

**Wharton v Brookdale Hosp. Med. Ctr.**

2024 NY Slip Op 32031(U)

June 13, 2024

Supreme Court, Kings County

Docket Number: Index No. 502023/2021

Judge: Anne J. Swern

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS**

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**ANGELIQUE WHARTON, on behalf of herself  
and all others similarly situated,**

**Plaintiff,**

**Hon. Anne J. Swern**

**Index No.: 502023/2021**

Cal no: 49-50

**-against-**

**THE BROOKDALE HOSPITAL MEDICAL  
CENTER,**

**Defendant.**

\_\_\_\_\_X

The above-entitled matters came before the Court on Named Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement, Service Award to Named 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 NAMED PLAINTIFF, AND CLASS COUNSEL'S ATTORNEY'S FEES AND COSTS**

Named Plaintiff filed the present Class Action Complaint in Kings County Supreme Court on January 26, 2021. The Complaint alleged that Defendant violated the New York Labor Law ("NYLL") and its supporting New York State Department Of Labor Regulations ("NYCRR") during the Class Period because Defendant allegedly often required its non-exempt hourly paid dieticians and housekeepers ("Hourly Employees") to work outside of their scheduled shift and during uncompensated meal breaks without compensation. As such, these Hourly Employees were allegedly deprived of straight time wages to which they were entitled under the NYLL and the NYCRR. A Negotiated Settlement Agreement and Release ("Settlement Agreement") was executed by all parties to resolve this matter for a gross settlement fund of \$900,000.00. On September 18, 2023, Named Plaintiff filed a Motion for

**Preliminary Approval Of The Settlement Agreement And Release, Certification Of The Class For Settlement Purposes, Appointment Of The Named Plaintiff As Class Representative, Appointment Of The Law Firm Of Louis Ginsberg, P.C. As Class Counsel and Approval Of The Class Notice and Claims Form.** On March 28, 2024, the Court granted preliminary approval of the Settlement Agreement And Release, certified the Class for settlement purposes, appointed Named Plaintiff as Class Representative, appointed the Law Firm of Louis Ginsberg, P.C. as Class Counsel and approved the Class Notice and Claims Form.

The Claims Administrator mailed the Settlement Class Notice and Claims Form to Class Members. Subsequently, Named Plaintiff filed an Unopposed Motion for Final Approval of Class Action Settlement, Service Award to Named Plaintiff, and Class Counsel's Attorney's Fees and Costs.

No Class Member has objected to the settlement.

Having considered the Motion for Final Approval of Class Action Settlement, Service Award to Named Plaintiff, and Class Counsel's Attorney's Fees and Costs, and the supporting Declaration of Louis Ginsberg, Esq., and the complete record in this matter, for the reasons set forth herein, and for good cause shown,

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

**Approval Of The Settlement Agreement**

1. The Court hereby grants the Motion for Final Approval of Class Action Settlement, Service Award to Named Plaintiff, and Class Counsel's Attorney's Fees and Costs and finally approves the settlement as set forth in the Settlement Agreement of \$900,000.00.

2. The Court finds that this action satisfies all of the prerequisites of New York Civil Practice Law and Rules (“CPLR”) § 901, and that consideration of the CPLR § 902 factors support certification for purposes of settlement.

3. The Court certifies the following class under Article 9 of the CPLR, for settlement purposes only (“Settlement Class”);

All current and former non-exempt hourly paid dieticians and housekeepers, who worked for Defendant in the State of New York, who are or were employed by Defendant at any time from January 26, 2015 through the date of Preliminary Approval.

4. 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 (1<sup>st</sup> 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.

5. 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 Defendant. 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 (2<sup>nd</sup> Cir. 2005) (internal quotation omitted). Additionally, Defendant has and will continue to vigorously contest Named Plaintiff's claims if the action does not settle. In light of the strengths and weaknesses of the case, the settlement easily falls within the range of reasonableness because it achieves a significant benefit for Named 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

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

7. 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).

8. Named 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).

9. Named 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.")

10. The service award of \$10,000.00 for Named 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

11. On March 28, 2024, the Court appointed the Law Firm of Louis Ginsberg, P.C. ("LG") as Class Counsel because they did substantial work identifying, investigating and litigating Named 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.

