UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LUDWIG, on behalf of himself and all others similarly situated, Plaintiff, v. PRET A MANGER (USA), Ltd., d/b/a PRET A MANGER Defendant.	Index No. 11 CV 5677 (BSJ)(AJP)

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL SETTLEMENT APPROVAL, FINAL CLASS CERTIFICATION AND COLLECTIVE ACTION DESIGNATION, APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL AND APPROVAL OF RELEASES

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The Parties respectfully submit this memorandum of law in support of their joint motion for: (1) final settlement approval; (2) class certification and collective action designation; (3) appointment of class representatives and class counsel; and (4) approval of class and individual releases.

PRELIMINARY STATEMENT

This action is brought by Plaintiff on behalf of himself and 171 current and former employees of Defendant Pret a Manger (USA), Ltd., d/b/a Pret a Manger ("Pret" or the "Company") who participated in the Company's Manager-In-Training program (the "Class"). The Parties are pleased to present to the Court for final approval a proposed settlement of the action (the "Settlement") pursuant to which Pret will pay $299,000.00 to compensate eligible Class members, pay attorneys' fees and service awards as awarded by the Court, and facilitate administration of the Settlement.

As set forth in the accompanying Joint Declaration of Lee S. Shalov and Louis Ginsberg (the "Declaration"), the Settlement was reached after substantial discovery, extensive face-to-face and telephonic negotiations between the parties and their counsel, and a comprehensive mediation session overseen by Magistrate Judge Andrew J. Peck. As a result of these efforts, the Settlement will repay most -- if not all -- of the overtime compensation Class members could expect to receive had Plaintiff achieved a complete victory after trail and overcome the many legal and factual obstacles faced throughout the litigation. Notably, not a single member of the Class has filed an objection to the Settlement, and only two individuals have requested to be excluded. For these and other reasons described below, the Parties respectfully submit that the Settlement is "fair, reasonable and adequate" for purposes of Federal Rule 23(e), and, accordingly, should be finally approved by the Court.

In connection with requesting final approval, Plaintiff also requests that the Court: (i) finally certify the Class pursuant to Federal Rule 23, and, as to individuals who opted into the litigation, confirm designation of the collective action conditionally certified by the Court in its February 29, 2012 Order preliminarily approving the Settlement (the "Order Granting Preliminary Approval"); (ii) confirm appointment of Plaintiff and Class member Christopher Thireos ("Thireos") as Class representatives and Plaintiff's attorneys as counsel for the Class; and (iii) approve the Class release and individual releases of Plaintiff and Thireos as fair.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Pret owns and operates over 34 restaurants in the United States, most of which are in New York. Pret's restaurants are run by a general manager and one or more assistant managers, depending on the size of the store. Decl., ¶ 3.

Every manager (whether assistant manager or store manager) is required to take Pret's Manager In Training program. Since August 2005, the length of the program has increased from eight to ten weeks, to ten to twelve weeks, and, more recently, to sixteen weeks. Every new hire must pass the program to work as a manager. Decl, ¶ 4.

During the relevant period, each Class Member was given a fixed salary and classified as exempt for purposes of applicable labor laws. As a result, Plaintiff asserts, Class members were not paid overtime by Pret during the Manager In Training program, even if they worked in excess of 40 hours per work week. Decl., ¶ 5.

Procedural History and Discovery

This action was commenced on August 16, 2011. As alleged in the Complaint, Plaintiff and other Class members in the Manager-In-Training program regularly worked overtime at

Pret's restaurants without receiving appropriate compensation. Accordingly, on behalf of himself and other trainees, Plaintiff asserted claims against Pret under applicable overtime provisions of the Fair Labor Standards Act "(FLSA") and the New York Labor Law ("NYLL"). Decl., ¶¶ 2,7.

As described in the Declaration, Plaintiff's counsel undertook an extensive investigation regarding the claims asserted in the action. Among other things, Plaintiff's counsel conducted telephonic interviews of Mr. Ludwig and other assistant managers, including Mr. Thireos; reviewed pay stubs and other employee records; conducted internet research regarding Pret's employment policies; and visited Pret stores in the New York area. Plaintiff's counsel also consulted with an expert in wage and hour law regarding legal and damage-related issues associated with Plaintiff's claims. In addition, Plaintiff's counsel conducted extensive legal research regarding classification, damage and class certification issues under the FLSA and NYLL. Decl., ¶ 8.

