25, 2016, the panel amended its decision, including by altering certain language discussing how courts should analyze intern cases brought as class actions. *Compare Glatt*, 811 F.3d 528, 539 (2d Cir. 2016) (clarifying that the primary beneficiary test is "highly context specific"), *with* 791 F.3d at 386 (stating that the test is "highly individualized"). In Plaintiffs' view, this clarification, while subtle, was significant because the prior language would have made it especially difficult to certify an intern class, in this or future litigation. Defendants note that the revised opinion did not change any of the factors relevant to the primary beneficiary standard, and the panel's analysis with respect to class certification in the present matter remained the same: Antalik's alleged "common" evidence could not resolve the claims of all class members, and "defendants' undisputed evidence demonstrated that the various internship programs it offered differed substantially across the many departments and four Fox divisions included in the proposed class." *See Glatt,* 811 F.3d at 539.

B. MacKown

On June 25, 2013, Plaintiff MacKown filed a class action lawsuit against Defendants on behalf of himself and a class of similarly situated unpaid interns in California. ECF No. 1. MacKown alleged violations under California law. *Id.* The Court stayed the case pending the *Glatt* appeal to the Second Circuit. ECF No. 17.

II. Settlement Negotiations

The parties attempted to settle the lawsuits twice with private mediators. The first mediation took place on January 30, 2013 before class certification and summary judgment briefing. Turner Decl. ¶¶ 27-28. The parties were not able to resolve the claims at that time. The

parties returned to mediation on May 13, 2016, before Dina Jansenson, Esq., and entered into a Stipulation on the material terms of a settlement. *Id.* ¶ 29. At all times, the negotiations occurred on an arm's length basis. *Id.* ¶ 30. Following the mediation, the parties negotiated the remaining terms of the settlement, which are memorialized in the Settlement Stipulation. *Id.* ¶ 31.

A. Summary of the Settlement Terms

1. Settlement Payments

Defendants have agreed to make a settlement payment of $495 to all members of the Settlement Class[3] (defined below) who completed an unpaid Internship for at least two weeks and submit a valid Claim Form. Ex. B (Settlement Stipulation) ¶ 5. As of October 31, 2016, 217 Class Members in both *Glatt* and *MacKown* had submitted Claim Forms. Ex. D (Decl. of Abigail Schwartz ("Schwartz Decl.") ¶ 18.

In addition, Defendants have agreed to make an individual payment to Plaintiff MacKown in the amount of $3,000. Ex. B (Settlement Stipulation) ¶ 4. He has signed a broader release than the Class Members, *see* Ex. B (Settlement Stipulation) ¶ 16(c), and his claims are stronger than the Class's claims because, unlike the Class's claims, MacKown's claims are not contingent on a class being certified. Turner Decl. ¶ 44.

2. Settlement Class

The "Rule 23 California Class" includes all individuals who had an unpaid Internship in California for at least two weeks between January 1, 2009 and September 1, 2010, with one or more of the following divisions of FEG: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media (renamed News Corp. Digital Media), Ex. B (Settlement Stipulation) ¶ 5(a).

There are 960 California Rule 23 Settlement Class Members. Turner Decl. ¶ 39.

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

3. Release

Upon the Effective Date, all Settlement Class members who do not exclude themselves will release their California wage and hour claims in connection with their Internship with Defendants. Ex. B (Settlement Stipulation) ¶ 16(a).

4. Settlement Claims Administration

Rust Consulting, Inc. has served as the third-party settlement claims administrator ("Claims Administrator"). Defendants will pay a combined total of up to $20,000 of the Claims Administrator's fees for both the *Glatt* and *MacKown* actions. Ex. B (Settlement Stipulation) ¶ 10(b); Turner Decl. ¶ 46.

The Notice advised the Settlement Class Members of their right to exclude themselves from or object to the settlement and how to do so. *See* Ex. D (Schwartz Decl.) Ex. A (Notice Package) ¶¶ 9-10. No Class Member objected to the settlement and a total of 16 Class Members requested exclusion from the *Glatt* or *MacKown* settlements. *Id*. ¶¶ 19-20.

