UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRUCE PADILLA,

Plaintiff,

-against-

U.S. SECURITY ASSOCIATES INC., a Delaware corporation,

Defendant.

Index No. 12 Civ. 7697 (JPO)(ADP)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT, SERVICE FEE, ATTORNEYS FEES AND COSTS

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PRELIMINARY STATEMENT

The parties settled this wage and hour action subject to the Court's final approval by payment by Defendant ("U.S. Security") of $525,000. That settlement was reached after negotiations conducted with the assistance of the U.S. Magistrate Judge. Plaintiffs now seek final approval of their Revised Joint Stipulation of Settlement and Release ("Settlement Agreement"). The motion is not opposed. The main settlement terms are: U.S. Security pays $525,000.00 on account of all wage claims, payroll taxes, prejudgment interest and $8,500.00 settlement administration. Individual awards will reflect each Security Officer's wage rate and number of alleged unpaid shift musters. Payments for alleged unpaid wages will be by payroll check less payroll tax deductions. Taxes will not be withheld from prejudgment interest awards. This is a claims-made settlement, but reversion of unclaimed settlement payments was capped by a formula which provided that if the total claimed Settlement Awards was less than 50% of the Net Settlement Payment, then the Settlement Award for each Qualified Claimant would be proportionately increased so that the amount actually distributed to Class Members shall equal 50% of the Net Settlement Payment. Any funds above 50% of the Net Settlement Payment that are not claimed remains the property of Defendant after judicial approval of a reversion application[1]. All class members who do not exclude themselves from the settlement will, with the Court's supervision, release all federal, state and local wage and hour claims that were or could have been asserted against U.S. Security in the lawsuit.

Additionally, the settlement provides that U.S. Security does not oppose awards from the settlement fund of: 1) a $10,000 Service Fee to Class Representative and Plaintiff Bruce Padilla; 2) attorneys' fees of $175,000 comprised of 1/3 of the $525,000 settlement amount; and 3) costs

[1] The reversion cap was not triggered because claims exceeded the 50% threshold.

and fees incurred in prosecuting this lawsuit in the amount of $3,153.05.

Plaintiff respectfully request that the Court: 1) grant approval of the Settlement Agreement attached at Stephen H. Kahn; Affirmation, Ex. A ("Kahn Aff.); 2) award a $10,000 Service fee to Class Representative Padilla; 3) award attorneys' fees of $175,000; and 4) award costs and fees in the amount of $3,153.05.

STATEMENT OF FACTS

A. The Claim

Plaintiff, a former Security Officer employed by U.S. Security, sued under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.* and New York Labor Law ("NYLL") Article 6 §§ 190 *et seq.* and Article 19 §§ 650 *et seq.* on behalf of himself and a putative collective group and Rule 23 class consisting of "all security personnel employed by U.S. Security in the State of New York." The Complaint alleges that until just after it received the Summons and Complaint, U.S. Security, a national security services company, required its security personnel ("Security Officers") to muster for Roll Call fifteen (15) minutes prior to the start of each work shift, yet failed to pay wages for this daily work time. This action sought compensation for unpaid work time including any unpaid overtime compensation, plus liquidated damages, interest, attorneys' fees, and costs.

U.S. Security admits that its Sony Site Security Officers are FLSA non-exempt employees. The parties stipulated that this action should proceed as a collective action and a certified Rule 23 Class Action for "all Security Personnel employed by U.S. Security at its Sony site" in Manhattan since October 15, 2006.[2] Defendant has employed a workforce of more than forty Security Officers at the midtown Manhattan site of its customer, Sony Corporation, since 2004. The Rule 23 class consists of 159 Security Officers employed by Defendant at the Sony Site in the six year period preceding the filing of the Complaint. These Security Officers received Court-approved notices informing them of their right to opt-in to the FLSA collective action and their right to opt-out of the certified Rule 23 NYLL action. 53 past and presently employed Security Officers opted-in; one opted-out.

B. The Settlement Negotiations; Ongoing Risks of Continued Litigation

Class Counsel made numerous attempts to resolve this suit at an early stage by settlement. The parties worked diligently with the Magistrate Judge. Counsel worked efficiently and effectively together. Negotiations were always conducted at arm's length. Settlement negotiations in this suit were not fruitful until the Magistrate Judge supervised discussions. The Court's involvement in the parties' settlement continued after the parties initially reached agreement. After Plaintiffs filed their August 8 motion for preliminary approval, the Court issued an Order dated August 12 and conducted several settlement conferences with the parties by telephone. As a consequence of that Order and those conferences, the parties revised the settlement agreement. The revisions simplified the Class Action Claim Form, capped the maximum possible reversion of unclaimed settlement funds and clarified the release language.

