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

MANUEL A. TRINIDAD, on behalf of himself, FLSA Collective Plaintiffs and the Class, Plaintiffs, v. PRET A MANGER (USA) LIMITED, et al., Defendants.	No. 12 Civ. 9064 (PAE)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT, FINAL CLASS CERTIFICATION AND COLLECTIVE ACTION DESIGNATION, AND APPROVAL OF THE CLASS AND INDIVIDUAL RELEASES

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INTRODUCTION

Plaintiff, Manuel Trinidad ("Plaintiff") with no opposition from Defendants Pret a Manger (USA) Ltd. ("Pret"), Pret 100 Church Street, Inc., Pret 1020 Sixth Avenue, Inc., Pret 11th and F Street DC Inc., Pret 1200 Avenue Of the Americas Inc., Pret 122 East 42, Inc., Pret 1350 Broadway, Inc., Pret 1399 New York Avenue Inc., Pret 1410 Broadway, Inc., Pret 1432 K Street, Inc., Pret 179 Broadway, Inc., Pret 1825 Eye Street, Inc., Pret 1828 L Street, Inc., Pret 185 Franklin Street Inc., Pret 2 Park Avenue, Inc., Pret 201 Pearl Inc., Pret 24 West 23rd Inc., Pret 319 Broadway Inc., Pret 342 7th Inc., Pret 350 Hudson, Inc., Pret 389 Fifth, Inc., Pret 425 Lex, Inc., Pret 425 Madison Inc., Pret 485 7th Avenue, Inc., Pret 485 Lexington Inc., Pret 50 Broadway, Inc., Pret 501 Boylston Street, Inc., Pret 62 West 45th Inc., Pret 655 Sixth Avenue Inc., Pret 708 Third Avenue, Inc., Pret 75 Nassau, Inc., Pret 757 Third Inc., Pret 821 Broadway, Inc., Pret 825 Eighth Avenue, Inc., Pret 853 Broadway, Inc., Pret 857 Broadway, Inc., Pret 880 Third Avenue, Inc., Pret A Manger-237 Park Avenue, Inc. (with Pret, the "Defendants," and together with Plaintiff, the "Parties") respectfully submits this memorandum of law in support of Plaintiffs' motion for final approval of the Parties' settlement ("Motion for Final Approval").

This case involves claims that certain non-exempt (hourly) employees of Pret were not paid all their overtime and other wages due. The Parties are pleased to present to the Court for final approval a proposed settlement of the action pursuant to which Pret will pay $910,000, which covers class member awards, attorneys' fees and costs, service awards as awarded by the Court, and a reserve set aside for reasonable costs of administration of the settlement. The Parties' $910,000.00 settlement of this wage and hour class and collective action satisfies all of the criteria for final approval. As set forth in the accompanying declaration of C.K. Lee (the "Lee Decl."), the settlement was reached after substantial discovery, extensive negotiations

between the Parties and their counsel, and a comprehensive 18-hour mediation session overseen by mediator Michael Young of JAMS. Moreover, the settlement is in line with the strength of Plaintiff's claims given the risk, expense, complexity and likely duration of further litigation. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005). Notably, not a single member of the Class[1] has filed an objection to the settlement, and only 22 individuals have timely requested to be excluded, representing under 1% of the Class. 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.

Plaintiff also seeks an order: (1) granting final class certification and collective action designation; (2) approving as fair the individual releases of the Plaintiff and opt-in Plaintiffs Janckell Fermin, Jason Fermin, Prospero Trinidad and Solange Tronoco ("Opt-In Plaintiffs") and the class release, and (3) confirm as final the appointment of Class Counsel and the Class Representative, and approve the form and manner of notice distribution and the reserve set aside for the costs of claims administration. Since the Settlement Agreement fully and fairly resolves the claims in this matter, the Parties also request that the Court enter judgment and dismiss this case with prejudice in accordance with, and subject to, the terms of the Global Settlement Agreement.[2]

[1] Unless otherwise noted, this memorandum of law incorporates the same definitions for capitalized terms used in the Settlement Agreement, attached to the Declaration of C.K. Lee as Exhibit 1.

