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

LAUREN BALLINGER and MATTHEW LEIB, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ADVANCE MAGAZINE PUBLISHERS, INC. d/b/a/ CONDÉ NAST PUBLICATIONS,

Defendant.

Case No. 13 Civ. 4036 (HP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF SERVICE PAYMENTS

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INTRODUCTION

In connection with Plaintiffs' Motion for Certification of the Settlement Class, Final Approval of the Class Action Settlement, and Approval of the Fair Labor Standards Act Settlement in the above-captioned action,[1] Plaintiffs respectfully request that the Court approve service payments of $10,000 each to be paid to Plaintiffs Lauren Ballinger and Matthew Leib in recognition of the services they rendered on behalf of the Class. The payments are reasonable in light of the time and effort they expended in furtherance of the litigation and settlement and the risks they endured in order to vindicate their rights and the rights of absent class members.

Class Members were apprised of the requests in the Notice and no Class Member objected to them.

FACTUAL BACKGROUND

Plaintiffs Ballinger and Leib (together, "Plaintiffs") have made important contributions to the prosecution and fair resolution of this action on behalf of Class Members. Decl. of Rachel Bien in Supp. Of Mot. for Certification of the Settlement Class, Final Approval of Class Action Settlement, and Approval of the FLSA Settlement, Mot. for Approval of Att'y's Fees and Reimbursement of Expenses, and Mot. for Approval of Service Payments. ("Bien Decl.") ¶ 48. They assisted Class Counsel's investigation and prosecution of the claims by providing detailed factual information and documents regarding their duties and responsibilities, the hours that they worked, and the duties and hours of other Class Members. *Id.* ¶ 49. Plaintiffs also provided documents related to their internships with Defendant, including handbooks, intern guides, training materials, and emails. *Id.* ¶ 50.

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[1] For a detailed account of the factual and procedural background of this case, Class Counsel refers the Court to the Memorandum of Law in Support of Plaintiffs' Motion for Final Approval and the supporting Declaration of Rachel Bien.

Plaintiffs reviewed and commented on declarations that they submitted in support of conditional certification, responded to interrogatories served by Defendant, and produced documents in response to Defendant's discovery requests. *Id.* ¶ 51-52. Plaintiffs also regularly communicated with Class Counsel to assist with their investigation of the facts. *Id.* ¶ 55.

Plaintiffs also helped Class Counsel prepare for the Court settlement conferences. Both attended the first settlement conference and Ballinger also attended the second conference. *Id.* ¶ 56. Plaintiffs provided helpful factual information during the settlement conferences in response to Defendant's arguments, and provided feedback on the settlement terms. *Id.* ¶ 54.

Although Plaintiffs no longer worked at Condé Nast, they nevertheless faced the risk that their current or future employers might retaliate against them for their involvement in this lawsuit. *Id.* ¶ 55. This is particularly true in cases like this one that receive media attention that can be easily located on Google. *See id.*; *See* Nona Willis Aronowitz, *'No one should work for free': Is this the end of the unpaid internship?*, NBC News, Sept. 2, 2013 (attached to the Bien Decl. as Ex. I) ("Some interns worry they'll be blacklisted from their chosen careers if they sue or campaign for pay.").[2]

The Court-approved Notice that was sent to Class Members informed them of the service payments that Plaintiffs request:

> As part of this settlement a fund of up to $5,850,000 will be set aside to pay the settlement payments claimed by class and collective members . . . [and] service payments of $10,000 each for the two interns who brought this Lawsuit[.]

Ex. B (Declaration of Sandy Peneda-Sibley ("Peneda Decl.")) Ex. A (Notice). No one has objected to the requested service payments. *See* Ex. B (Peneda Decl.) ¶ 18.

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[2] Unless otherwise indicated, all references to Exhibits are to the Bien Declaration.

ARGUMENT

I. The Requested Service Payments Are Reasonable and Should Be Approved.

The service payments that Plaintiffs request are reasonable given the contributions that Plaintiffs made to the prosecution and resolution of the lawsuit. Courts acknowledge that plaintiffs play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny. *See, e.g.*, *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 WL 7232783, at *7 (S.D.N.Y. June 25, 2007) ("[I]n employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.") (internal quotation marks omitted); *see generally* Nantiya Ruan, *Bringing Sense to Incentive Payments: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. & Emp. Pol'y J. 395 (2006).