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[2] Plaintiffs narrowed the class after learning that in New York State Defendant's unlawful Roll Call practice was limited to the Sony site and *de minimis* violations for a brief period at another customer site.

Even though this litigation is at an advanced stage, Plaintiffs continue to face risk and delay if this action is not settled. Defendant contends that its alleged wage an hour violations are minimal because the evidence shows that it provides its Security Officers with a daily 30 minute paid lunch break. Plaintiffs dispute this evidence, but the resolution of this mixed issue of fact and law is not entirely clear. The resolution of the damage calculation would require a court-hearing. Notwithstanding Plaintiffs' confidence, significant risk and delay remain.

C. Class Representative's Service to the Class

Class Representative Padilla performed significant service for the class. He assisted Class Counsel's investigation by providing detailed factual information regarding the job duties of all Security Officers, the wages they were paid, the hours that they worked, and other information relevant to their claims. The Class Representative facilitated communication with the Class. He met with Security Officers to encourage them to join the FLSA collective action. The possible receipt of a Service Award did not influence the Class Representative in discharging his duty to the Class during settlement negotiations.

D. Class Counsel's Legal Service on Behalf of the Class; Challenges of this Litigation; Attorneys' Fees and Cost Application

The Affirmation dated December 2, 2013 by Class Counsel Stephen H. Kahn describes the challenges posed by this lawsuit and his activities on behalf of the Class. The Affirmation also describes his professional background and the factual basis for his attorneys' fees and cost applications. The Court is respectfully referred thereto.

SUMMARY OF THE SETTLEMENT TERMS

A. The Settlement Terms

The Parties agree, subject to the Court's approval, to settle this lawsuit for payment by U.S. Security of $525,000.00 (the "Settlement Payment") to resolve the wage and hour claims

including unpaid payroll taxes, settlement administration costs and for awards of a Service Fee, attorneys' fees, and costs. The Settlement Agreement provides for settlement administration by Simpluris Inc., a class action Settlement Administrator. U.S. Security was required to deposit the Settlement Payment with the Settlement Administrator within fifteen days after the Court entered an Order granting final approval of the Settlement. Awards to Security Officers will be paid on a claims-made basis with a reversion of any unclaimed monies (limited by the above descried reversion cap) to U.S. Security after motion to the Court. The allocation of the net settlement payment reasonably reflects each individual Class Member's proportional share of the total settlement. The factors determining individual awards include: individual hourly pay rates, the amount of alleged unpaid hours worked as calculated by payroll evidence, whether overtime was triggered and participation in the FLSA collective action. The net settlement payment to each individual class member represents full payment for all unpaid wages plus substantial prejudgment interest. As provided by the Settlement Agreement, the parties agreed on a specific allocation of the Settlement Payment to individual class members in accordance with the principles outlined above after the Court's preliminary approval of the Settlement (Allocation schedule at Kahn Affidavit Ex. B.). All class members who have not excluded themselves from the settlement will, with the Court's supervision, release all federal, state and local wage and hour claims that were or could have been asserted in the lawsuit. U.S. Security has agreed to award from the Settlement of: 1) a $10,000 Service Fee to each of the two Class Representatives; 2) attorneys' fees of one third of the $525,000 settlement amount, i.e. $175,000 and 3) costs and fees incurred in prosecuting this lawsuit in the amount of $3,153.05. The parties agree that all applicable W-2 payroll taxes should be withheld from payments made on account of wages. Non-wage damages, i.e., prejudgment interest, Service Fee and attorneys' fees shall be reported

on IRS Form 1099-MISC. There will be no withholding from these non-wage payments.

The Settlement Administrator, pursuant to the Settlement Agreement coordinated the implementation of the settlement including: mailing the Court-approved Notice of Class Action Settlement and Claim Forms plus a return, self-addressed stamped envelope to Class Members within fifteen (15) days after the Court's preliminary approval; conducting one skip trace to determine a current mailing address in the case of undelivered Notices and Claim Forms; sending a reminder notice; and filing with the Court a declaration and verifying that the Notice of Class Action Settlement and Claim Forms were mailed.

