

Clemons v A.C.I. Found., Ltd.
2017 NY Slip Op 30980(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 154573/2015
Judge: Manuel J. Mendez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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**DEBORAH CLEMONS, on behalf of herself
and all other similarly situated employees,**

**Honorable Justice
Manuel J. Mendez
Index No.: 154573/2015**

Plaintiff,

-against-

**A.C.I. FOUNDATION, LTD., and AREBA
CASRIEL, INC.,**

Defendants.
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The above-entitled matters came before the Court on Plaintiff's Motion for Final Approval of Class Action Settlement, Service Award to Plaintiff, and Class Counsel's Attorney's Fees and Costs ("Motion for Final Approval").

**JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT, SERVICE AWARD TO PLAINTIFF, AND CLASS
COUNSEL'S ATTORNEY'S FEES AND COSTS**

Plaintiff filed the present Class Action Complaint in New York County Supreme Court on May 7, 2015. The Complaint alleged that Defendants violated the New York Labor Law ("NYLL") and its supporting New York State Department Of Labor Regulations ("NYCRR") during the Class Period because Defendants allegedly failed to compensate CASAC counselors at Defendants ("CASACs") for all hours worked before the scheduled start of their shift, after the end of their scheduled shift, during meal periods, and paying CASACs based upon their schedules and not their actual time worked thereby depriving these CASACs of straight and overtime wages owed under the NYLL and NYCRR.. A Joint Settlement Agreement and Release ("Settlement Agreement") was fully executed by all parties to effectuate the parties' agreement to resolve this matter for \$297,000. On March 7, 2017, Plaintiff filed a Motion for

Preliminary Approval Of The Settlement Agreement, Certification Of The Class For Settlement Purposes, Appointment Of The Plaintiff As Class Representative, Appointment Of The Law Firm Of Louis Ginsberg, P.C. As Class Counsel and Approval Of The Class Notice. On March 15, 2017, the Court granted preliminary approval of the Settlement Agreement, certified the Settlement Class, appointed Plaintiff as Class Representative, appointed the Law Firm of Louis Ginsberg, P.C. as Class Counsel and approved the Class Notice.

On May 5, 2017, Plaintiff filed a Motion for Final Approval of Class Action Settlement, Service Award to Plaintiff, and Class Counsel's Attorney's Fees and Costs. Defendant did not oppose this Motion.

The Court held a Fairness Hearing on May 10, 2017. No Settlement Class member objected to the settlement and only one Class Member requested exclusion.

Having considered the Motion for Final Approval of Class Action Settlement, Service Award to Plaintiff, and Class Counsel's Attorney's Fees and Costs, and the supporting Declaration of Louis Ginsberg, Esq., the oral argument presented at the May 10, 2017 Fairness Hearing, and the complete record in this matter, for the reasons set forth at the May 10, 2017 Fairness Hearing, and for good cause shown,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Certification Of The Settlement Class

1. The Court certifies the following class under Article 9 of the New York Civil Practice Law and Rules ("CPLR") for settlement purposes ("Settlement Class"):

All non-exempt hourly paid employees who worked as CASAC counselors for Defendant Areba Casriel, Inc. in the State of New York who are or were employed at any time from May 7, 2009 to date of preliminary approval and who during the Class Period were allegedly not paid for all of their straight time pay and overtime pay for work performed during meal breaks, for work performed pre-shift and for work performed

post-shift on the clock and off the clock or other wages of any kind or relief or penalties under any wage-related law.

Approval Of The Settlement Agreement

2. The Court hereby grants the Motion for Final Approval of Class Action Settlement, Service Award to Plaintiff, and Class Counsel's Attorney's Fees and Costs and finally approves the settlement as set forth in the Settlement Agreement of \$297,000.00.