Extensive discovery then ensued after Magistrate Judge Andrew J. Peck issued a Scheduling Order on September 27, 2011. Among other things, Plaintiff's counsel reviewed thousands of pages of Pret documents, including employee and training manuals; pay stubs and payroll data; employee compensation records; and documents from various Pret stores. Plaintiff's counsel also deposed a Pret Operations Manager, who testified about the function and duration of the Manager In Training program; the job duties of assistant managers; the scope of an assistant manager's responsibilities and authority; training and employee manuals; the work flow process at Pret stores; and other employee-related issues. Plaintiff and Thireos themselves responded to Pret's interrogatories and produced documents responsive to Pret's requests for documents. Decl., ¶ 9.

Settlement Negotiations

While discovery was underway, the parties engaged in a number of telephonic conversations, e-mail exchanges and face-to-face meetings regarding the possibility of settlement. While these efforts were productive, the parties continued to have disagreements regarding the existence and measure of Class member damages, and, consequently, were far apart in their settlement offers and demands. As a result, the parties agreed to participate in a settlement conference before Magistrate Judge Peck. Decl., ¶ 10.

The settlement conference was held on December 15, 2011. After extensive arm's-length negotiations under Judge Peck's guidance, the parties reached a preliminary agreement to settle the action for the sum of $299,000. Over the next several weeks, the parties agreed on the remaining settlement terms, all of which are memorialized in a Global Settlement Agreement (the "Agreement"), attached to the Declaration as Exhibit 1. Decl., ¶ 11.

As part of the Agreement, Plaintiff agreed to amend his Complaint to assert claims on behalf of assistant managers employed at Pret restaurants in Illinois and the District of Columbia. In accordance with that agreement, Plaintiff filed his Amended Complaint on February 22, 2012, thereby entitling additional Pret employees to participate in the Settlement. Decl., ¶ 12.

On February 29, 2012, the Court entered the Order Granting Preliminary Approval of the Settlement on behalf of "Class Members." As defined in the Agreement, a "Class Member" means all current and former employees who participated in Pret's Manager In Training program at any time during the "Covered Period." *See* Exhibit 1, ¶ 1.4. The term "Covered Period" means the following: for employees who participated in the Manager In Training program in the State of New York, from August 16, 2005 to the date of the Order Granting Preliminary

Approval, and for employees who participated in the program in Illinois or Washington, D.C., from August 16, 2008 to the date of the Order Granting Preliminary Approval. *Id.*, ¶ 1.5.

Terms of the Settlement and Allocation Formula

As described above, Pret has agreed to settle this action for $299,000 (the "Total Settlement Amount"). The Total Settlement Amount covers settlement payments to Class Members who execute a Claim Form and Release (*i.e.*, "Qualified Class Members"), service payments for Messrs. Ludwig and Thireos, attorneys' fees and reimbursement of litigation expenses, and reasonable costs of settlement administration. The settlement payments shall be calculated by the Claims Administrator (Rust Consulting, Inc.) as follows:

- The Claims Administrator shall determine a "Net Settlement Amount," which shall equal the Total Settlement Amount minus a reserve set aside for reasonable costs of settlement administration, the amount of attorneys' fees and reimbursement for costs approved by the Court, and the service payments to Plaintiff and Mr. Thireos. *See* Exhibit A, ¶ 3.4(D)(2).

- The Settlement Payment of each Class Member who worked no more than a day in the Manager-in-Training program and/or did not work beyond their On-The-Job Evaluation shall be $50 ("Alternate Payment"). *Id.*, ¶ 3.4(D)(2).

- Each Class Member's Settlement Payment, other than individuals receiving Alternate Payments, shall be calculated as follows: Divide the Net Settlement Amount, less the Alternate Payments, by the total number of Class Members, less the number of Class Members who are eligible only for the Alternate Payments. *Id.*, ¶ 3.4(D)(3).

- Any funds allocated to but not claimed by Class Members will be donated to charity. *Id.*, ¶ 3.4(E).

Decl., ¶ 15.

The Agreement provides that every Class Member who does not timely opt out of the Settlement will release Pret from, among other things, claims based on federal and state wage and hour laws during such individual's participation in Pret's Manager-In-Training program.

Exhibit 1, ¶¶ 2.7, 4.1. In addition, by signing a Claim Form and Release, each Class Member acknowledges that he or she opts into the action pursuant to 29 U.S.C. § 216(b). *Id.*, ¶ 2.7.

In addition to receiving compensation for unpaid wages under the Settlement, the Settlement Agreement provides that Plaintiff's counsel will apply for service payments for Plaintiff Ludwig (up to $10,000) and Class Member Thireos (up to $2,500), and that Defendant's counsel will not oppose such application. *Id.* ¶ 3.3(A). Both Messrs. Ludwig and Thireos played active and important roles during the litigation, conferring with Plaintiff's counsel, responding to interrogatories and document requests, providing comments to pleadings and other litigation documents, and executing affidavits. In addition, Mr. Ludwig attended the mediation session before Magistrate Judge Peck and provided valuable assistance to Plaintiff's counsel during that proceeding. Decl., ¶ 17.