On September 12, 2016, Claims Administrator mailed Notice Packages via First Class Mail to a total of 1095 Class Members in both *Glatt* and *MacKown*, whose names and addresses were provided by Defendants. Ex. D (Schwartz Decl.) ¶ 12. The Claims Administrator also emailed a short form of the Notice to 779 Class Members whose email addresses had been provided by Defendants. *Id*. ¶ 13.

Before mailing the Notice Packages, the Claims Administrator attempted to locate updated mailing addresses for all class members using the National Change of Address Database ("NCOA") maintained by the U.S. Postal Service. *Id*. ¶ 11. The NCOA contains requested changes of address filed with the U.S. Postal Service. In the event that any individual had filed a U.S. Postal Service change of address request, the address listed with the NCOA was used

instead. *Id*. Eighty-eight class members' addresses were located through the NCOA searches. *Id*.

As of October 31, 2016, 302 Notice Packages had been returned as undeliverable. *Id*. ¶ 14. The Claims Administrator performed 297 address traces using the Class Member's name and previous address to locate a current address.[4] *Id*. These traces resulted in 152 new addresses, to which Notice Packages were promptly re-mailed, with new Claim Form submission deadlines of November 2, 2016 and November 9, 2016. *Id*. Of the 152, five (5) Notice Packages were returned undeliverable a second time. *Id*.

Of the 145 records where the address trace did not provide an updated address, the Claims Administrator received phone numbers from Defendants for 107 records. *Id*. ¶ 15. The Claims Administrator called these Class Members and attempted to acquire updated contact information from them. *Id*. Nine new addresses were obtained and Notice Packages were promptly re-mailed, with new Claim Form submission deadlines of November 9, 2016 and November 16, 2016. *Id*. Additionally, the Claims Administrator left 66 voice messages for Class Members. *Id*.

Where phone numbers were not available, the parties instructed the Claims Administrator to use enhanced tracing methods to search for an updated mailing address. *Id*. ¶ 16. Fifteen updated addresses were located and Notice Packages were promptly re-mailed, with a new Claim Form submission deadline of November 9, 2016. *Id*.

ARGUMENT

I. The Settlement Class Meets the Legal Standard for Class Certification.

When faced with a proposed class action settlement, courts first examine whether the

[4] One Notice Package was returned by the Post Office with a forwarding address. Ex. D (Schwartz Decl.) ¶ 17. The Claims Administrator promptly re-mailed the Notice Package to that Class Member. *Id*.

settlement class can be certified. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). On August 12, 2016, the Court preliminarily certified the settlement class. ECF No. 28. Plaintiff respectfully requests that the Court grant final certification because the settlement class meets all of the requirements of Federal Rule of Civil Procedure 23 ("Rule 23").

Under Rule 23, a class action may be maintained if all of the requirements of Rule 23(a) are met, as well as one of the requirements of Rule 23(b). Rule 23(a) requires that:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23(b)(3) requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. Numerosity

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citation omitted). There are 960 California Rule 23 Class Members. Turner Decl. ¶ 39.

B. Commonality

The California Rule 23 Settlement Class satisfies the commonality requirement, the purpose of which is to test "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). Although the claims need not be identical, they must share "common questions of fact or law." *Frank v. Eastman*

Kodak Co., 228 F.R.D. 174, 181 (W.D.N.Y. 2005). There must be a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986).

Here, Plaintiff alleges that he and the class were subject to the same policy of classifying them as non-employees who are not entitled to minimum wage protections. This common factual and legal question is sufficient to satisfy commonality for settlement purposes. *See Eliastam v. NBCUniversal Media, LLC*, No. 13 Civ. 4634, ECF No. 83 at 2 (attached to the Turner Decl. as Ex. H) (certifying a settlement class of interns who alleged they were improperly denied the minimum wage); *Davenport v. Elite Model Mgmt. Corp.*, No. 13 Civ. 1061, ECF No. 51 at 6 (attached to the Turner Decl. as Ex. J) (commonality was met where "the central claim [was] that potential Class Members were all misclassified as 'trainees' during the relevant period," and where they all participated in the same internship program); *Ballinger v. Advance Mag. Pubs., Inc.*, No. 13 Civ. 4036, 2014 WL 7495092, at *4 (S.D.N.Y. Dec. 29, 2014) (in intern case, commonality satisfied where class members had common duties and alleged they were misclassified as non-employees).