[2] By separate motions, Class Counsel will apply for attorneys' fees and costs and seek service payments for the Plaintiff and Opt-In Plaintiffs.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural History

On August 9, 2012, a Class and Collective Action Complaint was filed against Defendants pursuant to Federal Rule of Civil Procedure 23 and 29 U.S.C. § 216(b), alleging violations of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). On December 27, 2012, Plaintiff filed an Amended Complaint. Plaintiff alleged that Defendants failed to pay he and other non-exempt employees for all the hours they worked due to time shaving (including overtime pay), and, that Defendants improperly pooled tips, failed to provide accurate wage statements and wage notices, and failed to provide spread of hours and call-in pay, among other claims.

On January 15, 2013, Plaintiff filed a motion to conditionally certify an FLSA collective action for notice purposes ("FLSA Notice Motion") consisting of current and former non-exempt employees at Pret's 35 locations in New York City. During the briefing, on March 9 and 11, 2013, the Opt-In Plaintiffs opted-in and filed consents to sue. Following briefing and extensive supplemental briefing, on July 11, 2013, the Court granted Plaintiff's FLSA Notice Motion in part, authorizing the mailing of notice of the FLSA claims to all non-exempt employees who have worked at Pret during the three years prior to the filing of the Amended Complaint at only six of Pret's approximately 35 stores in New York City: 1200 Avenue of the Americas, 630 Lexington Avenue, 50th Street and 7th Avenue, 32nd Street and Park Avenue, 48th Street and Madison Avenue, and 16th Street and Broadway. Notice was subsequently sent to 941 individuals, and as a result, an additional 23 plaintiffs opted-in and filed consents to sue.

II. Investigation and Discovery

Prior to reaching the settlement, Plaintiff's Counsel engaged in extensive investigation,

including conducting detailed interviews with the named Plaintiff, and the four opt-in Plaintiffs. Lee Decl. ¶ 8. Plaintiff's Counsel also obtained documents and data from the named Plaintiff and opt-in Plaintiffs, including paystubs and employment records.

In addition, Defendants produced thousands of pages of documents in litigation. Lee Decl. ¶ 9. These documents included records of dates of employment, payroll records, timesheets, wage statements, and personnel and corporate documents. Lee Decl. ¶ 9. Defendant also produced class-wide data for thousands of Pret employees of multiple stores, including dates of employment, job titles, and pay rates. Lee Decl. ¶ 9. Plaintiff's Counsel analyzed this information and created formulas to account for the full amount of damages Defendants would owe to Plaintiff and the Class Members were Plaintiff to succeed on each claim. Lee Decl. ¶ 10. Plaintiff's Counsel consulted with Plaintiff and Opt-in Plaintiffs to verify Defendants' records. Lee Decl. ¶ 9. In addition to reviewing these documents and those provided by Plaintiff, Plaintiffs' Counsel also conducted legal research on the underlying merits of Plaintiff and Class Members' claims and the damages to which they were entitled. Lee Decl. ¶ 10. The Parties also exchanged written discovery, Plaintiff deposed Defendants' 30(b)(6) corporate representative, and Defendants deposed Plaintiff and the four Opt-In Plaintiffs. Lee Decl. ¶¶ 9, 11.

III. Settlement Negotiations

The Parties engaged in numerous informal telephonic and e-mail-based settlement discussions and attended an 18-hour in person mediation with mediator Michael Young of JAMS on January 9, 2014. Lee Decl. ¶ 12. Prior to the mediation date, Plaintiff submitted a detailed mediation statement that explained the Class Members' damages calculations, presented responses to Defendants' alleged defenses, and provided detailed calculations. *Id.* ¶ 13. Defendants also submitted a lengthy mediation statement contesting Plaintiff's ability to obtain

class certification and the merits of the claims of the Plaintiff and Opt-In Plaintiffs. *Id.* ¶ 13.

During the in-person mediation session, the Parties continued to vigorously disagree as to the merits of the case as well as the prospects of class certification, but made progress towards a settlement and ultimately reached settlement on the principal terms. *Id.* ¶ 14. The Parties subsequently memorialized their settlement in the Settlement Agreement. *Id.* ¶ 15.