3. CPLR § 908 requires judicial approval for any compromise of claims brought on a class basis. In determining whether to approve a class action settlement, courts examine "the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 537 (NY Sup. Ct. 2010) (citation omitted). Relevant factors in determining whether a settlement is fair, reasonable, and adequate include "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact." In re Colt Indus. Shareholder Litig., 155 A.d.2d 154, 160 (1st Dept. 1990)(citations omitted). A court should also "balance[e] the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." Fiala at 538 (citation omitted). All of these factors weigh in favor of approving the settlement.

4. In reaching the settlement, Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendants. The settlement negotiations were at all times

hard fought and arm's length, between parties represented by counsel experienced in wage and hour law, and they have produced a result that Class Counsel believes to be in the best interests of the Class in light of the costs and risks of continued litigation. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2nd Cir. 2005) (internal quotation omitted). Additionally, Defendants have and will continue to vigorously contest Plaintiff's claims if the action does not settle. In light of the strength and weaknesses of the case, the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Plaintiff and the Settlement Class members in the face of significant obstacles. While there is a possibility that the Class could recover more money, including interest, after trial, the Settlement provides the significant benefit of a guaranteed and substantial payout to Settlement Class members, rather than "speculative payment of hypothetically larger amount years down the road." Gilliam v. Addicts Rehab. Ctr. Fund, 2008 WL 782596, 5 (S.D.N.Y. 2008) (quoting Teachers' Ret. Sys. Of Louisiana v. A.C.L.N. Ltd., 2004 WL 1087261, 5 (S.D.N.Y. 2004)).

Service Award To The Class Representative

5. The Court finds reasonable the service award of \$10,000.00 for the class representative, Deborah Clemons, given the significant contributions she made to advance the prosecution and resolution of the lawsuit. This award shall be paid from the settlement fund.

6. A Court may grant service awards in a class action. Such awards "rewards the named plaintiffs for the effort and inconvenience of consulting with counsel over the many years [a] case was active and for participating in discovery..." Cox v. Microsoft Corp., 26 Misc.3d 1220(A), 4 (N.Y. Sup. 2007). Service awards "are particularly

appropriate in the employment context...[where] the plaintiff is often a former or current employee of the defendant, and thus...he has, for the benefit of the class as a whole, undertaken the risks of adverse actions by the employer or co-workers.” Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

7. Plaintiff expended considerable time and effort to assist Class Counsel with the case. As such, her actions exemplify the very reason service fees are awarded. See Frank at 187 (recognizing the important role that plaintiffs play as the “primary source of information concerning the claim[,]” including by responding to counsel’s questions and reviewing documents).

8. Plaintiff also assumed significant risks in prosecuting this action. Even where there is not a record of actual retaliation, service fees are appropriate in recognition of the risk of retaliation assumed by lead plaintiffs for the benefit of absent class members. Frank at 187-188 (“Although this Court has no reason to believe that Kodak has or will take retaliatory action towards either Frank or any of the plaintiffs in this case, the fear of adverse consequences or lost opportunities cannot be dismissed as insincere or unfounded.”)

9. The service award totaling \$10,000.00 for Plaintiff is reasonable and well within the range awarded by courts in similar matters. See Capsolas v. Pasta Resources Inc., 2012 WL 4760910, 9 (S.D.N.Y. 2012) (approving service awards of \$20,000 and \$10,000 for class representatives in wage and hour action); Lovaglio v. W & E Hospitality Inc., 2012 WL 2775019, 4 (S.D.N.Y. 2012)(approving service awards of \$10,000 each to three class representatives in wage and hour action); Sewell v. Bovis Lend Lease, Inc., 2012 WL 1320124, 13 (S.D.N.Y. 2012) (approving service awards of

\$15,000 and \$10,000 for the class representatives); Matheson v. T-Bone Restaurant, LLC, 2011 WL 6268216, 9 (S.D.N.Y. 2011) (approving service awards of \$45,000 and \$5,000 for the class representatives in a wage and hour class action); Willix v. Healthfirst, Inc., 2011 WL 754862, 7 (E.D.N.Y. 2011)(approving service awards of \$30,000, \$15,000, and \$7,500 in a wage and hour class action.)