C. Typicality

Typicality is also satisfied because "each class member's claim arises from the same [alleged] course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 373, 376 (2d Cir. 1997). "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank*, 228 F.R.D. at 182. "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the plaintiffs and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

In this case, Plaintiff and the class members all alleged that they interned for Defendants in California and alleged that, based on their status as interns, they suffered the same violation of the law. This satisfies the typicality requirement for settlement purposes. *See* Ex. J (*Davenport v. Elite Model Mgmt. Corp.*) at 7 (finding typicality met where plaintiffs alleged that they, "like the class they seek to represent, were wrongfully misclassified as 'trainees' and consequently unpaid for their work for the Defendant"); *Ballinger*, 2014 WL 7495092, at *5 (typicality was satisfied where interns do "similar work and were classified . . . under the same corporate policy").

D. Adequacy of the Plaintiff and His Counsel

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). "The adequacy requirement exists to ensure that the named representative will 'have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class Members.'" *Toure v. Cent. Parking Sys. of N.Y.*, No. 05 Civ. 5237, 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 WL 1580080, at *6 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)) (internal quotation marks omitted).

Plaintiff does not have interests that are antagonistic to or at odds with the Class Members' interests. *See Ballinger*, 2014 WL 7495092, at *5. As this Court previously found, Outten & Golden LLP is adequate to serve as class counsel. *See* ECF No. 28. Courts have noted that the firm "routinely represents plaintiffs in employment litigation in th[e] [SDNY] and has appeared in many major FLSA and Labor Law cases," and have held that, based on this work,

there is "no question that it will prosecute the interests of the class vigorously." *See Ballinger*, 2014 WL 7495092, at *7.

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

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

1. Common Questions Predominate

Predominance requires 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." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001), *abrogated on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (internal quotation marks and citation omitted). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *Id.* at 139. Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005).

Here, for settlement purposes, Plaintiff's common allegation – that he was an employee entitled to be paid the minimum wage – predominates over any factual or legal variations among Class Members. *See* Ex. J (*Davenport v. Elite Model Mgmt. Corp.*) at 8-9 (predominance met where the defendant implemented a single policy classifying its interns as non-employees); *Ballinger*, 2014 WL 7495092, at *6 (same).

2. A Class Action Is a Superior Mechanism

Plaintiff also satisfies the superiority requirement. Superiority analyzes whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Rule 23(b)(3) sets forth a non-exclusive list of relevant factors, including whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).[5]

The class action device is superior in this case because it is unlikely that individual Class Members would have brought their claims if not for this case. *See* Fed. R. Civ. P. 23(b)(3). In addition, employing the class device here will achieve economies of scale, will conserve the resources of the judicial system, and will avoid the waste and delay of repetitive proceedings and inconsistent adjudications of similar issues and claims. *See* Ex. J (*Davenport v. Elite Model Mgmt. Corp.*) at 9; *Ballinger*, 2014 WL 7495092, at *6 (same).

II. The Proposed Settlement Is Fair, Reasonable, and Adequate and Should Be Approved.

Rule 23(e) requires court approval for a class action settlement to insure that it is procedurally and substantively fair, reasonable, and adequate. Fed. R. Civ. P. 23(e). To determine procedural fairness, 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*

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[5] Another factor, whether the case would be manageable as a class action at trial, is not of consequence in the context of a proposed settlement. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial"); *Frank*, 228 F.R.D. at 183 ("The court need not consider the [manageability] factor, however, when the class is being certified solely for the purpose of settlement."). Moreover, denying class certification on manageability grounds is "disfavored" and "should be the exception rather than the rule." *In re Visa Check*, 280 F.3d at 140 (citation omitted).

Bank, 236 F.3d 78, 85 (2d Cir. 2001). To determine substantive fairness, courts evaluate 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, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

Courts examine procedural and substantive fairness in light of the "strong judicial policy in favor of settlements" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks and citation 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.").