IV. The Court's Conditional Certification of the Class and Preliminary Approval of the Settlement Agreement

On March 28, 2014, the Court took the first step in the settlement approval process by conditionally certifying the Class, granting preliminary approval, directing that notice be mailed to Class Members, and setting the date for the final fairness hearing. Lee Decl. ¶ 17; Docket No. 98.

SUMMARY OF THE SETTLEMENT TERMS

I. The Settlement Fund

The Settlement Agreement creates a common fund of $910,000 (the "Fund"), Settlement Agreement, § 3.1 (hereinafter "Settlement Agreement"), which covers Class Members' awards, all Claims Administrator's fees, all attorneys' fees and litigation costs that are awarded by the Court, and any Court-approved service payments. *Id.*

II. Eligible Employees

The settlement covers the claims of all current and former employees of Pret who worked for Pret in New York City as a team member, team member star, barista, team member trainer, kitchen team leader, shop team leader, team leader, or any other non-exempt, non-management store position ("Covered Position") at any time from August 9, 2006 to the date of entry of the Order Granting Preliminary Approval (March 28, 2014) ("Class Members"). Settlement Agreement, §1.4 – 1.5.

III. Releases

Plaintiffs, Opt-In Plaintiffs, and Class Members who do not timely opt out release Defendants from all claims that are based upon laws governing overtime pay, wage requirements, failure to pay for hours worked, or that otherwise relate to the facts, acts, transactions, occurrences, events or omissions alleged in the Litigation and that arose during any time that such individual was employed in a Covered Position up until the date of the entry of the order granting Final Approval. Settlement Agreement, § 4.1.

IV. Allocation Formula

After the allocation of the Court-approved attorneys' fees, the Court-approved litigation costs and out of pocket expenses, costs of settlement administration and service payments, the amount remaining (the "Net Settlement Amount") will be divided among Class Members based on an allocation formula. Settlement Agreement, § 3.4(C). Every Class Member who did not opt out ("Qualified Class Member") will receive a settlement check containing his or her share of the Net Settlement Amount. Each Qualified Class Member who worked for Pret for a week or less shall receive $5 of the Net Settlement Amount ("Alternate Payment"). Each Qualified Class Member, other than those who receive Alternate Payments, shall receive a settlement payment according to the following formula: First, the Claims Administrator will calculate a numerator for each Qualified Class Member equal to the number of weeks that the Class Member worked for Pret in a Covered Position between August 9, 2006 and the date of entry of the order granting preliminary approval to the settlement. Second, the Claims Administrator will calculate a Total Denominator equal to the sum of the numerators of each Qualified Class Member. Third, the Claims Administrator will calculate a Share Percentage for each Qualified Class Member equal to the Qualified Class Member's numerator divided by the Total Denominator. Fourth, the

Claims Administrator will determine each Qualified Class Member's share by multiplying his or her Share Percentage times the amount of the Net Settlement Amount less the sum of the Alternate Payments. Any uncashed checks will cover unforeseen expenses agreed upon by the parties with the remainder to be donated to charity. Settlement Agreement, § 3.4(D).

V. Settlement Checks

Each Class Member who did not opt-out will receive a settlement check after final approval containing the following affirmation ("Settlement Check"):

> "By signing, endorsing, depositing, cashing or negotiating this check, I hereby opt into the collective action under Case No. 12-cv-6094 (S.D.N.Y.) pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), and give my consent to become a party. I further understand and agree to the release of claims set forth in Section 6.b of the Notice I was provided."

Settlement Agreement, § 2.8. Regardless of whether or not he or she signs, negotiates, deposits, endorses or cashes the Settlement Check, any Class Member who did not opt out will be bound by the release. *Id.* § 3.4(A).

VI. Attorneys' Fees, Litigation Costs, and Service Awards

Class Counsel has filed a Motion for Attorneys' Fees and Reimbursement of Expenses and a Motion for Approval of Service Awards simultaneously with this Motion. The Settlement Agreement provides that Class Counsel may petition the Court for attorneys' fees up to $303,333 plus expenses and costs, and service awards up to $7,500 each for the Plaintiff and Opt-In Plaintiffs. Settlement Agreement, § 3.2-3.

