UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUC A. BIJOUX and JUAN RODRIGUEZ, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERIGROUP NEW YORK, LLC, Defendant.	**No. 14 Civ. 3891 (PK)**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CERTIFICATION OF THE SETTLEMENT CLASS, FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT, AND APPROVAL OF THE FLSA SETTLEMENT

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INTRODUCTION

Plaintiffs Luc A. Bijoux and Juan Rodriguez ("Plaintiffs") submit this Memorandum of Law in support of their unopposed Motion for Certification of the Settlement Class, Final Approval of the Class Action Settlement, and Approval of the FLSA Settlement ("Motion for Final Approval"). The $1,650,000 settlement of this wage and hour class and collective action satisfies all of the criteria for final approval. Plaintiffs seek an order: (1) certifying the settlement class described below; (2) approving as fair and adequate the class-wide settlement of this action, as set forth in the Joint Stipulation of Settlement and Release ("Agreement"), attached as Exhibit A to the Declaration of Rachel Bien in Support of Plaintiffs' Motion for Certification of the Settlement Class, Final Approval of Class Action Settlement, and Approval of the FLSA Settlement, Motion for Approval of Attorneys' Fees and Reimbursement of Expenses, and Motion for Approval of Service Payments ("Bien Decl.");[1] and (3) approving the FLSA Settlement.

On February 8, 2016, the Court took the first step in the settlement approval process by preliminarily approving the Agreement; provisionally certifying the Settlement Class[2] pursuant to Federal Rule of Civil Procedure 23; appointing Outten & Golden LLP and Shulman Kessler LLP as Class Counsel; directing that notice be sent to the Class Members, and setting a date for the final fairness hearing. ECF No. 72, Minute Entry for proceedings held before Magistrate Judge Peggy Kuo (Feb. 8, 2016). No Class Members have excluded themselves from this settlement, and no Class Members have objected to it. Ex. C (Declaration of Chris Pikus ("Pikus Decl.")) ¶¶ 10-11. For the reasons stated below, the Court should grant final approval.

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[1] Unless otherwise indicated, all exhibits are attached to the Bien Declaration.

[2] Unless otherwise indicated, all capitalized terms have the definitions set forth in the Agreement.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Overview of Litigation

On June 23, 2014, Plaintiffs filed a class and collective action complaint alleging, *inter alia*, that Defendant violated the Fair Labor Standards Act ("FLSA") and/or New York Labor Law ("NYLL") by failing to pay them and other similarly situated Marketing Representatives for all of the hours they worked, including overtime. ECF No. 1. On December 22, 2014, Plaintiffs filed a Motion for Conditional Certification and Court-Authorized Notice Pursuant to § 216(b) of the FLSA, which Defendant opposed. ECF Nos. 32-34, 35-37, 42-43, 46. On July 23, 2015, Magistrate Judge Pohorelsky issued a report and recommendation that the district court grant Plaintiffs' motion. ECF No. 59. Defendant objected to the report and recommendation, requiring additional briefing from the parties. ECF Nos. 60, 61. On September 15, 2015, the district court overruled the objections and accepted Magistrate Judge Pohorelsky's report and recommendation. ECF No. 63.

B. Discovery and Settlement Negotiations

Between November 2014 and March 2015, the parties engaged in extensive written discovery, including but not limited to, the production, review, and exchange of policy, payroll, and time-keeping documents, and thousands of emails and attachments; and responses to interrogatories. Bien Decl. ¶ 12. In addition to document discovery, Plaintiffs and Defendant engaged in negotiations related to the production of Electronically Stored Information ("ESI"), including identifying custodians and search terms for email discovery. *Id*. Plaintiffs also interviewed many Class Members about their duties, and obtained declarations from Plaintiffs and ten other Marketing Representatives to support their conditional certification motion. *Id.* ¶ 13.

