UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DIEGO PERECHU and CESAR DURAN, *individually and on behalf of all others similarly situated*,

Plaintiffs,

v.

FLAUM APPETIZING CORP. d/b/a FLAUM APPETIZING, MOSHE GRUNHUT and AVIRAM CHEN, *individually*,

Defendants.

ORDER
18-CV-1085-SJB

BULSARA, United States Magistrate Judge:

Plaintiffs Diego Perechu ("Perechu") and Cesar Duran ("Duran" and collectively, "Plaintiffs") seek final approval of the settlement between them and defendants Flaum Appetizing Corp. ("Flaum"), Moshe Grunhut, and Aviram Chen (collectively, "Defendants") of a collective action resolving Fair Labor Standards Act ("FLSA") claims, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), and a class action, pursuant to Rule 23(e), resolving New York Labor Law ("NYLL") claims. (Pls.' Mot. for Final Approval of Class and Collective Action Settlement dated Mar. 15, 2022 ("Final Settlement Approval Mot."), Dkt. No. 151). For the reasons stated below, the motion is granted.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs, former laborers for Defendants' food processing and distribution business, filed this action on February 20, 2018 on behalf of themselves and similarly situated employees. (Compl. dated Feb. 20, 2018, Dkt. No. 1). The Complaint alleged that Defendants failed to pay employees overtime compensation and provide wage

notices and statements in violation of FLSA and NYLL. (Am. Compl. dated Dec. 7, 2018 ("Am. Compl."), Dkt. No. 38 ¶¶ 1, 6–7, 154–71). The Complaint also contained a claim for intentional discrimination under New York City Human Rights Law ("NYCHRL"). (*Id.* ¶¶ 172–78). The parties later stipulated to the dismissal of the NYCHRL claim with prejudice. (Stipulation of Voluntary Dismissal with Prejudice dated June 28, 2021, Dkt. No. 141).

On November 3, 2021, Plaintiffs filed a motion for preliminary approval, (Notice of Consent Mot. to Approve Settlement Agreement dated Nov. 3, 2021, Dkt. No. 145; *see* Settlement Agreement and Release dated May 11, 2021 ("Final Settlement Agreement"), attached as Ex. A to Decl. of Bruce E. Menken in Supp. of Pls.' Mot. dated Oct. 28, 2021, Dkt. No. 145-1), which the Court granted. (Order dated Dec. 17, 2021 ("Order Granting Mot. for Prelim. Approval"), Dkt. No. 147).

The settlement is a hybrid class and collective action resolution; it contemplates two procedural vehicles operating simultaneously: (a) a class action settlement, pursuant to Federal Rule of Civil Procedure 23, resolving NYLL claims; and (b) a collective action settlement to resolve FLSA claims. The eligible employees are all present and former drivers and helpers employed by Flaum between February 20, 2012 and December 17, 2021. (Final Settlement Agreement §§ 1.5–1.6). The members of the collective are individuals who worked as drivers and helpers for Flaum between February 20, 2015 and December 17, 2021. (*Id.* § 1.6). To participate in the FLSA collective, employees other than the named plaintiffs were required to affirmatively consent, or "opt in," to the collective. Employees who chose not to opt in retain their rights to bring their own FLSA claim. The class members are individuals who worked as drivers and helpers for Flaum between February 20, 2012 and December 17, 2021. (*Id.*

§ 1.5). Rule 23 class actions do not require the affirmative consent of class members. Rather, all class members are bound by the class settlement unless they affirmatively "opted out." Thus, an eligible employee had the option to remain in the class while not participating in the FLSA collective.[1]

The settlement fund provides a recovery of $482,843.78. (Final Settlement Agreement § 1.38). The agreement defines the "Net Settlement Amount" as the remainder of the settlement fund after deductions for fees, costs, service awards, and, if a third distribution is made, a portion of the applicable fees and costs for Rust Consulting, the settlement claims administrator.[2] (*Id.* § 1.23). The settlement does not include a reversionary component. (*Id.* § 2.9(D)).

Employees who began working for Flaum after April 1, 2018 will receive $100 if they opt into the collective and $75 if they do not. (*Id.* § 3.4(B)). The remaining portion of the net settlement fund will be distributed *pro rata* based on the potential damages of the collective and class members. (*Id.*). Each member of the collective receives 100% of their share of the settlement award. (*Id.*). Employees who decline to opt into the collective, and who remain in the class action (by virtue of not opting out of the class) receive 75% of their share of the settlement award as a settlement of their NYLL claims. (Final Settlement Agreement § 3.4(C)). Employees who stopped working for Flaum

[1] *See Marichal v. Attending Home Care Servs., LLC*, 432 F.Supp.3d 271, 279 (E.D.N.Y. Jan. 13, 2020) ("[T]he affirmative assent of each opt-in plaintiff—as a party to the case—is required [to settle his claims].").

[2] Rust Consulting will receive $15,000, which is paid by Flaum in addition to the settlement fund. *See* Final Settlement Agreement § 1.40. If a third distribution is made, Flaum is responsible for paying the first $1,750 of Rust Consulting's fees and costs, with any excess payable from the settlement fund. *See id.* §§ 1.33, 1.40.

before February 20, 2015 are not eligible to be collective members, and do not need to opt in, and their award is based upon their membership in the class. (*Id.*).