Claims Administration and Notice

The parties retained the services of Rust Consulting, Inc. ("Rust"), an experienced wage and hour claims administrator, to administer the Settlement. Attached to the Declaration as Exhibit 2 is the Declaration of Stacy Roe, Rust's Senior Project Administrator (the "Roe Decl.").

On March 30, 2012, Rust mailed the Court-approved Notice (the "Notice") to 172 Class Members. To the extent Pret had e-mail addresses, Rust also e-mailed the Notice to 138 Class Members. Roe Decl., ¶ 9.

A total of 55 claim forms were forwarded to Rust by Class Members. Of these 55 forms, 14 had deficiencies, one of which remains uncured, leaving 54 Class Members with valid claims. *Id.*, ¶ 12. Two Class Members have requested exclusion from the Class. *Id.*, ¶ 13.

The Notice advised Class Members that they could object to the Settlement. *Id.*, Exhibit A, ¶ 2.8. As of the date of this Declaration, not a single Class Member objected to the Settlement or counsel's request for attorneys' fees and reimbursement of expenses. *Id.*, ¶ 14.

ARGUMENT

I. The Proposed Settlement Is Fair, Reasonable, And Adequate, And Should Be Approved

Federal Rule 23(e) requires court approval for a class action settlement to ensure that it is procedurally and substantively fair, reasonable, and adequate. 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 assess whether the settlement's terms are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) ("*Grinnell*"). These inquiries are made in light of the "strong judicial policy in favor of settlement" of class action suits. *Wal-Mart Stores*, 396 F.3d at 116 (internal citation omitted); *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238, 2005 U.S. Dist. LEXIS 10848, at *19-20 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions.")

A. Procedural Fairness Considerations Support Approving The Settlement

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, Third*, § 30.42 (1995)); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). If the settlement was achieved through experienced counsels' arm's length negotiations, "[a]bsent 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.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 17, 2007); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D.Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." [internal quotations omitted])

In this case, the Settlement was reached only after multiple and lengthy negotiations between counsel and a comprehensive mediation session overseen by Magistrate Judge Peck. This process involved substantial give-and-take between the parties and their counsel regarding Class Member damages and a host of other substantive and procedural issues. Moreover, Plaintiff's counsel had the benefit of substantial document and deposition discovery that allowed them to negotiate the Settlement and assess its adequacy on a fully informed basis. *See* Decl., ¶¶ 8-11. Thus, this factor favors approval of the Settlement.

B. The Second Circuit's Standard For Examining Substantive Fairness of Class Action Settlements Favors Granting Final Approval

In *Grinnell*, the Second Circuit articulated the analytical framework for evaluating the substantive fairness of a class action settlement. *Grinnell*, 495 F.2d 448 (2d Cir. 1974). This framework is known as the *Grinnell* factors, and guides a court's analysis based on the following considerations: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the state 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. *Id.* at 463. Here, the *Grinnell* factors weigh heavily in favor of final approval of the Settlement.

1. Litigation Through Trial Would Be Complex, Costly, And Lengthy

"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). This case was no different. Among other things, there were difficult factual and legal issues regarding the exempt or non-exempt status of participants in Pret's Manager-In-Training program. Even if Class Members were found non-exempt during the program, there were complex questions regarding the number of overtime hours worked and the applicability of the fluctuating workweek method in determining the amount of overtime compensation Class Members should be paid. *See* Decl., ¶¶ 18-20.

Further, substantial merits and expert discovery remained to be completed, necessitating significant financial expenditures by both parties. Further, a trial of these issues would consume tremendous amounts of time and resources and require substantial judicial resources to adjudicate and resolve. Moreover, any judgment would likely be appealed, thereby extending the duration of the litigation even further. In these circumstances, the complexity, cost and likely duration of this litigation militate in favor of the Settlement.

2. The Reaction of the Class Has Been Overwhelmingly Positive

"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, 362-63 (S.D.N.Y. 2002). Lack of objection to a settlement strongly favors judicial approval. *See Ross v. A.H. Robins Co., Inc.*, 700 F.Supp. 682, 684 (S.D.N.Y. 1988)

(noting that "[t]he absence of objectants may itself be taken as evidencing the fairness of the settlement.") Here, because not a single member of the Class has registered an objection (Roe Decl., ¶ 14), this factor militates in favor of approving the Settlement.