In order to receive a Settlement Award, each Class Member was required, within sixty (60) days of the mailing of the Notice of Class Action Settlement to return the Claim Form to the Settlement Administrator. The Settlement Administrator will pay individual claims within fourteen (14) days of receipt of a Court-issued Final Approval Order.

Unclaimed net Settlement Payment monies will not revert to U.S. Security prior to the issuance of a Court-Order. Thus, Plaintiffs retain the right to object to any individual reversion. The Settlement Agreement specifically bars retaliation against Class Members.

B. Class Action Settlement Procedure

The Court's September 12 Order found that the Settlement Agreement met the procedural requirements of a class action settlement including: 1) preliminary approval of the proposed settlement after submission to the Court of a preliminary approval motion; 2) notice of settlement to all affected class members; and 3) a final settlement approval hearing. The Settlement Agreement also provides for application for an award of attorneys' fees and costs by motion served on the parties and reasonable notice to the Class. See, Fed. R. Civ. Pr. 23(e) and (h). Simpluris' Declaration, attached to the Kahn Aff. as Ex. D shows that this settlement provisions

were complied with. As of this date, no objections to the settlement have been filed.

ARGUMENT

POINT I

FINAL APPROVAL OF THE SETTLEMENT AGREEMENT IS APPROPRIATE

Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e). However, the law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). The court's review of a settlement should be guided by "proper deference to the private consensual decision of the parties" because of "the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . ." *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, et al., 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). Whether a settlement is "fair, reasonable, and adequate" hinges upon both the settlement's substance and procedural concerns including whether arm's length negotiations were conducted by experienced counsel. *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803-04 (2d Cir. 2009). Substantive fairness is based upon an evaluation of the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974): (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 Defendant 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.

The Settlement Agreement, as revised after review by the Magistrate Judge, satisfies both substantive and procedural concerns. The zealous advocacy by both counsel and the involvement of the Magistrate Judge throughout settlement negotiations demonstrate that experienced counsel have advocated at arm's length. The "procedural" test is met.

The substantive *Grinnell* factors are all also satisfied:

- *Grinnell* Factor 1(complexity, expense, duration) - Even at the advanced stage of this litigation, Plaintiff are challenged by unresolved mixed questions of law and fact, cost and delay. Notwithstanding Plaintiff' confidence, significant risk and delay remain. Settlement addresses these concerns on terms that favor the class.
- *Grinnell* Factor 2 (reaction of class) - The reaction of the class to the Settlement Agreement has been positive as gauged by the high participation rate and the fact that no Class Member has objected to the settlement.
- *Grinnell* Factors 3 through 6 (risk factors) - The fact that this settlement occurred at a late stage in this litigation weighs in favor of satisfaction of *Grinnell* factors 3 through 6. Discovery is concluded. The Court permitted this suit to proceed as an FLSA collective action and has certified a Rule 23 class. The parties were able to resolve the case responsibly. Plaintiffs evaluated their risks including the risk of U.S. Security prevailing on its defense that after taking into account the daily paid lunch hours, the Security Officers are paid all wages required by law excepting some minor pay discrepancies. These *Grinnell* factors are all positive for settlement approval.
- *Grinnell* Factor 7 (ability to withstand a judgment) - U.S. Security apparently can withstand a judgment.

- *Grinnell* Factors 8 and 9 (reasonableness of settlement fund) - The settlement fund is substantial in light of the best possible recovery. This settlement achieves a significant recovery for the class especially when measured against the attendant risk and delay. Plaintiffs will receive full compensation for alleged unpaid wages. The potential "value added" from continued litigation does not appear to be great. The Settlement Agreement does not include liquidated damage because of the disputed evidence regarding this issue, but it includes generous prejudgment interest awards.

Both procedural and substantive factors favor granting final approval of the settlement.

POINT II

PLAINTIFFS ALSO SEEK APPROVAL OF THE FLSA SETTLEMENT

Plaintiff simultaneously seeks approval of the settlement of the FLSA collective claims when they file their motion for final settlement approval. 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 Intern. Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984); *see also McMahon v. Olivier Cheng Catering and Events, LLC*, 08 CIV. 8713 (PGG), 2010 WL 2399328 at *6 (S.D.N.Y. Mar. 3, 2010) ("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.")