12. Louis Ginsberg Law Offices are experienced attorneys who have obtained tens of millions of dollars for employees. *See Marjorie Quintyne, on behalf of herself and all others similarly situated v. Concerned Home Managers For The Elderly, Inc. d/b/a COHME*, Index No. 150245/2020 (Hon. Lynn R. Kotler) (New York Co. Supreme Court 2023) (Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of 316 and received final approval of a \$500,000.00 class-wide settlement); *Susan Sonaike, on behalf of herself and all others similarly situated v. The New York Foundling*, Index No. 157216/2019 (Hon. Lynn R. Kotler) (New York Co. Supreme Court 2023) (Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 75 and received final approval of a \$300,000.00 class-wide settlement); *Thomas Brown, Jeremy Brown, Rafael Azcona and Waldys Hernandez, on behalf of themselves and all others similarly situated v. Tomra Metro, LLC*, Index No. 32781/2018E (Hon. Wilma Guzman) (Bronx Co. Supreme Court 2022) (Louis Ginsberg

appointed Class Counsel in a wage and hour class action for a class of approximately 77 and received final approval of a \$475,000.00 class-wide settlement); *Yvette Brewster, on behalf of herself and all others similarly situated v. Morris Park Nursing And Rehab Center, LLC d/b/a Morris Park Nursing Home*, Index No. 34642/2019E (Hon. Mary Ann Brigantti)(Bronx Co. Supreme Court 2022)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 281 and received final approval of a \$985,000.00 class-wide settlement); *Ralph Martinez, on behalf of himself and all others similarly situated v. The Hospital For Special Surgery Pho, Inc.*, Index No. 157925/2019 (Hon. Paul A. Goetz)(New York Co. Supreme Court 2021)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 40 and received final approval of a \$390,000.00 class-wide settlement); *Clinton Mingo, on behalf of himself and all others similarly situated v. Altice Technical Services*, Index No. 601560/2019 (Hon. Sharon M.J. Gianelli)(Nassau Co. Supreme Co. 2021)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 77 and received final approval of a \$900,000.00 class-wide settlement); *Meyonka Kissoon, on behalf of herself and all others similarly situated v. DO & CO New York Catering, Inc.*, Index No. 506808/2019 (Hon. Lara J. Genovesi)(Kings Co. Supreme Court 2020)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 59 and received final approval of a \$375,000.00 class-wide settlement); *Nykeira Folkes, on behalf of herself and all others similarly situated v. Mosholu Parkway Nursing And Rehabilitation Center LLC*, Index No. 30553/2019E (Hon. Julia Rodriguez)(Bronx Co. Supreme Court 2020)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 110 and received

final approval of a \$450,000.00 class-wide settlement); *Hyacinth Bell, on behalf of herself and all others similarly situated v. St. Patrick's Home For The Aged*, Index No. 23148/2018E (Bronx Co. Sup. Ct. 2019)(Hon. Ruben Franco)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 330 and received final approval of a \$750,000.00 class-wide settlement); *James Beckett, on behalf of himself and all others similarly situated v. Samaritan Village, Inc. d/b/a Samaritan Daytop Village, Inc.*, Index No. 704110/2017 (Queens Co. Sup. Ct. 2019)(Hon. Timothy J. Dufficy)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 124 and received final approval of a \$659,606.18 class-wide settlement); *Robert Charles, on behalf of himself and all other similarly situated employees v. Avis Budget Car Rental, LLC*, Case No. 152627/2016 (N.Y. Co. Sup. Ct. 2017) (Hon. Erika M. Edwards)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 107 and received final approval of a \$320,000.00 class-wide settlement); *Gladys Crawford, on behalf of herself and all others similarly situated v White Plains Center For Nursing* Case No. 55625/2016 (Westchester Co. Sup. Ct. 2017) (Hon. Joan B. Lefkowitz)(Louis Ginsberg appointed Class Counsel in a wage and hour class action for a class of approximately 41 and received final approval of a \$312,500 class-wide settlement); *Deborah Clemons, on behalf of herself and all others similarly situated v. A.C.I. Foundation, Ltd and Areba Casriel, Inc.*, Case No. 154573/2015 (N.Y. Co. Sup. Ct. 2017) (Hon. Manuel Mendez)(Louis Ginsberg appointed Class Counsel in wage and hour class action for a class of approximately 75 and received final approval of a \$297,000 class-wide settlement); *Siewharack v. Queens Long Island Medical Group, P.C.*, (11 cv 03603 (WFK)(ARL) (E.D.N.Y.)) (Louis Ginsberg appointed