3. Discovery Has Advanced Far Enough To Allow The Parties To Resolve The Action

Although preparing this case through trial would require additional discovery, the Parties have completed more than enough discovery to recommend a settlement. The proper inquiry 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, 527 (3d Cir. 2004). "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify … [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 at 176 (internal quotations omitted).

As described in the Declaration, Plaintiff's counsel conducted substantial formal and informal discovery during the course of the litigation. This included review of employee and training manuals; pay stubs and payroll data; employee compensation records; and documents from various Pret stores. Plaintiff's counsel also deposed a Pret Operations Manager who testified about the Manager In Training program; the job duties of assistant managers; the scope of an assistant manager's responsibilities and authority, training and employee manuals; the work flow process at Pret stores; and other employee-related issues. Plaintiff's counsel also interviewed a number of participants in Pret's Manager-In-Training program regarding their roles and job responsibilities during the program and the amount of overtime they worked during their training periods. Plaintiff's counsel also consulted extensively with an expert in wage and hour law regarding evidentiary and legal issues associated with the action. Decl., ¶¶ 8, 9. This

discovery was more than sufficient to allow counsel during settlement negotiations to make informed assessments regarding the strength of Plaintiff's claims and Pret's defenses.

4. Plaintiff Would Face Significant Risks If The Case Proceeded

"Litigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Indeed, "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). In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp. 2d at 177 (internal quotations omitted).

Counsel believes the Settlement represents an excellent result for members of the Class given the substantial risks Plaintiff would have confronted had the case been litigated to trial. For example, a significant obstacle existed in proving that Class Members were misclassified as exempt during the Manager In Training program. In this regard, Pret would have argued at trial that Class Members performed a number exempt executive and administrative tasks during their training period, such as opening and closing stores, hiring and firing employees and making operational decisions. Had Pret succeeded in proving that Class Members were properly exempt from overtime compensation during all or part of the training period, that result could have severely reduced -- if not entirely eliminated -- Class Members' recoverable damages.

A further risk existed in proving the number of overtime hours Class Members worked during Pret's training program. In this regard, Pret asserted that Class Members worked little, if any, overtime during the initial weeks of the training program and contested Plaintiff's assertion that trainees regularly worked in excess of 20 hours of overtime per week. In addition, since Pret

did not require trainees to record their time on a daily or weekly basis, Plaintiff faced a hurdle in establishing the number of overtime hours worked by each member of the Class. Clearly, had Pret succeeded in demonstrating that Class Members worked limited amounts of overtime during the training program, the amount of recoverable damages would have been substantially reduced.

Yet an additional obstacle Plaintiff would have confronted was refuting Pret's assertion that it could apply the fluctuating workweek doctrine ("FWW") to the payment of overtime. If the FWW method applies, overtime damages are calculated on a half-time basis (*i.e.*, the employee's straight time hourly rate is multiplied by 50% to produce the overtime rate that must be paid for every hour worked beyond 40 that week.) By illustration, an hour of overtime under the FWW method based on an hourly rate of $20.00 would be $10.00 if the FWW applies, while an hour applying a 1.5 hourly rate of overtime would be $30.00. Had the Court accepted Pret's assertion that the FWW method should apply in calculating the amount of compensable overtime, Class Members would have received far less than the amount offered under the Settlement.

Thus, while Plaintiff's case is strong, it is plainly subject to non-negligible risks as to liability and damages. The Settlement alleviates this uncertainty. Therefore, *Grinnell* factors four and five weigh heavily in favor of final approval.

5. Maintaining A Class Through Trial Would Be Difficult

The risk of maintaining class action status through trial is also present. Although Pret concedes that class certification is appropriate for settlement purposes, absent a settlement, Pret would have vigorously opposed Plaintiff's motions for collective and class certification, asserting, for example, that individual issues regarding job responsibilities and damages would render a trial unmanageable. Even if the Court rejected those arguments and granted

certification, Pret would likely move to decertify before trial, thereby forcing another round of briefing. *Chatelain v. Prudential-Bache Sec.*, 805 F.Supp. 209 at 214 (S.D.N.Y. 1992). ("Even if certified, the class would face the risk of decertification.") In light of these difficulties, the sixth *Grinnell* factor weighs heavily in favor of final approval of the Settlement.

6. The Settlement Fund Is Substantial, Even In Light Of The Best Possible Recovery And The Attendant Risks of Litigation

The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174 at 186 (W.D.N.Y. 2005) (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. "It is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 628 (9th Cir. 1982).