On or about September 24, 2015, the parties agreed to engage in mediation. Bien Decl. ¶ 15. Magistrate Judge Pohorelsky stayed proceedings pending mediation. ECF No. 67. In advance of the mediation, Defendant provided Plaintiffs with payroll records for the conditionally certified collective, including dates of employment, hourly rates, work absences, and any recorded overtime. Bien Decl. ¶ 16. This information allowed Plaintiffs to generate damage estimates to be used in settlement negotiations. *Id.* Plaintiffs expended significant time and effort analyzing the data. *Id.*

October 26, 2016, the parties participated in a day-long mediation with Linda Singer of JAMS, a private mediator. Bien Decl. ¶ 17. After reaching an agreement on the material terms of the settlement, the parties negotiated a detailed settlement agreement over the next few weeks. *Id.* ¶¶ 18-19.

C. Plaintiffs' Motion for Preliminary Approval

On January 15, 2016, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Appointment of Plaintiffs' Counsel as Class Counsel, and Approval of Plaintiffs' Proposed Notice of Settlement ("Motion for Preliminary Approval"), which the Court granted on February 8, 2016. *See* ECF No. 72.

D. CAFA Notice

The Claims Administrator sent notices to federal and state authorities as required by the Class Action Fairness Act ("CAFA") on January 29, 2016. *See* 28 U.S.C. § 1715(d). The 90-day CAFA notice period concludes on April 29, 2016. Ex. C (Pikus Decl.) ¶ 14.

II. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Fund

Defendant has agreed to pay a Total Settlement Amount of $1,650,000 to cover payments to Qualified Class Members, Court-approved attorneys' fees, costs, and expenses, service

payments, the Claims Administrator's fees up to $50,000, any fees associated with investing and liquidating the Total Settlement amount, and any taxes incurred directly or indirectly by Defendant as a result of investing the Total Settlement Amount to the extent not covered by accrued interest. Ex. A (Settlement Agreement) § 4.1.

B. Settlement Class Members

Settlement Class Members include all individuals who worked as Marketing Representatives, Facilitated Enrollment Representatives, Certified Application Counselors, or Marketplace Facilitated Enrollers for Defendant in New York between May 1, 2012 and the date of the Court's preliminary approval of the Settlement Agreement. Ex. A (Settlement Agreement) § 2.3. FLSA Class Members include all individuals who filed Consent to Join Forms with the Court on or before the execution of the Settlement Agreement. *Id*. § 2.8.

C. Releases

All Class Members who have not excluded themselves will release all NYLL claims brought in the litigation or that could have been brought in the litigation. *Id*. § 4.6. Class Members who endorse their Settlement Checks will release the same claims under the FLSA. *Id*. Plaintiffs and FLSA Class Members who receive a service payment will release all claims relating to their employment with Defendant except those that cannot be waived by law. *Id.* § 4.6(B).

D. Allocation Formula

Under the allocation formula, Qualified Class Members will be paid based on the number of workweeks they worked from May 1, 2012 through the date of the Preliminary Approval Order. Ex. A (Agreement) § 4.4(B). Each Qualified Class Member was assigned 1 point for each workweek between May 1, 2012 and the date of the Preliminary Approval Order. *Id.* Each

Qualified Class Member who is a FLSA Class Member was assigned an additional 0.5 points for each workweek between May 1, 2012 and the date of the Preliminary Approval Order in recognition of the affirmative step he/she took to join the case. *Id.*

To calculate each Qualified Class Member's proportionate share of the Net Settlement Fund, the Claims Administrator added all points for Qualified Class Members together to obtain a "Total Denominator," and then divided the number of points for each Qualified Class Member by the Total Denominator to obtain each Qualified Class Member's "Portion of the Net Settlement Fund." *Id.* The Claims Administrator then multiplied each Qualified Class Member's Portion of the Net Settlement Fund by the Net Settlement Fund to determine each Qualified Class Member's Settlement Amount. *Id*.

E. Attorneys' Fees and Costs

Plaintiffs seek Court approval for one-third ($550,000) of the Settlement Amount for their Attorneys' Fees, plus their reasonable litigation costs and expenses of $14,270.00. *Id.* § 4.2; Bien Decl. ¶ 40. Pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), Plaintiffs have moved for Court approval of their Attorneys' Fees and Costs simultaneously with their Motion for Final Approval of the Settlement.