Award Of Fees And Costs To Class Counsel

10. On March 15, 2017, the Court appointed the Law Firm of Louis Ginsberg, P.C. ("LG") as Class Counsel because they did substantial work identifying, investigating, litigating, and settling Plaintiff's and the Settlement Class members' claims, have years of experience prosecuting and settling wage and hour class actions, and are well-versed in wage and hour law and in class action law.

11. LG are experienced attorneys with an excellent reputation among the employment law bar, who have obtained millions of dollars for employees. See Siewharack v. Queens Long Island Medical Group, P.C., (11 cv 03603 (WFK)(ARL) (E.D.N.Y.)) (Class Counsel served as Co-Lead Class Counsel in wage and hour class action for a class of approximately 2,500 and received approval of a \$2.45 million class-wide settlement); Ludwig v. Pret A Manger, (11 cv 5677 (BSJ)(AJP)(S.D.N.Y.)) (Class Counsel served as Co-Lead Class Counsel in wage and hour class action for a class of approximately 165, received approval of a \$299,000 class-wide settlement, and the Court stated that "Each of the firms before me do have experience, substantial experience in prosecuting wage-and-hour actions such as this."); Ramirez v. Riverbay, 2014 WL 3800886, 7 (S.D.N.Y. 2014) (Class Counsel appointed as Co-Lead Class Counsel in wage and hour class action, received Class Certification for 3 subclasses of about 1,700

employees, received approval of a \$6.25 million class-wide settlement and the Court found that “Plaintiffs’ counsel has pursued a number of similar actions and has vigorously litigated the action before this Court.”); and Kaye v. Orange Regional Medical Center (Index No.: 2012/003968, Orange County Sup. Ct., J. Colangelo) (Class Counsel appointed as Lead Class Counsel in a wage and hour class action and obtained Final Approval of a \$371,739.79 class action settlement.); and *Pierre v. Grandell Rehabilitation and Nursing Center, Inc.* (15 Civ. 967 (ADS) (GRB)) (Class Counsel appointed as Lead Class Counsel in a wage and hour class action and obtained a settlement of \$562,500.00 for a class of approximately 154 members.) Class Counsel’s experience prosecuting large scale class and collective employment law actions on behalf of workers was directly responsible for bringing about the positive settlement in this case.

12. The work that Class Counsel has performed in litigating and settling this case demonstrates their commitment to the class and to representing the best interests of the class. Class Counsel has committed substantial resources to prosecuting this case.

13. The Court hereby grants Class Counsel’s request for attorney’s fees and awards Class Counsel \$98,990.10, which is 33% of the settlement fund.

14. The CPLR authorizes a court to grant attorneys’ fees to class counsel who obtain a judgment on behalf of a class: “If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys’ fees to the representatives of the class based on the reasonable value of legal services rendered...” CPLR § 909.

15. A Court may calculate reasonable attorney’s fees by either the lodestar method (multiplying the hours reasonably billed by a reasonable hourly rate) or based on

a percentage of the recovery. Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 540. Where a settlement establishes a common fund, the percentage method is often preferable because “[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an incentive to raise their fees by billing more hours.” Cox v. Microsoft Corp., 26 Misc.3d 1220(A), 4 (N.Y. Sup. 2007).

16. Public policy favors a common fund attorneys’ fee award in wage and hour class actions. See Johnson v. Brennan, 2011 WL 4357376, 19 (S.D.N.Y. 2011)(“If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk.”); See also Sand v. Greenberg, 2010 WL 69359, 3 (S.D.N.Y. 2010)(“But for the separate provision of legal fees, many violations of the Fair Labor Standards Act would continue unabated and uncorrected.”).