VII. Claims Administration and Notice

The parties retained American Legal Claim Services ("ALCS"), a third-party wage and hour claims administrator, to administer the settlement. Lee Decl. ¶ 21. Attached to the Lee Decl. as Exhibit 2 is the Declaration of Steven Platt, who supervised the notice and

administration process (the "Platt Decl.").

On April 25, 2014, ALCS mailed the Court-approved Notice to 4,119 Class Members whose names and addresses were provided by Defendants. Ex. 2 to Lee Decl. (Platt Decl.) ¶ 6.) After the Notices were mailed, certain notices were returned as undeliverable by the Post Office without updated addresses. *Id*. ¶¶ 13-15. ALCS then used a nationally recognized location service that maintains a national databases of current addresses for individual credit reporting purposes and the United States Postal Service National Change of Address database to attempt to obtain new addresses for the Class Members whose Notices were returned, and made a second mailing to the Class Members for whom ALCS could locate new addresses. *Id*. ¶ 12.

The Notice advised Class Members, among other things, that they could object to or exclude themselves from the settlement. Ex. 1 to the Lee Decl., Ex. A to Settlement Agreement. Class Members who wished to opt out of the settlement were required to submit a written and signed Opt Out Statement to ALCS. Docket No. 98, Preliminary Approval Order at § IX.B. An Opt Out Statement is timely if it was mailed to the Claims Administrator and postmarked by June 9, 2014. *Id.* Only 22 Class Members have timely opted out of the Settlement. Ex. 2 to the Lee Decl. (Platt Decl.) ¶ 19.)

Class Members who wished to object to the settlement had to submit an objection to ALCS. An objection would be timely if postmarked to ALCS by June 9, 2014 and received by ALCS no later than June 16, 2014. Docket No. 98, Preliminary Approval Order at § IX.B. No Class Member has objected to the Settlement. Ex. 2 to the Lee Decl. (Platt Decl.) ¶ 20.)

ARGUMENT

I. 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). 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 (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 (internal quotation marks and citation omitted); *see also Spann v. AOL Time Warner, Inc.*, No. 02 Civ. 8238, 2005 WL 1330937, at *6 (S.D.N.Y. June 7, 2005) ("[P]ublic policy favors settlement, especially in the case of class actions."). When, as here, "a settlement is negotiated prior to class certification, . . . it is subject to a higher degree of scrutiny in assessing its fairness." *D'Amato*, 236 F.3d at 85; *Spann*, 2005 WL 1330937, at *5. Even under high scrutiny, procedural and substantive considerations support approving the proposed settlement.

A. The Proposed Settlement Is Procedurally Fair.

The proposed settlement is procedurally fair because it was reached through vigorous, arm's-length negotiations and after experienced counsel had evaluated the merits of Plaintiff's claims. *See 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); *McMahon*, 2010 WL 2399328, at *4 (same). A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (internal quotation marks omitted); *see also D'Amato,* 236 F.3d at 85. Where 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*., Nos. 05 Civ. 10240, 05 Civ. 10287, 05 Civ. 10515, 05 Civ. 10610, 06 Civ. 00304, 06 Civ. 00347, 06 Civ. 01684, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007).

Here, the settlement was reached after Class Counsel conducted a thorough investigation and significant litigation, and evaluated the claims and defenses, and after extensive arm's-length negotiations between the parties. In addition to numerous, informal settlement discussions, the Parties attended an 18-hour in-person mediation with respected mediator Michael Young. Lee Decl. ¶ 12. Plaintiff's Counsel did significant work to prepare for the mediation, including, among other things, submitting a detailed mediation statement that explained the Class Members' damages calculations, presented responses to Defendants' alleged defenses and provided detailed calculations. Lee Decl. ¶ 13; *Yuzary*, 2013 WL 5492998 at *5 (finding settlement to be "procedurally fair, reasonable, adequate, and not a product of collusion" where the parties conducted a thorough investigation and evaluated the claims and defenses, and after arm's-length negotiations). Similarly, Defendants spent significant time submitting a mediation statement pointing out the weaknesses in the merits of Plaintiff's case as well as the difficulties Plaintiff would face in certifying a class. The arm's-length negotiations involved counsel and