POINT III

A REASONABLE SERVICE AWARD FOR THE CLASS REPRESENTATIVE SHOULD BE APPROVED

In FLSA collective actions and Rule 23 class actions, service awards 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 plaintiff. *Diaz v. Scores Holding Co., Inc.,* 07 CIV. 8718 THK, 2011 WL 6399468 (S.D.N.Y. July 11, 2011) (collecting cases). Service payments foster the public policy goal of encouraging employees to undertake the arduous and sometimes risky class representative burden of acting as private attorneys general. *Matheson v. T-Bone Rest., LLC,* 09 CIV. 4214 DAB, 2011 WL 6268216 (S.D.N.Y. Dec. 13, 2011) reports that:

> Courts routinely approve similar service awards in wage and hour class and collective actions. See, e.g., *Willix v. Healthfirst, Inc.,* No. 07 Civ. 1143, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (finding service awards in wage and hour action of $30,000, $15,000, and $7,500 to be reasonable); *Mentor v. Imperial Parking Sys., Inc.,* No. 05 Civ. 7993, 2010 WL 5129068, at *1–2 (S.D.N.Y. Dec. 15, 2010) (granting $40,000 and $15,000 service awards in wage and hour action, where named plaintiffs were actively involved in prosecuting the case over its five-year pendency); *Duchene v. Michael Cetta, Inc.,* No. 06 Civ. 4576, 2009 WL 5841175 (S.D.N.Y. Sept. 10, 2009) (approving service payments of $25,000 and $10,000 in wage and hour action).

The $10,000 amount requested is not large in relationship to the $525,000 settlement. The service award request is justified in this case.

POINT IV

A FEE AWARD TO
CLASS COUNSEL
OF ONE-THIRD
OF THE SETTLEMENT FUND
IS REASONABLE

The FLSA and NYLL both provide for an award of reasonable attorneys' fees to a successful plaintiff. *See* 29 U.S.C. § 216(b); NY Labor Law §198(1–a). The Settlement Agreement provides that U.S. Security does not oppose this application by Class Counsel for attorneys' fees of $175,000 (1/3 of the $525,000 settlement). From the outset of this suit, the Security Officer class was advised by the court-approved notice that Class Counsel may apply for one-third of the monetary recovery. The attorneys' fees request is reasonable and well within the range approved by courts in similar cases.

A. The Percentage Method Fee Awards Are Preferred

In wage and hour class action lawsuits, public policy favors attorneys' fee awards based upon a percentage of the common fund, as opposed to a loadstar method. *Reyes v. Altamarea Grp., LLC*, No. 10 Civ. 6451, 2011 WL 4599822, at *7 (S.D.N.Y. Aug. 16, 2011). See, *McDaniel v. County of Schenectady*, 595 F.3d 411, 417 (2d Cir. 2010); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005). The percentage method "directly aligns the interests of the class and its counsel" because it provides an incentive to attorneys to resolve the case efficiently and to create the largest common fund out of which payments to the class can be made. Also, the percentage method "relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." *Wal-Mart Stores,* 396 F.3d at 122; *Karpus v. Borelli*, Nos. 02 Civ. 6527 & 03 Civ. 1194, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004).

B. The *Goldberger* Factors Support an Award of One-Third of the Fund

Regardless of which method the Court applies to award attorneys' fees, it should evaluate the six factors enumerated in *Goldberger v. Integrated Res. Inc.*, 209 F.3d 43, 48-50 (2d Cir. 2000): (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. The instant fee application passes muster under the *Goldberger* factors:

- *Goldberger Factor 1* – (Counsel's Time and Labor): Class Counsel spent significant time to achieve the $525,000 settlement. Counsel and the Class representative achieved an extremely high FLSA collective action participation rate. Detailed fact discovery was pursued including approximately nine depositions, multiple supplemental discovery requests, negotiations to resolve discovery disputes and a discovery dispute sanction application. Preliminary issues were resolved on terms favorable to Plaintiffs through negotiation including: i) collective action and class certification; ii) inclusion of Security Officers who were assigned to work an adjacent related retail location; and iii) inclusion of shift supervisors as collective and class members. Plaintiffs developed substantial evidence to cast doubt on the viability of Defendant's main substantive defenses and to establish a credible possibility that Plaintiffs might be entitled to liquidated damages. Class Counsel made numerous attempts to resolve this suit at an early stage by settlement. The parties worked diligently with the Magistrate Judge. Class Counsel worked efficiently and effectively.