17. “Common fund recoveries are contingent on a successful litigation outcome.” Guaman v. Anja-Bar NYC, 2013 WL 445896, 7 (S.D.N.Y. 2013). Such “contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation...and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk. deMunecas v. Bold Food LLC, 2010 WL 3322580, 8 (S.D.N.Y. 2010)(internal quotation marks and citation omitted). Many individual litigants, “cannot afford to retain counsel at fixed hourly rates...yet they are willing to pay a portion of any recovery they may receive in return for successful representation.” Id. (citation omitted).

18. Regardless of the method used to determine reasonable attorney's fees, a court should consider the following factors:

“the risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case's history and the work done by counsel prior to trial, and what it would be reasonable for counsel to charge a victorious plaintiff.”

Fiala v Met Life Insurance Co., Inc., 899 N.Y.S.2d 531, 540 (N.Y. Sup. 2010). All of these factors weigh in favor of approving the requested fee.

19. Applying the lodestar method as a comparison, the Court finds that the fee Class Counsel seeks is reasonable, as Class Counsel's request for 33% of the settlement fund is consistent with that awarded in these types of cases. The fee requested is also reasonable based on the fact Class Counsel did substantial work on a fully contingent basis. See e.g. In re Lloyd's Am. Trust Fund Litig., 2002 WL 31663577, 27 (S.D.N.Y. 2002)(a “multiple of 2.09 is at the lower end of the range of multipliers awarded by courts”); In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding multiplier of 3.97 times lodestar); Rabin v. Concord Assets Group, Inc., 1991 WL 275757, 2 (S.D.N.Y. 1991)(awarding multiplier of 4.4); In re RJR Nabisco, Inc. Sec. Litig., 1992 WL 210138, 5-8 (S.D.N.Y. 1992)(awarding multiplier of 6). Here, Class Counsel seeks only a tiny multiplier. The fee award requested by Class Counsel is very close to the total amount of time spent by them based on the lodestar method.

20. The fact that Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward also supports their fee request.

21. The Court also awards Class Counsel reimbursement of their litigation expenses in the amount of \$547.28

22. The attorney's fees and the amount in reimbursement of litigation costs and expenses shall be paid from the settlement fund.

Settlement Procedure

23. Within seven (7) days of this Order, the Claims Administrator shall pay Class Counsel attorneys' fees of \$98,990.10 from the settlement fund.

24. Within seven (7) days of this Order, the Claims Administrator shall reimburse Class Counsel for litigation costs and expenses totaling \$547.28 from the settlement fund.

25. The "Effective Date" of the settlement shall be thirty (30) days following this Order if no appeal is taken from the Order. If a party appeals this Order, the "Effective Date" of the settlement shall be the day after all appeals are finally resolved in favor of final approval.

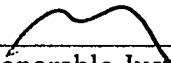
26. Within seven (7) days of the Effective Date, the Claims Administrator will pay the service award of \$10,000.00 to Plaintiff Deborah Clemons.

27. Within ten (10) days of the Effective Date, the Claims Administrator shall pay the remainder of the settlement fund (after subtracting for the attorney's fees, costs and expenses, the Plaintiff's service award, and the Claims Administrator's fees of \$11,500 which are also approved), to

Qualified Class Members in accordance with the allocation plan described in the Settlement Agreement.

- 28. The Court retains jurisdiction over this action for the purpose of enforcing the Settlement Agreement and overseeing the distribution of settlement funds. The parties shall abide by all terms of the Settlement Agreement, which are incorporated herein, and this Order.
- 29. This litigation shall be dismissed with prejudice and all members of the Settlement Class who have not excluded themselves from the settlement shall be permanently enjoined from pursuing and/or seeking to reopen claims that have been released pursuant to the settlement.

It is so ORDERED this 11th day of MAY, 2017.



Honorable Justice Manuel J. Mendez

MANUEL J. MENDEZ
J.S.C.