F. Service Payments

In addition to their payments under the allocation formula, Plaintiffs seek service payments of no more than $10,000 each for Named Plaintiffs Luc A. Bijoux and Juan Rodriguez, and no more than $2,000 for FLSA Class Members Jose Alarcon, Gashyln Desrosiers, Mauricio Espinal, Jean Estime, Oscar Landaverde, Emmanuella Lazarre, McKenson Jean Jacques, Stephanie Mondesir, Narciso Ozoria, and Pascal Saint-Aude in recognition of the services they rendered to the Class and any risks they incurred. Ex. A (Agreement) § 4.3. Plaintiffs have

moved for Court approval of the service payments simultaneously with their Motion for Final Approval of the Settlement.

G. Settlement Claims Administrator

The parties designated Rust Consulting, Inc. ("Rust") as the Claims Administrator. Ex. A (Agreement) §§ 2.1, 3.1. The Claims Administrator's Fees and Costs will be paid from the Settlement Amount. *Id.* § 3.1. On March 4, 2016, Rust mailed Court-approved Notices to 248 Class Members, using the names and addresses provided by Defendant. Ex. C (Pikus Decl.) ¶ 8. After the Notices were mailed, Rust received nine (9) Notices returned as undeliverable. *Id.* ¶ 9. Rust performed seven (7) address traces for these undeliverable Notices, and re-mailed three (3) of them to Class Members for whom new addresses were located, none of which were returned to Rust as undeliverable a second time. *Id.* There were a total of four (4) Class Members for whom Notices were ultimately undeliverable. *Id.*

The Notice advised Class Members, among other things, that they could object to or exclude themselves from the settlement. Ex. G (Notice) at ¶¶ 12-14. No Class Member objected to the Settlement, and no Class Member requested exclusion from the Settlement. Ex. C (Pikus Decl.) ¶¶ 10-11. Class Counsel received over two dozen inquiries from Class Members with questions about the settlement or who provided updated contact information. Bien Decl. ¶ 50.

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 settlement class can be certified. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). On February 8, 2016, this Court provisionally certified a Class consisting of:

> [A]ll individuals who were employed as Marketing Representatives, Facilitated Enrollment Representatives, Certified Application Counselors, or Marketplace Facilitated Enrollers for Defendant in New York between May 1, 2012 through

> the date on which the Court grants Preliminary Approval of the Agreement [February 8, 2016].

Minute Entry (Feb. 8, 2016); Bien Decl. Ex. A (Agreement) at § 2.3. The Court should now grant final certification because the settlement meets all of the requirements of Fed. R. Civ. P. 23 ("Rule 23"), and because "no facts have been presented . . . to indicate that [the] preliminary determination [to certify a settlement class] was incorrect." *Lizondro-Garcia v. Kefi LLC*, No. 12 Civ. 1906, 2014 WL 4996248, at *3 (S.D.N.Y. Oct. 7, 2014).

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). 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 class' interests. 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.

Id. at (b)(3).

A. Numerosity

Numerosity is satisfied when the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[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). Plaintiffs satisfy the numerosity requirement for the purposes of settlement because there are approximately 250 Class Members. *See* Ex. C (Pikus Decl.) ¶ 6.

B. Commonality

The proposed settlement class also 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 "[t]he 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) (citing *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983)). There must be a "unifying thread" among the claims to warrant class certification for the limited purposes of settlement. *Kamean v. Local 363, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986). Even where class members do "not share exact experiences in terms of uncompensated or improperly compensated hours worked, the claims are based on similar allegations, which give rise to the same or similar legal arguments." *Sewell v. Bovis Lend Lease, Inc.*, No. 09 Civ. 6548, 2012 WL 1320124, at *3 (S.D.N.Y. Apr. 16, 2012).

Here, the common factual and legal issue presented is whether Defendants did not compensate Marketing Representatives for all overtime hours worked after their scheduled shifts or on the weekend pursuant to a corporate policy. Courts have granted class certification to classes of workers raising similar allegations. *See, e.g.*, *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 374-81 (7th Cir. 2015) (affirming grant of class certification to bankers in off-the-clock case); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165-66 (9th Cir. 2014) (affirming grant of class certification to claims adjusters in off-the-clock case). Therefore, commonality exists for settlement purposes only.

C. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the class. "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 (citation omitted); *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) ("Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding") (citing 5 Moore's Federal Practice § 23.24[4]). Typicality is satisfied "when 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." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d. Cir. 1997). "[M]inor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendants direct "the same unlawful conduct" at the named plaintiff and the class. *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993).