Co-Lead Class Counsel in wage and hour class action for a class of approximately 2,500 and received final approval of a \$2.45 million class-wide settlement); *Ludwig v. Pret A Manger*, (11 cv 5677 (BSJ)(AJP)(S.D.N.Y.)) (Louis Ginsberg appointed Co-Lead Class Counsel in wage and hour class action for a class of approximately 165 and received final approval of a \$299,000 class-wide settlement); *Ramirez v. Riverbay*, 2014 WL 3800886, 7 (S.D.N.Y. 2014) (Louis Ginsberg appointed Co-Lead Class Counsel in wage and hour class action, received Class Certification for 3 subclasses of about 1,600 employees, and received final approval of a \$6.25 million class-wide settlement); and *Pierre v. Grandell Rehabilitation and Nursing Center, Inc.* (15 Civ. 967 (ADS) (GRB))(E.D.N.Y.) (Louis Ginsberg appointed Class Counsel in a wage and hour class action and obtained final approval of a class-wide settlement of \$562,500.00 for a class of approximately 154 members.)

13. 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 on a fully contingent basis.

14. The Court hereby grants Class Counsel's request for attorney's fees and awards Class Counsel \$300,000.00, which is 33% of the settlement fund.

15. 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.

16. Class Counsel's one-third fee request is "consistent with the norms of class litigation..." *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, 5 (S.D.N.Y. 2008)(granting one-third of the settlement fund). Thus, courts routinely grant requests of one-third of settlement funds for attorney's fees in wage and hour class actions such as this. *See Heigl v. Waste Management of New York, LLC*, No. 19-cv-05487, at ECF No. 35 (E.D.N.Y. 2021)(attorneys' fees of one-third of settlement fund of \$2.7 million granted); *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at \*7 (E.D.N.Y. 2012)(citing cases); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, at \*6-7 (E.D.N.Y. 2011)(one-third of settlement fund of \$7.675 million granted); *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, 5 (S.D.N.Y. 2008)(granting one-third of the settlement fund); *Khait v. Whirlpool Corp.*, 2010 WL 2025106, 8 (E.D.N.Y. 2010)(granting counsel one-third of a \$9,250,000 settlement fund in a multistate wage and hour class action); *Reyes v. Altamarea Group, LLC*, 2011 WL 4599822, at 9 (S.D.N.Y. 2011)(awarding one-third of a \$710,000 settlement fund in a wage and hour class action); *Diaz v. Eastern Locating Service Inc.*, 2010 WL 5507912, 7 (S.D.N.Y. 2010)(awarding one-third of settlement fund in wage and hour class action); *Sewell v. Bovis Lend Lease, Inc.*, 2012 WL 1320124, 10 (S.D.N.Y. 2012)(awarding one-third of settlement fund in wage and hour class action); *Josephs v. United Hebrew of New Rochelle Certified Home Health Agency, Inc. d/b/a United Hebrew Geriatric Center*, Index No. 50926/2019, NYSCEF No. 28 (Sup. Ct. Westchester Cnty. 2020)(attorneys' fees of one-third of \$2.1 million settlement fund granted).

17. 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.”).

18. “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).

19. In determining 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.

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 \$467.28.

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. The "Final Effective Date" of the settlement shall be the last of the following dates: (a) the date thirty (30) days after entry of an order by the Court granting final approval to the Agreement and the settlement set forth therein, and the expiration of any appeal period, provided there are no appeals; or (b) if there is an appeal of the Court's decision granting final approval, the latest of the following: (1) any appeal from the Final Approval Order has been finally dismissed; (2) the Final Approval Order has been affirmed on appeal in a form substantially identical to the form of the Final Approval Order entered by the Court; (3) the time to petition for review with respect to any appellate decision affirming the Final Approval Order has expired; and (4) if a petition for review of an appellate decision is filed, the petition has been denied or dismissed, or, if granted, has resulted in affirmance of the Final Approval Order in a form entered by the Court.

24. Within twenty (20) days after the Final Effective Date, the Claims Administrator shall make payment to the Authorized Claimants in accordance with the allocation plan described in the Settlement Agreement and the Claims Administrator may be paid its fees which are also approved.

25. Within twenty (20) days after the Final Effective Date, the Claims Administrator will pay the service award of \$10,000.00 for Named Plaintiff.

26. Within twenty (20) days of the Court's Order granting Final Approval, the Claims Administrator shall pay Class Counsel attorneys' fees of \$300,000.00 from the settlement fund.

27. Within twenty (20) days of the Court's Order granting Final Approval, the Claims Administrator shall reimburse Class Counsel for litigation costs and expenses totaling \$467.28 from the settlement fund.

28. The Court retains jurisdiction over this action for the purposes 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.

It is so ORDERED this 13 day of June, 2024.

  
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Honorable Justice Anne J. Swern