

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 10/27/15

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OSCAR RAMIREZ, JAVIER GUERRERO, :
GERONIMO HERCULANO, PABLO RUTILIO, :
MAGGIE ANDRES CRECENCIO, GUILLERMO :
ALVAREZ, JUANA CRUZ HERNANDEZ, :
LEONIDAS MATEO, ANYELI OVALLES :
HERNANDEZ, MIRNA REYES MARTINEZ, :
RAMON ROSARIO, OMAR TAVERAS, LUIS :
ESPINAL, JUAN SALMERON, ERASMO DIAZ :
JULIO RODRIGUEZ, JACINTO VICTORIANA :
DE OLEO, FRANCISCA PENA, and SIMON :
GRULLON, :

13-CV-7249 (VEC)
14-CV-4030 (VEC)

ORDER

Plaintiffs, :

-against- :

M L RESTAURANT, CORP.; M.L. SAN JOSE :
ENTERPRISES, CORP., d/b/a Liberato :
Restaurant; and ANTONIO MANUEL :
LIBERATO, jointly and severally, :

Defendants. :

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MANUEL ANTONIO LIBERATO, M L :
RESTAURANT CORP., M.L. SAN JOSE :
ENTERPRISES, CORP., d/b/a Liberato :
Restaurant, NELSON GOMEZ, SARAH :
VALLEJO, and RAMIRES BETANCES, :

Plaintiffs, :

15-CV-326 (VEC)

-against- :

LAUNDRY WORKERS CENTER UNITED, :
VIRGILIO OSCAR ARAN, ROSANNA :
RODRÍGUEZ ARAN, MAHOMA LOPEZ :
GARFIAS, OSCAR RAMIREZ, PABLO :
RUTILIO, and MAGGIE ANDRES :
CRECENCIO, :

Defendants. :

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VALERIE CAPRONI, United States District Judge:

After lengthy Court-assisted settlement discussions, on October 6, 2015, the parties in the three above-captioned cases reached a settlement. The settlement requires the Defendants to pay \$1 million to the Plaintiffs over time. The Court placed the balance of the terms of the settlement on the record and orally found that the terms were fair. This opinion expands that finding and considers Plaintiffs' counsels' request for attorneys' fees of \$327,831.62 (33.3% of the full settlement amount, net of costs) and \$16,505.13 in costs. For the reasons discussed below, the Court approves the requested fees as reasonable.

Background

These three cases arise out of a labor dispute between certain former workers and management at Liberato Restaurant's two Bronx locations. What might normally have been an easily-settled collective action¹ became litigation that stretched more than a year, including: a federal counter lawsuit against some of the plaintiffs, the labor organization and its leader who organized picketing and leafletting of the restaurants;² one or more state court actions; and numerous complaints to the National Labor Relations Board ("NLRB"). This settlement resolves all of the various cases.³

¹ The first case filed was *Grullon v. Liberato et al.* (No. 13-CV-7249), brought by a deliveryman who claimed the Defendants failed, *inter alia*, to pay him overtime, minimum wage, and tips under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). That lawsuit was followed almost a year later by *Ramirez et al. v. Liberato et al.* (No. 14-CV-4030), brought as a putative class action and collective action for, *inter alia*, similar violations of the FLSA and NYLL. Ultimately, twenty-one employees and former employees opted into the *Ramirez* lawsuit, which was consolidated with *Grullon*. Those cases are referred to collectively as "the Consolidated *Ramirez* Action."

² After months of litigation, picketing of the restaurants and secondary activity aimed at Defendants' lead attorney, on January 6, 2015, the Defendants brought a separate lawsuit, *Liberato et al. v. Laundry Workers Center United et al.* (No. 15-CV-326), against several Plaintiffs and the labor organization's leader, who appeared to be organizing the picketing. That lawsuit sought damages and injunctive relief for, *inter alia*, violation of the Racketeer Influenced and Corruption Organizations Act, the Labor-Management Relations Act and the common law (the "*Liberato* Action").

³ As to certain Plaintiffs, the NLRB will have to approve dismissal of the NLRB actions as part of this settlement.

In its October 7, 2015 Order, the Court found the parties' settlement to be fair, pending approval of Plaintiffs' counsels' fees. Dkt. 183 in the Consolidated *Ramirez* Action and Dkt. 93 in the *Liberato* Action. Pursuant to the October 7, 2015 Order, Plaintiffs in the Consolidated *Ramirez* Action seek attorneys' fees of \$327,831.62 and have provided data necessary to calculate a "lodestar crosscheck." Dkt. 184 in the Consolidated *Ramirez* Action. For the following reasons, Plaintiffs' request for attorneys' fees is GRANTED, and the settlement is approved.

DISCUSSION

The parties may not dismiss an FLSA action with prejudice unless the settlement agreement at issue has been approved by either the Court or the Department of Labor. *See Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015). Before granting approval, the Court must find that the proposed settlement is "fair and reasonable" and that any award for attorneys' fees is reasonable. *Camacho v. Ess-A-Bagel, Inc.*, No. 14-CV-2592(LAK), 2015 WL 129723, at *1 (S.D.N.Y. Jan. 9, 2015); *see also* 29 U.S.C. § 216(b) ("The Court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (emphasis added)). In determining whether the proposed settlement is fair and reasonable, courts should consider, *inter alia*: "(1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion." *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335 (S.D.N.Y. 2012) (citations and internal quotations omitted).