mediators well-versed in wage and hour law, raising a presumption that the settlement achieved meets the requirements of due process. *See Wal-Mart Stores*, 396 F.3d at 116; *McMahon*, 2010 WL 2399328, at *4. The mediation process also involved substantial give-and-take between the Parties regarding damages and a host of other substantive and procedural issues. Moreover, Plaintiff's counsel had the benefit of substantial discovery prior to the mediation that allowed them to negotiate the settlement and assess its adequacy on a fully informed basis. Thus, this weighs in favor of approval of the settlement.

B. The Proposed Settlement Is Substantively Fair.

In *Grinnell*, the Second Circuit provided the analytical framework for evaluating the substantive fairness of a class action settlement. 495 F.2d at 448. The *Grinnell* factors guide district courts in making this determination. They are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id*. at 463. All of the *Grinnell* factors weigh in favor of final approval of the Settlement Agreement.

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 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 v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is no exception, with multiple claims across approximately 4,119 Class Members, representing current and former employees at Pret's 35 New York City locations.

Because of the large number of class members, locations and managers involved in the case, continuation of the case would necessarily involve complex factual issues. Although there has been significant discovery, additional discovery would be required to establish liability and damages, including depositions of the 23 opt-in claimants, and Defendants' employees and managers across all 35 of Pret's locations in New York City. Plaintiff would likely move for summary judgment, and Defendants would likely cross move for summary judgment on Defendants' defenses. This intensive discovery and briefing process would consume tremendous amounts of time and resources for both sides and require substantial judicial resources to adjudicate and resolve. If the case could not be resolved on summary judgment, a fact-intensive trial would then be necessary to determine liability and damages. A trial would be lengthy and consume additional time and resources. It is likely the losing party would appeal the judgment. The settlement, on the other hand, makes monetary relief available to Class Members in a prompt and efficient manner. Therefore, the first *Grinnell* factor weighs in favor of 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 a settlement." *Ross v. A.H. Robins Co., Inc*., 700 F. Supp. 682, 684 (S.D.N.Y.1988).

Here, the Notices sent to Class Members included an explanation of the allocation formula and an estimate of each Class Member's award. Ex. 1 to the Lee Decl., Ex. A to Settlement Agreement. The Notice also informed Class Members of their right to object to or exclude themselves from the settlement and explained how to do so. *Id*. Significantly, no Class Member has objected to the settlement. Ex. 2 to Lee Decl. (Platt Decl.) ¶ 20. Similarly, only 22 Class Members timely opted out of the settlement, which is a less than 1% opt-out rate. Ex. 2 to the Lee Decl. (Platt Decl.) ¶ 19. This favorable response demonstrates that the class approves of the settlement, which further supports final approval. *See Yuzary*, 2013 WL 5492998 at *6 (granting final approval where the vast majority of class members neither objected nor opted out); *see also Wright v. Stern*, 553 F. Supp. 2d 337, 344-45 (S.D.N.Y. 2008) ("that the vast majority of class members neither objected nor opted out is a strong indication" of fairness). This factor also weighs in favor of approval.

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 hundreds of 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) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)) (internal quotation marks 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 at 176 (quoting *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998)) (internal quotation marks omitted). The Parties' discovery here meets this standard. Plaintiff obtained

thousands of pages of discovery from Defendants, including time records, personnel files, payroll records and other relevant information. Lee Decl. ¶ 9. Both parties served and responded to written discovery, Plaintiff deposed Defendants' 30(b)(6) corporate representative, and Defendants deposed Plaintiff and the four Opt-In Plaintiffs. Lee Decl. ¶¶ 9, 11. Plaintiff also received class-wide data that included Class Members' dates of employment, job titles and pay rates, among other information. Lee Decl. ¶ 9. Plaintiff was able to perform detailed damages calculations based on the data that Defendants provided. *Id*. ¶ 10. Plaintiff also interviewed Plaintiff, the Opt-In Plaintiffs and others regarding the claims at issue in the case. *Id*. ¶ 8.