A. The Proposed Settlement Is Procedurally Fair

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." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted); *see also D'Amato*, 236 F.3d at 85. "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.*, Nos. 05 Civ. 10240, 05 Civ. 10287, 05 Civ. 10515, 05 Civ. 10610, 06 Civ. 00304, 06 Civ. 00347, 06 Civ. 01684, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Here, the parties engaged in substantial discovery, several years of litigation, and an appeal in the *Glatt* case. Turner Decl. ¶¶ 11-25. The parties also worked with two mediators, who assisted them to understand the strengths and weaknesses of their respective positions. *Id.* ¶ 27. Based on these circumstances, the parties were well-equipped to reach a settlement. *See* Ex. J (*Davenport v. Elite Model Mgmt. Corp.*) at 11 (finding settlement was procedurally fair where it "was reached through arm's length negotiations supervised by an experienced mediator, after experienced counsel had evaluated the merits of Plaintiffs' claims, and is untainted by

collusion"); *Toure v. Amerigroup Corp.*, No. 10 Civ. 5391, 2012 WL 3240461, at *3 (E.D.N.Y. Aug. 6, 2012) (finding settlement to be "procedurally fair, reasonable, adequate, and not a product of collusion" after plaintiffs conducted a thorough investigation and enlisted the services of an experienced employment law mediator).

B. The Proposed Settlement Is Substantively Fair

In *Grinnell*, the Second Circuit provided the analytical framework for evaluating the substantive fairness of a class action settlement. 495 F.2d at 448. The *Grinnell* factors guide district courts in making this determination. They are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (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. *Id*. at 463. All of the *Grinnell* factors except the seventh factor (which is not determinative) weigh in favor of final approval of the settlement.

1. Further Litigation and Trial Would Be Complex, Costly, and Long (*Grinnell* Factor 1).

The *Glatt* lawsuit raised novel issues that few courts had addressed. It required the parties to expend significant time and effort litigating over the appropriate standard to evaluate an unpaid intern's status under the FLSA – a complex question on which courts and the U.S. Department of Labor have differed. In addition to this question, under any standard, the issues are fact-intensive, requiring substantial discovery and making class and collective certification challenging. Under these circumstances, this case was highly complex. Although *Glatt* settled

the question of the proper intern standard in the Second Circuit, if the parties had not settled, they would have engaged in further litigation and possibly a trial. The settlement will provide all class members relief promptly, avoiding the significant risk that each side faces, particularly the Plaintiff. Therefore, the first *Grinnell* factor weighs in favor of final approval.

2. The Reaction of the Class Has Been Positive (*Grinnell* Factor 2).

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *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 the settlement." *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 150 (E.D.N.Y. 1995) (quoting *Weiss v. Drew Nat'l*, 465 F. Supp. 548, 551 (S.D.N.Y.1979)) (internal quotation marks omitted). Here, there were no objections. Ex. D (Schwartz Decl.) ¶ 20.

As discussed above, as of October 31, 2016, 217 Class Members had submitted timely claim forms in both *Glatt* and *MacKown* to obtain a portion of the settlement – representing approximately 20 percent of all Class Members. Ex. D (Schwartz Decl.) ¶ 18. The Claims Administrator and Class Counsel made every effort to reach Class Members to ensure they received the Notice Package and were aware of the deadline, including by calling Class Members and searching for updated addresses in several databases. *See* Ex. D (Schwartz Decl.) ¶¶ 11, 14-16; Turner Decl. ¶ 48.

Courts have approved settlements with claims rates that are comparable to the claims rate here. *See*, *e.g.*, *Hernandez v. Immortal Rise, Inc.*, No. 11 Civ. 4360, 2015 WL 1579373, at *6 (E.D.N.Y. Mar. 27, 2015) (approving wage and hour settlement with a 20 percent claim rate); *In re Penthouse Executive Club Compensation Litig.*, No. 10 Civ. 1145, ECF Nos. 142 at 19 & 159 (attached to the Turner Decl. as Ex. K) (motion for approval of wage and hour settlement with

approximately 19 percent claim rate and approval order); *see also Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 92 (3d Cir. 1985) (in antitrust class action case, noting that only 12 percent of the class responded to the notice by filing a claim to share in the settlement); 2 McLaughlin on Class Actions § 6:24 (8th ed.) ("Claims-made settlements typically have a participation rate in the 10-15 percent range.").