"Service awards are common in class action cases and serve 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 the plaintiffs." *Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011). Service payments further the important purpose of compensating plaintiffs for the time they spend and the risks they take. *Massiah v. MetroPlus Health Plan, Inc.*, No. 11 Civ. 5669, 2012 WL 5874655, at *8 (E.D.N.Y. Nov. 20, 2012).

Courts have also justified service payments based on the need to encourage litigants to bring class actions, furthering the public policy underlying the statutory scheme. *Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be

said for rewarding those [employees] who protect and help to bring rights to a group of employees who have been the victims of [employer wrongdoing]"); *see also In re Smithkline Beckman Corp. Sec. Litig*., 751 F. Supp. 525, 535 (E.D. Pa. 1990) (approving $5,000 award because named plaintiffs "rendered a public service" and "conferred a monetary benefit" on the shareholder class).

In examining the reasonableness of a requested service payment, courts consider: (1) the existence of special circumstances, including the personal risk incurred by the named plaintiffs; (2) the time and effort expended by the named plaintiffs in assisting the prosecution of the litigation; and (3) the ultimate recovery in vindicating statutory rights. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997).

II. Plaintiffs Assumed Significant Risks.

In the workplace context, where workers are often blacklisted if they are considered "trouble makers," plaintiffs who sue their employers are particularly vulnerable to retaliation. *See Frank*, 228 F.R.D. at 187-88; *see also Sewell v. Bovis Lend Lease*, *Inc.,* No. 09 Civ. 6548, 2012 WL 1320124, at *14 (S.D.N.Y. Apr. 16, 2012) (recognizing that plaintiffs in wage and hour case "fac[e] potential risks of being blacklisted as 'problem' employees"). "Courts acknowledge that plaintiffs play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny, and that '[service] awards are particularly appropriate in the employment context' where 'the plaintiff is often a former or current employee of the defendant, and thus . . . he has, for the benefit of the class as a whole, undertaken the risks of adverse actions by the employer or co-workers.'" *Tiro v. Pub. House Invs., LLC*, No. 11 Civ. 7679, 2013 WL 4830949, at *11 (S.D.N.Y. Sept. 10, 2013) (citations omitted).

Although Plaintiffs were no longer working for Defendant when they filed the lawsuit, they nevertheless faced the risk that their current or future employers might discriminate or retaliate against them for being involved in this case. *See Guippone v. BH S&B Holdings, LLC*, No. 09 Civ. 1029, 2011 WL 5148650, at *7 (S.D.N.Y. Oct. 28, 2011) ("Today, the fact that a plaintiff has filed a federal lawsuit is searchable on the internet and may become known to prospective employers when evaluating the person."); *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) ("[F]ormer employees put in jeopardy their ability to depend on the employer for references in connection with future employment."); *see also Connolly v. Weight Watchers N. Am. Inc.*, No. 14 Civ. 01983, 2014 WL 3611143, at *4 (N.D. Cal. July 21, 2014) (representative plaintiffs "assume[] the risk of being stigmatized or disfavored by their current or potential future employers by suing their employer").

Even where there has been no actual retaliation, plaintiffs merit recognition for assuming the risk of retaliation. *See Guippone*, 2011 WL 5148650, at *7 ("Even where there is not a record of actual retaliation, notoriety, or personal difficulties, class representatives merit recognition for assuming the risk of such for the sake of absent class members."); *Frank*, 228 F.R.D. at 187-88 ("Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded."). Service payments "provide an incentive to seek enforcement of the law despite these dangers." *Parker*, 2010 WL 532960, at *1.

As former interns at the beginning of their careers, Plaintiffs are especially vulnerable because they are at the very bottom of the workplace hierarchy and must struggle to find

employment in a difficult economy. *See* Nona Willis Aronowitz, *'No one should work for free': Is this the end of the unpaid internship?*, NBC News, Sept. 2, 2013 (attached to the Bien Decl. as Ex. I) ("To many interns trying to make it in their fields, challenging the status quo through financial demands or lawsuits doesn't seem worth it . . . . Some interns worry they'll be blacklisted from their chosen careers if they sue or campaign for pay."); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, April 2, 2010 (attached to the Bien Decl. as Ex. H) ("[I]nterns are often afraid to file complaints. Many fear they will become troublemakers in their chosen field, endangering their chances with a potential future employer."). Where, as here, "a low level employee assumes responsibility for prosecuting an action against an employer and takes considerable personal risk in so doing, [service] awards are singularly appropriate." *Henry v. Little Mint, Inc.*, No. 12 Civ. 3996, 2014 WL 2199427, at *10 (S.D.N.Y. May 23, 2014).