This discovery was more than sufficient to allow counsel to make informed assessments regarding the strength of Plaintiff's claims and Pret's defenses during settlement negotiations. *See Frank*, 228 F.R.D. at 185 (approving settlement of case "in relatively early stages of discovery" where parties had exchanges extensive information pertaining to the identities of Class Members and to Defendant's time and pay practices and where counsels' negotiations, while "cooperative" had "been in no way collusive"); *deMunecas*, 2010 WL 2399345, at *1; *McMahon v. Olivier Cheng Catering & Events, LLC*, No. 08 Civ. 8713, 2010 WL 2399328, at *4 (S.D.N.Y. March 3, 2010); *Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811, 2009 WL 6583143, at *1 (S.D.N.Y. Sept. 22, 2009). This factor also weighs in favor of approval.

4. **Plaintiff Would Face Real Risks if the Case Proceeded (*Grinnell* Factors 4 and 5).**

Although Plaintiff believes his case is strong, it is subject to considerable risk. "Litigation inherently involves risks." *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Indeed, "[i]f 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). 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*, 80 F. Supp. 2d at 177 (internal quotation marks and citation omitted).

Counsel believes that the settlement represents an excellent result for members of the Class given the substantial risks Plaintiff would have faced had the case been litigated to trial. For example, Plaintiff would have had to prove that he and other Class Members "performed work for which [they were] not properly compensated, and that the employer had actual or constructive knowledge of that work." *Edwards v. City of New York*, 2012 WL 1694608, at *3 (S.D.N.Y. May 15, 2012) (internal quotation marks and citation omitted). Defendants would have argued that Plaintiff did not meet that burden, and if they succeeded, neither Plaintiff nor the Class would be entitled to any damages. Similarly, Plaintiff would have the burden of proving not only that some uncompensated work was performed with Pret's knowledge, but also proving how much for purposes of damages calculations. Thus, while Plaintiff's case is strong, it is subject to risks as to liability and damages. Plaintiff's Counsel are experienced and realistic, and understand that the resolution of liability issues, the outcome of the trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. The proposed settlement alleviates these uncertainties. These factors therefore weighs in favor of approval.

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

In light of recent Supreme Court cases in this area, obtaining and maintaining class certification in this matter would present risks. Had the case continued and Plaintiff moved for Rule 23 certification, Defendants would have argued that there is no common unlawful policy

that could justify certification across all New York City locations that could be resolved "in one stroke" — as to all class members. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2551 (2011). Indeed, the difficulty of obtaining class certification on these facts was highlighted by the Court's decision denying Plaintiff's request to provide notice of the FLSA claims to over 30 stores, and allowing notice instead to just six stores, stating that "plaintiffs have not demonstrated across all locations a uniform policy of failure to pay overtime compensation." *See Trinidad v. Pret A Manger (USA) Limited et al.*, 12-cv-6094 (S.D.N.Y.), 2013 WL 3490815, at *9 (July 11, 2013). Defendants would also have argued that in light of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), it would be inappropriate to certify a class here because there is no manageable way to determine classwide damages. Moreover, even if the Court had certified a class, Defendants may have moved for decertification, which would require another round of extensive briefing. Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay. This factor also favors approval.

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

A "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian and German Bank Holocaust Litig*, 80 F. Supp. 2d at 178 n.9 (alterations and citation omitted)). Here, the Settlement Agreement eliminated the risk of collection because it required Defendants to deposit Nine Hundred Ten Thousand Dollars ($910,000.00) into the qualified settlement fund, administered by the Claims Administrator, by no later than ten (30) days after the date of the Preliminary Approval Order, Settlement Agreement § 3.5. Accordingly, this factor also favors 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).

Defendants have agreed to pay a substantial amount, up to $910,000. This represents considerable value given the risks associated with obtaining certification of a class and succeeding on the merits identified above.