In this case, and for settlement purposes only, Plaintiffs' claims arise from the the same alleged factual and legal circumstances that form the bases of Class Members' claims: that Marketing Representatives were allegedly subject to the same policy or practice of limiting the amount of overtime for which they were paid. This satisfies the typicality requirement for settlement purposes only. *See Aponte v. Comprehensive Health Mgmt., Inc.*, No. 10 Civ. 4825, 2011 WL 2207586, at *10 (S.D.N.Y. June 2, 2011) (typicality satisfied where "[p]laintiffs . . ., similar to the proposed class members, worked as Benefits Consultants promoting defendant's health care plans and products, were subject to the same alleged misclassification as exempt employees, and were denied overtime wages for hours worked in excess of forty hours per week").

D. Adequacy of the Plaintiffs and Their 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 representatives 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*, 443 F.3d at 268).

Here, for the purposes of settlement only, Plaintiffs do not have interests that are antagonistic to or at odds with the Class Members' interests. *Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 176 (S.D.N.Y. 2014) (plaintiffs were adequate where there was no evidence that their interests were at odds with the class's interests), *final approval granted*, No. 12 Civ. 1906, 2014 WL 4996248, at *10 (Oct. 7, 2014). Plaintiffs have also selected counsel who are adequate to represent the class's interests. *See, e.g.*, *Ballinger v. Advance Magazine Publishers, Inc.*, No. 13 Civ. 4036, 2014 WL 7495092, at *1 (S.D.N.Y. Dec. 29, 2014) (Outten & Golden LLP is "generally (and appropriately) regarded as being among the top employment law firms in the [Southern] District."); *Sukhnandan v. Royal Health Care of Long Island LLC,* No. 12 Civ. 4216, 2014 WL 3778173, at *8 (S.D.N.Y. July 31, 2014) ("The work that [Shulman Kessler] has performed in litigating and settling this case demonstrates their commitment to the class and to representing the class's interests"); *see also* Bien Decl. ¶¶ 6-7 (collecting cases); Declaration of Troy Kessler ("Kessler Decl.") ¶¶ 7-9 (same).

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

Rule 23(b)(3) requires that 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, 594 (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, Plaintiffs' common contentions predominate over any factual or legal variations among Class Members. *See Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 217 (S.D.N.Y. 2015) (finding predominance requirement satisfied where common questions were "whether the class members were entitled to overtime under the FLSA and NYLL and whether Citi had a companywide policy to deprive them of overtime pay in spite of those laws" and "because a vigorously-prosecuted class action is a superior alternative to each of the plaintiffs individually taking on Citi, one of the world's largest and most powerful financial institutions"); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 617 (S.D.N.Y. 2012) (predominance satisfied because "all members of the class are unified by common factual allegations that Defendant had a policy of not paying Class Members overtime premium pay for hours worked over 40 in a workweek while pressuring them to achieve high performance goals. They are also unified by a

common legal theory—that these policies violated the NYLL. These common issues predominate over any issues affecting only individual Class Members.").

2. A Class Action Is a Superior Mechanism.

Plaintiffs also satisfy 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).[3]

For settlement purposes only, 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 id.* 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. *Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114, 126 (S.D.N.Y. 2014) ("Courts routinely hold that a class action is superior where, as here, potential class members are aggrieved by the same policy, the damages suffered are small in relation to the expense and burden of individual litigation, and many potential class members are currently employed by the defendants.") (collecting cases); *Lizondro-Garcia*, 300 F.R.D. at 177 (class action more economical "due to plaintiffs' limited financial resources and the

[3] 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 Prods.*, 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" (citation omitted)); *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.

relatively modest size of any individual's recovery"); *Ballinger*, 2014 WL 7495092, at *6 (same); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 161, 164 (S.D.N.Y. 2008) (same).

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

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). "Approval of a class action settlement is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *Tiro v. Pub. House Invs., LLC*, No. 11 Civ. 7679, 2013 WL 4830949, at *4 (S.D.N.Y. Sept. 10, 2013) (citation and internal quotation marks omitted). 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 Bank*, 236 F.3d 78, 85 (2d Cir. 2001). To determine substantive fairness, 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, 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 settlement[]" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116; *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 Settlement Is Procedurally Fair.