Out of 1095 Class Members in both *Glatt* and *MacKown*, 16 filed exclusions. *See* Ex. D (Schwartz Decl.) ¶ 19. This supports final approval. *See, e.g., Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 619 (S.D.N.Y. 2012) (where 16 out of 1500 class members excluded themselves and only one objected, the "response demonstrates strong support for the settlement"); Ex. H (*Eliastam v. NBCUniversal Media, LLC*) at 4 (noting that 37 out of 8,960 class members opted out of the settlement); *Wright v. Stern,* 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008) ("[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate")

3. Discovery Has Advanced Far Enough to Allow the Parties to Resolve the Case Responsibly (*Grinnell* Factor 3).

The parties in *Glatt* have engaged in significant discovery, including exchanging tens of thousands of pages of documents and conducting multiple depositions. Turner Decl. ¶ 13. Although Plaintiff would have sought some additional discovery in this case if litigation had proceeded, he had already obtained a great deal of information from the *Glatt* case relating to the policies and practices that applied to all unpaid interns, including those in California. Thus, Plaintiff was sufficiently informed of the strengths and weaknesses of the claims before he resolved them.

4. Plaintiff Would Face Risk If the Case Proceeded (*Grinnell* Factors 4 and 5).

The Second Circuit's primary beneficiary standard and its decertification of the class and collective present significant risk to Plaintiff on the merits and with regard to certification. Although Plaintiff believes that he could have avoided summary judgment, a few courts have granted summary judgment to employers under the Second Circuit's standard, and as of the filing of this motion, no courts have granted summary judgment in favor of an unpaid intern. *See, e.g., Wang v. Hearst Corp.,* No. 12 Civ. 793, 2016 WL 4468250 (S.D.N.Y. Aug. 24, 2016), *appeal filed*, No. 16-3302 (Sept. 16, 2016); *Mark v. Gawker Media LLC*, No. 13 Civ. 4347, 2016 WL 1271064, at *12 (S.D.N.Y. Mar. 29, 2016).

The Second Circuit's decision, despite its revised language in the amended opinion, also makes class and collective certification extremely challenging. While the Settlement Class Members were subject to some common policies, including the one that the Court held predominated under the Department of Labor's test, under the primary beneficiary test, the Court could conclude that the differences among interns exceed their similarities. This risk strongly supports the settlement because, under it, all class members had the opportunity to obtain relief.

5. Establishing and Maintaining the Class Through Trial Presents Risk (*Grinnell* Factor 6).

As discussed above, this is probably the strongest factor favoring the settlement. While the Second Circuit did not rule out that the Plaintiff could certify a class, it expressed doubt that he would be able to do so. *See Glatt*, 811 F.3d at 539. Accordingly, this factor favors final approval.

6. Defendants' Ability to Withstand a Greater Judgment Is Not Determinative (*Grinnell* Factor 7).

While there is little doubt that Defendants could have paid a greater judgment, this fact "standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (internal brackets, citation, and quotation marks omitted). Accordingly, this factor does not preclude the Court from granting final approval.

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 $495 that Defendants will pay to each Settlement Class Member who submits a claim is substantial given the risks of litigation discussed above, even though the recovery would be greater if Plaintiff prevailed and maintained a class through trial and on appeal. While the amount is at the low end of the range that courts have approved in other unpaid intern settlements – the payments range from about $500 to $1,900[6] – these cases were resolved before the Second Circuit adopted the primary beneficiary standard. In light of this, these payments fall within the "'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.'" *Frank*, 228 F.R.D. at 186 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

By Class Counsel's estimate, $495 constitutes about 25% of what Settlement Class Members would have received if they prevailed on their minimum wage claims at trial and through an appeal. Turner Decl. ¶ 33. This is a reasonable percentage given the significant risks of this case. *See Grinnell*, 495 F.2d at 455 n.2 ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single

[6] *See* Turner Decl. ¶ 34 & note 2.

percent of the potential recovery.") Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, *Grinnell* factors 8 and 9 favor final approval.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court: (1) finally certify the settlement class; and (2) grant final approval of the class action settlement.

Dated: November 2, 2016
New York, New York

Respectfully submitted,
OUTTEN & GOLDEN LLP

/s/ Juno Turner
Juno Turner

Juno Turner
Rachel Bien
Sally J. Abrahamson
685 Third Avenue, 25th Floor
New York, New York 10017
Telephone: (212) 245-1000
Facsimile: (646) 509-2060
Attorneys for Plaintiffs