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 and 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 law 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 Serv. Comm'n of the City and Cnty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (emphasis added); *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 WL 73423, at *12-13 (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 much more than "a fraction of the potential recovery." *Officers for Justice*, 688 F.2d at 628. Every Class Member who does not opt out ("Qualified Class Member") will receive a settlement check containing his or her share of the Net Settlement Amount. Settlement Agreement § 3.4(A). Each Qualified Class Member who worked for Pret

for a week or less shall receive $5 of the Net Settlement Amount ("Alternate Payment"), *id.* § 3.3(C)(2), which would represent pay for approximately ½ hour of unpaid time in just one week of employment based on Pret's average starting hourly rate of $9 per hour. Each Qualified Class Member, other than those who receive Alternate Payments, shall receive a settlement payment according to the following formula: First, the Claims Administrator will calculate a numerator for each Qualified Class Member equal to the number of weeks that the Class Member worked for Pret in a Covered Position between August 9, 2006 and the date of entry of the order granting preliminary approval to the settlement. Second, the Claims Administrator will calculate a Total Denominator equal to the sum of the numerators of each Qualified Class Member. Third, the Claims Administrator will calculate a Share Percentage for each Qualified Class Member equal to the Qualified Class Member's numerator divided by the Total Denominator. Fourth, the Claims Administrator will determine each Qualified Class Member's share by multiplying his or her Share Percentage times the amount of the Net Settlement Amount less the sum of the Alternate Payments. *Id.* § 3.4(C)(3).

Thus, the formula is based on the length of someone's employment at Pret and directly proportional to the amount of damages that Class Member may have incurred. For example, a Class Member who worked at Pret for over a year will receive a substantially larger payment than someone who worked for Pret for only a few weeks. The payments Class Members will receive range from $5 for someone who worked for Pret for less than a week up to about $1,000 per Class Member for Class Members with longer tenures. Weighing the benefits of the settlement against the available evidence and the risks associated with proceeding in the litigation, the settlement amount is reasonable.

In light of the foregoing, the *Grinnell* factors all weigh in favor of granting final approval

of the settlement.

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

A. The Court Should Grant 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 Plaintiffs' FLSA claims under 29 U.S.C. § 216(b). No member of the Class has objected to collective action certification. For these reasons, and the reasons generally set forth in Plaintiffs' Motion for Preliminary Approval (Docket Nos. 95-97), the Court should confirm collective action designation for purposes of settlement of this matter.

B. The Court Should Grant 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 March 25, 2014, the Court preliminarily certified the settlement class. The Court should now grant final certification for the reasons stated in Plaintiffs' Motion for Preliminary Approval (Docket Nos. 95-97). The Parties therefore respectfully request that the Court grant final certification of the Rule 23 Class for purposes of effectuating the settlement.

III. Final Approval of the Agreement's Release Language, As Well as the Release Language on the Settlement Checks and Individual Releases, Is Appropriate.

A. The Release In The Settlement Agreement, Including the Release of FLSA Claims, Is Fair.

For Plaintiff, Opt-In Plaintiffs, and all Class Members who have not opted out of the settlement, the Settlement Agreement releases their claims as follows:

> By operation of the entry of the Judgment and Final Approval, and except as to such rights or claims as may be created by this Agreement, Plaintiff, Opt-In