The settlement is procedurally fair because it was reached through vigorous, arm's-length negotiations, after experienced counsel had evaluated the merits of the claims and defenses. *See Gonqueh v. Leros Point To Point, Inc.*, No. 14 Civ. 5883, 2016 WL 791295, at *3 (E.D.N.Y. Feb. 26, 2016) (finding settlement to be fair, reasonable, and adequate where "the Settlement

Agreement has been reached as the result of intensive, arms-length negotiations, including mediation with an experienced third-party neutral."); *Kochilas v. Nat'l Merch. Servs., Inc.*, No. 14 Civ. 311, 2015 WL 5821631, at *3 (E.D.N.Y. Oct. 2, 2015) ("[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.") (quoting *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)). 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 (quoting Manual for Complex Litigation, § 30.42 (3d Ed. 1995)). "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, *et al.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Here, the parties engaged in extensive discovery, including but not limited to, the production of policy, payroll records, and time-keeping documents; and propounding and responding to written discovery. Bien Decl. ¶ 12. Plaintiffs interviewed many Class Members about their duties, the hours they worked, and their practices with respect to recording time. *See id.* ¶¶ 12-13. In addition, the parties engaged in arm's-length negotiations with a private mediator, who assisted the parties to understand the strengths and weaknesses of their respective positions. *Id.* ¶ 17. Based on these circumstances, the parties were equipped to reach a settlement. *See Lizondro-Garcia*, 2014 WL 4996248, at *3-4 (finding settlement procedurally fair where parties exchanged data relevant to the claims, engaged in arm's-length negotiations, and participated in a settlement conference); *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 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 463. 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*. Eight of the nine *Grinnell* factors weigh in favor of final approval of the Agreement, and the remaining factor, when weighed, is neutral.

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

By reaching a settlement prior to dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay, and ensure a recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato*, 236 F.3d 78. This case is no exception, with approximately 250 Class Members with claims under federal and state law.

Further discovery would be required to establish liability and damages and to support Plaintiffs' class certification motion and Defendant's opposition to such motion. This discovery would include further electronic discovery; depositions of Plaintiffs, opt-ins, and Defendant's employees, including managers who supervised Plaintiffs and opt-ins and Defendant's corporate representatives; and potential expert analysis of data to determine the hours that Marketing Representatives actually reported compared to the hours for which they were paid, if any. After completing discovery, the parties would likely move for summary judgment. If the Court determined that fact disputes precluded summary judgment, a fact-intensive trial would be necessary. Any judgment might be appealed, further extending the litigation. This settlement, on the other hand, provides significant relief to Qualified Class Members in a prompt and efficient manner. 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) (citation and internal quotation marks omitted). Here, there were no objections. Ex. C (Pikus Decl.) ¶ 11. This is strong evidence of the fairness of the settlement. *See Lizondro-Garcia*, 2014 WL 4996248, at *4 (finding class's reaction to settlement to be "extremely positive" when no class member objected and only one opted out) (collecting cases).

None of the approximately 250 Class Members requested exclusion. Ex. C (Pikus Decl.) ¶ 10. This, too, supports final approval. *See, e.g.*, *Kochilas*, 2015 WL 5821631, at *5 (where no class members submitted a timely objection to the settlement or requested exclusion, "[t]his

overwhelmingly favorable response recommends final approval") (collecting cases); *Behzadi v. Int'l Creative Mgmt. Partners, LLC*, No. 14 Civ. 4382, 2015 WL 4210906, at *2 (S.D.N.Y. July 9, 2015) ("The Settlement Class's reaction to the settlement was positive [because] [n]o Class Member objected to the Settlement Stipulation, and only 24 Exclusion Forms were timely submitted."); *Morris*, 859 F. Supp. 2d at 619 (where 16 out of 1,500 class members excluded themselves and only one objected, the "response demonstrates strong support for the settlement").

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

Although preparing this case through trial would require many more hours of discovery for both sides, the parties have completed enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation omitted). "[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian & German Bank Holocaust Litig*, 80 F. Supp. 2d 164 at 176 (internal quotation omitted).