- *Goldberger Factor 2* (Magnitude and Complexity): Ordinary wage and hour cases involve complex legal issues, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981). ("FLSA claims typically involve complex mixed questions of fact and law . . . .") "Hybrid"

actions combining federal and state wage claims magnify the complexity.

- *Goldberger Factor 3* (Risk of Litigation): The possibility that U.S. Security's "paid lunch break" defense might be accepted meant that there might be no recovery at all. Plaintiffs risked a rejection of their claims. The risk in a lawsuit of this type is compounded by the fact that Plaintiff began with limited information and evidence. Class Counsel prosecuted this action on a contingency fee basis without any assurance of payment for their services. Class Counsel knew at the outset that a significant investment of time and resources would be required. Under these circumstances, the risk of recovery for the Class and for Class Counsel was significant.
- *Goldberger Factor 4* (Quality of Representation): Class Counsel respectfully submits his work product in this case demonstrates his dedication to the best interests of the class and his effectiveness as an advocate.
- *Goldberger Factor 5* (Fee in Relation to the Settlement): Class Counsel's one third fee request is "consistent with the norms of class litigation in this circuit." *Morris v. Affinity Health Plan, Inc.*, 09 CIV. 1932 ALC, 2012 WL 1608644 at * 10 (S.D.N.Y. May 8, 2012)(approving one-third of the $833,333.33 fund); *Sewell v. Bovis Lend Lease, Inc.*, 09 CIV. 6548 RLE, 2012 WL 1320124 (S.D.N.Y. Apr. 16, 2012)(approving one-third of the total settlement payment of $2,350,000, or $843,340 and collecting cases approving one-third payments).
- *Goldberger Factor 6* (Public Policy Considerations): Public policy considerations favor granting the fee application. Adequate compensation for attorneys who protect employees' rights by aggregating relatively small individual wage and hour claims furthers the remedial purpose of the FLSA and NYLL. *Khait v. Whirlpool Corp.*, 06-6381 (ALC), 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20, 2010). Attorneys might be unwilling to take on the risk of class wage and hour litigation without the possibility of fair compensation.

C. The Lodestar Cross Check Further Supports This Fee Application

The lodestar method provides a rough "baseline" "cross check" of the reasonableness of percentage method fee awards. *Goldberger*, 209 F.3d at 50. In calculating the lodestar for cross check purposes, the "hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.*

Here, Class Counsel seeks a lodestar multiplier of approximately **1.98** on time spent litigating and settling the case which is on the low end of the range normally sought in hybrid FLSA and NYLL class action suits. The loadstar cross check provides such a margin of reasonableness that even if the Court reduced the loadstar by reducing the hourly rate, or hours charged, or both, the multiplier could still be well within the range typically approved by courts in this type of lawsuit. *Johnson v. Brennan*, 10 CIV. 4712 CM, 2011 WL 4357376 (S.D.N.Y. Sept. 16, 2011) ("Courts regularly award lodestar multipliers from two to six times lodestar"); Multipliers of the loadstar figure in FLSA cases in excess of 4 are regularly approved. *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172 (W.D.N.Y. 2011), (collecting cases).

POINT V

CLASS COUNSEL IS ENTITLED TO REIMBURSEMENT OF COSTS

Class Counsel requests reimbursement of $3,153.05 in combined taxable expenses and out-of-pocket costs to be paid from the Fund. The fees and costs include necessary expenses such as filing fees, expert fees, photocopy charges, postage for mailings to the class, and the purchase of transcripts. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were "incidental and necessary to the representation' of those clients." *In re Indep. Energy Holdings PLC Sec. Litig.*, 302 F. Supp. 2d

180, 183 n.3 (S.D.N.Y. 2003) (internal quotation marks omitted).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully request that the Court issue an Order an Order: 1) granting final approval of the parties' Revised Joint Stipulation of Settlement and Release; 2) awarding a $10,000 Service Fee to the Class Representatives; 3) awarding attorneys' fees in the amount of $175,000; and 4) awarding costs and fees incurred in prosecuting this lawsuit in the amount of $3,153.05.

Dated: December 2, 2013

Respectfully submitted,

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