> Plaintiffs and each Class Member who does not timely opt out pursuant to Section 2.5, forever and fully release Defendants, their owners, stockholders, predecessors, successors, assigns, agents, directors, officers, employees, representatives, attorneys, parent companies, divisions, subsidiaries, affiliates, benefit plans, plan fiduciaries and/or administrators, and all persons acting by, through, under or in concert with any of them, including any party that was or could have been named as a Defendant in the Litigation (collectively, the "Released Parties") from any and all past and present matters, claims, demands, causes of action, and appeals of any kind, whatsoever, whether at common law, pursuant to statute, ordinance, or regulation, in equity or otherwise, and whether arising under federal, state, local, or other applicable law, which any such individual has or might have, known or unknown, asserted or unasserted, of any kind whatsoever, that are based upon federal, state or local laws governing overtime pay, wage requirements, failure to pay for all hours worked, or otherwise arise out of or relate to the facts, acts, transactions, occurrences, events or omissions alleged in the Litigation, and that arose during any time that such individual was employed by Pret in a Covered Position up until the date of the entry of the order granting Final Approval ("Released Claims"). The Released Claims include without limitation claims asserted in the Litigation, including but not limited to in the Complaint, Amended Complaint, discovery, and briefing on Plaintiff's Motion for Conditional Certification, and any other claims based on state or federal law governing overtime pay, payment of wages, hours worked, denial of meal periods and rest breaks, denial of spread of hours pay, failure to pay call-in pay, failure to pay wages upon termination, failure to provide itemized wage statements or wage notices, improper tip pooling, denial of tips, improper calculation of overtime pay, failure to pay uniform costs or maintenance pay, failure to pay for orientation or training time, unfair competition, failure to provide benefits or benefit credits, failure to keep records of hours worked or compensation due, and penalties for any of the foregoing, including without limitation claims under the Fair Labor Standards Act ("FLSA"), the New York Minimum Wage Act, New York Labor Law §§ 650 et seq., New York Wage Payment Act, New York Labor Law §§ 190 et seq., the New York State Department of Labor Regulations, 12 N.Y.C.R.R. part 142, 12 N.Y.C.R.R. part 146, and all other statutes and regulations relating to the foregoing.

Settlement Agreement § 4.1. The Settlement Checks Class Members will receive also state that by "signing, endorsing, depositing, cashing or negotiating this check…I understand and agree to the release of claims set forth in Section 6.b of the Notice I was provided," which is a copy of the text set forth in the release in Section 4.1 of the Settlement Agreement, and therefore incorporates the release language. Settlement Agreement § 2.8. The Settlement Agreement

makes clear that Class Member claims are released regardless of whether the Settlement Checks are signed, deposited, endorsed, cashed or negotiated. Settlement Agreement § 3.4(A).

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); *see also 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); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221-22 (5th Cir. 1981).

The releases include a waiver of FLSA claims. Such a release of FLSA claims 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). Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Lynn's Food Stores*, 679 F.2d at 1353-54. 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 $910,000 settlement fund. As part of that process, it was agreed that every Class Member would receive a Settlement Check unless he or she opted out. Because the Settlement Agreement is a reasonable compromise of a *bona fide* dispute and was reached after vigorous arm's-length settlement negotiations, it should be approved. *See Yuzary*, 2013 WL 5492998 at *8 (approving FLSA settlement where it was the result of arm's-length negotiation involving vigorous back and forth by counsel experienced in wage and hour law).

B. **The Individual Releases Are Fair**.

As part of the Settlement, Plaintiff and the four Opt-In Plaintiffs have signed individual

releases in which they will waive all claims that arose up through and including the date they signed the release. Ex. 1 to the Lee Decl., Ex. D to Settlement Agreement. The individual releases include a waiver of, inter alia, FLSA claims. Specifically, Plaintiff and the Opt-In Plaintiffs signed the releases in exchange for the opportunity to receive any court-approved service payment. These amounts were negotiated by experienced Class Counsel in arms-length negotiations. The Parties, therefore, 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 Settlement Agreement, incorporated in the Settlement Checks, and the Individual Releases.

IV. The Court Should Approve as Final the Appointment of Class Counsel and the Class Representative and Approve the Form and Manner of Notice, and the Reserve Set Aside for Claims Administration

In its Preliminary Approval Order (Docket No. 98), the Court appointed C.K. Lee of Lee Litigation Group, PLLC as Class Counsel, Plaintiff as Class Representative, and approved the form and manner of notice to the Class. No Class Member objected to the form and manner of notice, the reserve set aside for claims administration, or the Class Counsel and Class Representative designations. Therefore, the Court should approve these designations as final, approve the reserve set aside for claims administration, and grant final approval to the form and manner of notice.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court: (1) grant final approval of the class settlement; (2) grant final class certification and collective action designation; (3) approve as fair the class release and the individual releases of the Plaintiff and Opt-In Plaintiffs, and (4) confirm as final the appointment of Class Counsel and the Class Representative, and approve the form and manner of notice distribution and the reserve set aside for the costs of claims administration.

Dated: July 9, 2014
New York, New York

Respectfully submitted,

By: /s/ C.K. Lee
C.K. Lee

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