Applied here, eligible Class Members will receive far more than a "fractional" share of their potential recovery. For example, assuming each Class Member worked 100 hours of overtime during an eight week training program and had an average hourly wage of $18 per hour, the damages for a Class Member would be approximately $900 applying the FWW method urged by Pret. By way of comparison, dividing the Total Settlement amount by the total number

of Class Members (172) yields a recovery of approximately $1,738 per Class Member, less attorneys' fees, service payments and administrative expenses.

For these reasons, it is clear that the *Grinnell* factors all weigh in favor of issuing final approval of the Settlement. Because the Settlement is "'fair, adequate, and reasonable, and not a product of collusion," the Court should grant final approval. *Frank*, 228 F.R.D. at 184.

II. The Court Should Grant Class Certification And Final Collective Action Designation

Under the FLSA, an action may be maintained by an employee or employees on behalf of others who are "similarly situated." 29 U.S.C. § 216(b). This Court, in the Order Granting Preliminary Approval, has previously provisionally certified Plaintiff's FLSA claims under 29 U.S.C. § 216(b). No member of the Class has objected to collective action certification and 54 Class Members opted in. For these reasons, and the reasons generally set forth in Plaintiffs' Motion for Preliminary Approval, the Court should confirm collective action designation for purposes of settlement of this matter.

Similarly, no Class Member has objected to certification of the Class under Rule 23. For the reasons set forth in Plaintiff's Motion for Preliminary Approval, this Court should grant final certification of the Class.

III. Final Approval Of The Agreement's Release Language, As Well As That Contained In The Claim Form And Individual Releases, Is Appropriate

A. The Release In The Settlement Agreement Is Fair

For Plaintiff and all Class Members who have not opted out of the settlement, the Agreement and the Claim Forms and Individual Releases release claims that are "based upon federal, state or local laws governing overtime pay, wage requirements, or hours worked or that otherwise arise out of or relate to the facts, acts, transactions, occurrences, events or omissions

alleged in the Litigation, and that arose during the initial five months of such individual's employment in an exempt position in a Pret store and/or during such individual's participation in Pret's Manager-In-Training program." *See* Agreement ¶ 4.1; *see also* Agreement ¶ 4.2 (Class Counsel releasing claims for attorneys' fees and costs.) Courts routinely approve such releases in class actions. *See, e.g., Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 n.6 (8th Cir. 1993); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001); *In re VMS Sec. Litig.*, 21 F.3d 139, 140-41 (7th Cir. 1994).

The releases include a waiver of FLSA claims. Such a release is proper when it reflects a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-53 (11th Cir. 1982). Here, the Parties had a "bona fide dispute over FLSA provisions" reflected in hard fought and time consuming discovery and mediation. After assessing the relative strengths and weaknesses of their respective positions, experienced class counsel engaged in arms-length negotiations resulting in a $299,000 settlement fund. To receive a proportionate share of the fund, all a Class Member had to do was timely execute and return to the Claims Administrator a Claim Form and Release in a pre-paid envelope. This is a "reasonable compromise" of a bona fide dispute. *Frank*, 228 F.R.D. at 187.

B. The Individual Releases Are Fair

As part of the Settlement, David Ludwig and Chistopher Therios have signed individual releases in which they will waive all claims that arose up through and including the date they signed the release. The individual releases include a waiver of, *inter alia*, FLSA claims. Specifically, Therios and Ludwig signed the releases in exchange for the opportunity to receive any court-approved service payment. These amounts were negotiated by experienced Class

Counsel in arm's-length negotiations. Accordingly, the Parties ask the Court to approve the individual releases as fair.

Under the FLSA, a settlement that results in waiver of FLSA claims should be approved when it is "entered as part of a stipulated judgment approved by the court after scrutinizing the settlement for fairness." *Lynn's Food Stores, Inc.*, 679 F.2d at 1352-53. In this regard, courts in the Second Circuit look to whether the agreement reflects a "reasonable compromise" of disputed issues. *Frank*, 228 F.R.D. at 187; *see also Lazzarini v. Reinwald Bros. Bakery Corp.*, No. 08-CV-2264 (JS)(WDW), 2009 WL 1941215, at *1 (E.D.N.Y. June 29, 2009).

Accordingly, the Court should grant final approval of the release language contained in the Agreement and the Claim Form and Individual Releases.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court: (i) approve the Settlement in its entirety; (ii) finally certify the Class; (iii) confirm appointment of Plaintiff and Christopher Thireos as class representatives and Plaintiff's Counsel as counsel for the Class; and (iv) approve the class release and individual releases of Plaintiff and Christopher Thireos.

Dated: June 29, 2012
New York, New York

Respectfully submitted,

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