The parties' discovery here meets this standard. Between November 2014 and March 2015, the parties engaged in extensive discovery, including but not limited to, producing policy, payroll records, and time-keeping documents and thousands of emails and attachments; and propounding and responding to written discovery requests. Bien Decl. ¶ 12. Plaintiffs also interviewed many Class Members about their duties, the hours they worked, and their practices with respect to recording time. *See id.* ¶ 13. This factor therefore favors final approval. *See*

Sewell, 2012 WL 1320124, at *8 (granting final approval where the parties exchanged documents and plaintiffs' counsel interviewed class members).

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

Although Plaintiffs believe their case is strong, it is subject to risk. "Litigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 126 (S.D.N.Y. 1997). "If settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *6 (S.D.N.Y. June 25, 2007).

Here, Plaintiffs' claims hinged on two fact-intensive inquiries—whether Defendant had a policy of not paying Marketing Representatives for hours worked over 40 in a workweek; and whether Defendant had actual or constructive knowledge that Marketing Representatives were working off-the-clock but failed to take steps to address it. *See Morris*, 859 F. Supp. 2d at 620 ("the fact-intensive nature of Plaintiffs' off-the-clock claim presents risk"); *Frank*, 228 F.R.D. at 189 (mixed questions of fact and law supported court's award of attorneys' fees representing approximately 40% of the common fund). The settlement alleviates this uncertainty. Accordingly, this factor also weighs in favor of final approval.

5. Maintaining the Class Through Trial Would Not Be Simple (*Grinnell* Factor 6).

The risk of obtaining class certification and maintaining it through trial is also present. A motion for class certification under Rule 23 would require significant discovery and briefing. *See Raniere*, 310 F.R.D. at 218-19 (explaining risk of establishing liability and maintaining a class through trial, and finding such risk supported final approval of class of Home Lending

Specialists). Settlement eliminates this risk, expense, and delay. This factor favors final approval.

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

It is not clear whether Defendant could withstand a greater judgment. However, even if it could, its ability to do so, "standing alone, does not suggest that the settlement is unfair." *In re Austrian*, 80 F. Supp. 2d 164 at 178 n.9; *accord Ballinger*, 2014 WL 7495092, at *3. Therefore, this factor is neutral and 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 settlement amount is substantial given the value of the claims and the litigation risks. 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 (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 178). "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.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). "[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 percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2; *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 WL 73423, at *12-13, *16 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement where the "best possible recovery would be approximately $121 million").

Here, the settlement provides more than "a fraction of the potential recovery." *See Grinnell*, 495 F.2d at 455. By Class Counsel's estimation, the fund represents

approximately 23% of Class Members' best possible recovery, excluding any liquidated damages or other penalties to which they may be entitled. Bien Decl. ¶ 28. Weighing the benefits of the settlement against the available evidence and the risks associated with proceeding in the litigation, the settlement amount is reasonable.

III. Approval of the FLSA Settlement Is Appropriate Under Federal Law.

Plaintiffs also request that the Court approve the settlement of the FLSA claims. They have brought their FLSA claims as a collective action. Unlike the procedure under Rule 23, collective members must affirmatively opt into the litigation in order to join it. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 84 (S.D.N.Y. 2001). Because, under the FLSA, "parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date[,]" FLSA collective actions do not implicate the same due process concerns as Rule 23 actions. *McKenna v. Champion Int'l. Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984), *abrogated on other grounds by Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989); *Lizondro-Garcia*, 2014 WL 4996248, at *6. "Accordingly, an FLSA settlement is examined with less scrutiny than a class action settlement; the court simply asks whether the settlement reflects a fair and reasonable compromise of disputed issues that was reached as a result of contested litigation." *Lizondro-Garcia*, 2014 WL 4996248, at *6; *see Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982) (FLSA "[s]ettlements may be permissible . . . because initiation of the action by the employees provides some assurance of an adversarial context.").

Because the Agreement resolves a *bona fide* dispute and was reached after vigorous arm's-length settlement negotiations, it should be approved. *See Lizondro-Garcia*, 2014 WL 4996248, at *3, *6.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court: (1) finally certify the settlement class; (2) grant final approval of the settlement; and (3) approve the FLSA settlement.

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Respectfully submitted,
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