Having participated in the settlement discussions, the Court is comfortable that the settlement amount is fair and was the product of arm's-length bargaining between experienced counsel. Full recovery to the Plaintiffs of all claimed damages, including liquidated damages covering six years of the alleged harm but excluding pre-judgment interest, would have been approximately \$1.6 million. Had the litigation proceeded, the Plaintiffs would have been entitled to summary judgment as to certain claims because the summary judgment motion was not opposed by the Defendants. Damages from the uncontested claims alone, including liquidated damages but excluding pre-judgment interest, were approximately \$500,000.

The primary obstacle to settlement was widely divergent views on the Defendants' ability to pay a judgment. Because the parties' positions were so far apart on that issue, the Court appointed a Special Master to review the restaurants' books and records and to prepare unaudited financial statements. While the Special Master's work did not fully answer the question of the Defendants' ability to withstand and pay a judgment for full damages, it gave the parties a better view of the Defendants' finances. Consistent with the Defendants' finances, the settlement is structured so that the Defendants make substantial cash payments in the first few months of the settlement period, followed by monthly payments that are within the Defendants' financial ability to pay.⁴

Given the cost of litigation, the risk that a jury would not award all damages sought by the Plaintiffs, and the difficulty of collecting a judgment from the Defendants, the Court finds that the settlement is fair and reasonable and not the product of coercion or collusion. *See Elliott v. Allstate Investigations, Inc.*, No. 07 CIV. 6078(DLC), 2008 WL 728648, at *1-2 (S.D.N.Y.

⁴ The attorneys will recover their fee over time as a percentage of each payment made by the Defendants. Pls.' Letter at 1.

Mar. 19, 2008) (settlements granting plaintiffs less than the full amount of liquidated damages may be approved after scrutinizing the proposed settlements for fairness).

With respect to attorneys' fees, courts should consider evidence demonstrating a factual basis for the award, such as invoices or other billing records documenting the attorneys' work on the matter. *See Wolinsky*, 900 F. Supp. 2d at 336 (citations omitted). "While there is a strong presumption that the 'lodestar' amount—that is, the number of attorney hours reasonably expended times a reasonable hourly rate—represents a reasonable fee, the court may adjust the fee award upward or downward based on other considerations." *Id.* (citations omitted).

In this case, the overwhelming majority of Plaintiffs agreed to a 33.33% contingent fee in their retainer agreements with counsel.⁵ Moreover, the Court finds Plaintiffs' counsels' fee to be reasonably in-line with those charged by counsel of similar background and experience in this District. Unlike in many settled FLSA cases, there was very substantial litigation in this case. Finally, the number of Plaintiffs and the fact that most of the Plaintiffs did not speak English added burdens on their attorneys. Thus, although the fees as a percentage of the recovery (approximately 33% of the settlement) are higher than this Court generally finds to be fair in settled FLSA cases, given the circumstances of this case, the Court finds the fees requested to be reasonable as a percentage of the recovery. As a lodestar crosscheck, the proposed fee of \$327,831.62 for 751.6 hours of work yields a blended rate of \$436.17 per hour. The Court finds this fee to be fair and reasonable under the circumstances, and the number of hours reasonably reflects the amount of litigation in the case. *See Mireku v. Red Vision Sys., Inc.*, No. 11 CIV. 9671(RA)(JLC), 2013 WL 6335978, at *2-3 (S.D.N.Y. Dec. 6, 2013) ("Courts in this District

⁵ Plaintiffs' October 14, 2015 letter requesting attorneys' fees does not provide a retainer agreement or other paper work for Plaintiff Simon Grullon, who is represented by different counsel than all of the other Plaintiffs. Dkt. 184 in the Consolidated *Ramirez* Action. In addition, Plaintiffs' letter does not include a retainer agreement for Plaintiffs Jose Daniel Ramos and Victoriana de Oleo but only a consent to join form that makes no mention of the 33.33% contingency fee. *Id.*

have determined that a fee ranging from \$250 to \$450 per hour is generally appropriate for experienced civil rights and employment law litigators.” (citing cases)).⁶

CONCLUSION

For the foregoing reasons, the Court finds that the proposed settlement is fair and reasonable, and therefore the Plaintiffs’ request for attorneys’ fees is GRANTED, and the settlement is APPROVED as fair and reasonable. The parties are reminded that these actions will be dismissed on November 6, 2015, unless before that date one or more of the parties files a letter with the Court requesting that the action not be dismissed.

SO ORDERED.

Date: October 27, 2015
New York, NY



VALERIE CAPRONI
United States District Judge

⁶ While one of Plaintiffs’ attorneys was quite junior, the balance of Plaintiffs’ attorneys were seasoned, experienced attorneys with more than fifteen years of experience litigating labor law cases.