III. Plaintiffs Expended Significant Time and Effort.

Courts recognize the important factual knowledge that employees bring to employment class actions, including information about employer policies and practices that affect wages. *See In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 354 (S.D.N.Y. 2014) (recognizing efforts of plaintiffs, including time spent reviewing draft pleadings and motions, searching for and producing documents, reviewing filings, and communicating regularly with counsel); *Parker*, 2010 WL 532960, at *1 (awarding service payments where plaintiffs met with counsel, reviewed documents, helped form case theory, identified and located other class members, and attended court proceedings); *Frank*, 228 F.R.D. at 187 (service payment justified where plaintiffs were the "primary source of information concerning the claims").

As discussed above, Plaintiffs contributed significant time and effort to the case by providing Class Counsel with detailed factual information regarding their job duties and hours

and those of other interns; providing information and documents in response to Defendant's discovery requests; reviewing and commenting on declarations used to support the motion for conditional certification; helping to prepare for and attending the settlement conferences; and being available to speak with Class Counsel to assist their factual investigation. Bien Decl. ¶ 4.

Plaintiffs' time and effort on behalf of the Class supports the requested service payments. *See Eliastam v. NBCUniversal Media, LLC*, No. 13 Civ. 4634, at 5 (May 28, 2015) (attached as Ex. K to the Bien Decl.) (approving service award of $10,000 to named plaintiff); *Munir v. Sunny's Limousine Serv., Inc.*, No. 13 Civ. 1581, slip op. at 3 (S.D.N.Y. Jan. 18, 2015) (attached as Ex. J to the Bien Decl.) (approving service awards of $30,000 to one named plaintiff and $10,000 each to five other named plaintiffs); *Ceka v. PBM/CMSI Inc.*, No. 12 Civ. 1711, 2014 WL 6812127, at *1 (S.D.N.Y. Dec. 2, 2014) (approving service award of $10,000 to class representative who provided factual information regarding the class members' job duties, the hours that they worked, and the wages they were paid, and who was closely involved in settlement negotiations); *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12 Civ. 4216, 2014 WL 3778173, at *16 (S.D.N.Y. July 31, 2014) (approving $10,000 service payments to four plaintiffs); *Lovaglio v. W & E Hospitality, Inc.*, No. 10 Civ. 7351, 2012 WL 2775019, at *4 (S.D.N.Y. July 6, 2012) (approving service payments of $10,000 each to class representatives in wage and hour action); *Sewell*, 2012 WL 1320124, at *15 (approving service payments of $15,000 and $10,000).

IV. The Ultimate Recovery Supports the Requested Payments.

The service payments amount to approximately 0.34% of the total recovery, which is a reasonable percentage. *See Reyes*, 2011 WL 4599822, at *9 (approving payments representing approximately 16.6% of the settlement); *Parker*, 2010 WL 532960, at *2 (finding that service

payments totaling 11% of the total recovery are reasonable "given the value of the representatives' participation and the likelihood that class members who submit claims will still receive significant financial awards"); *Frank*, 228 F.R.D. at 187 (approving payment of approximately 8.4% of the settlement).[3]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court approve service payments of $10,000 each to Plaintiffs Lauren Ballinger and Matthew Leib, in recognition of the risks they assumed and the efforts they made on the Class's behalf.

Dated: June 24, 2015
New York, NY

Respectfully submitted,
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[3] This case is distinguishable from *Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424 (S.D.N.Y. 2014). In *Fujiwara*, the court acknowledged the named plaintiffs' efforts and risks on behalf of the class but denied their application for service awards because the settlement allocation formula favored the named plaintiffs over other class members, providing them with a "back door" service award. *Id*. at 434-35. Here, the settlement allocation does not give preferential treatment to the Plaintiffs and treats them the same as other class members. Therefore, the concerns raised in *Fujiwara* about paying named plaintiffs a "back door" service award are not present in this case.