On November 12, 2019, a notice with information about the settlement was sent via first class U.S. mail to 201 employees. (Decl. of Jennifer Mills dated Mar. 15, 2022 ("Mills Decl."), Dkt. No. 153 ¶¶ 9–10, 12–13; Decl. of Jacob Aronauer in Supp. of Pls.' Mot. for Final Approval dated Mar. 15, 2022 ("Aronauer Decl."), Dkt. No. 154 ¶¶ 5, 9). The notice alerted individuals with FLSA claims that the "only way" to receive a payment for the proportionate share of the settlement fund for their FLSA claims was to submit a consent form to join the collective. (Notice attached as Ex. A to Mills Decl. at 2 (emphasis in original)). Members of the class did not need to affirmatively opt in, but could exclude themselves from the settlement by submitting an opt-out statement. (*Id.* at 7). Class members could remain in the class and object to the settlement by writing to the Court. (*Id.*). Alternatively, if they did nothing, they would remain part of the class and receive a payment resolving their NYLL claims. (*Id.* at 5). The notice also included the date of the final fairness hearing. (*Id.* at 3).

The Court concludes that the notice fairly and adequately advised eligible employees of the nature of the action, class members' right to exclude themselves and object to the settlement, the right of eligible employees to opt into and joint the collective, the right of employees to be represented by their own counsel, and their right to appear at the final fairness hearing. The Court concludes that the notice and distribution complied with Fed. R. Civ. P. 23 and FLSA, 29 U.S.C. § 201.

On March 15, 2022, Plaintiffs filed a motion for final settlement approval. (*See* Final Settlement Approval Mot.). Contemporaneously, the parties jointly submitted a letter indicating that 15 consent forms were filed, as well as copies of the forms. (Letter

dated Mar. 15, 2022 ("Mar. 15, 2022 Letter"), Dkt. No. 149; Exs. A–O attached to Mar. 15, 2022 Letter). The Court held a final fairness and settlement approval hearing on March 29, 2022. Counsel for Plaintiffs and Defendants were present.

Following the final fairness hearing, Plaintiffs' counsel submitted a letter updating the Court regarding certain consent forms whose status was uncertain. (Letter dated Apr. 5, 2022 ("Apr. 5, 2022 Letter"), Dkt. No. 157). The letter stated that Eduardo Gonzaga submitted an opt-out form in error. (*Id.* at 1). By virtue of his filing an opt-in form, he is a member of the FLSA collective. Esad Rostoder was in the same position, having erroneously filled out an opt-out form, but is a collective member by virtue of filing an opt-in form. (*Id.*). Rafael Colon ("Colon") submitted an unsigned opt-in form and had not cured his form as of April 5, 2022. (*Id.*). In early April 2022, Hernan Asencion ("Asencion") contacted counsel and indicated he should have received a notice because he briefly worked for Flaum after April 1, 2018. (*Id.*). He will be sent a consent form and is entitled to $100 if the form is signed and returned. (*Id.*). Plaintiffs' counsel represented that if they receive signed forms for Colon and/or Asencion, only minor modifications to the payment calculations will be necessary. (Apr. 5, 2022 Letter at 2).

In total, 15 employees submitted consent forms to participate in the settlement to date, *i.e.*, 9.6% of the 157 eligible employees opted into the collective. (Mar. 15, 2022 Letter; Exs. A–O attached to Mar. 15, 2022 Letter; Mills Decl. ¶ 9; *see also* Apr. 5, 2022 Letter). There were no objections to the settlement. (Mills Decl. ¶ 18).

Counsel requested an award of $160,947.93 for attorney's fees and $4,875.80 for costs and expenses. (Final Settlement Agreement § 1.10; Mem. of Law in Supp. of Pls.' Unopposed Mot. for Final Approval dated Mar. 15, 2022, Dkt. No. 152 at 4).

DISCUSSION

I. Final Collective Action Approval

A settlement that resolves FLSA claims with prejudice must be approved by the Court. To approve such a settlement, the Court must find that the agreement is fair, *i.e.*, that it "reflects a reasonable compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer's overreaching." *Le v. SITA Information Networking Computing, USA, Inc.*, No. 07-CV-86, 2008 WL 724155, at * 1 (E.D.N.Y. Mar. 13, 2008) (internal quotations and citation omitted); *see also Cheeks*, 796 F.3d at 207 (requiring court approval in FLSA actions "to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees").

In determining whether a FLSA settlement is fair, the Court considers:

> (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.

Fisher v. SD Prot. Inc., 948 F.3d 593, 600 (2d Cir. 2020) (quoting *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 335–36 (S.D.N.Y. 2012)); *see also Cheeks*, 796 F.3d at 206.

A. Range of Recovery

As the Court previously found in granting preliminary approval, the settlement amount as reflected in the settlement agreement and in the supplemental materials provides the class and collective action members with a recovery that is fair, reasonable,

and adequate, particularly in light of the litigation risks faced by both parties. (Order Granting Mot. for Prelim. Approval at 3–4).

Counsel has indicated that alleged unpaid overtime wages—excluding notice violations and claims by drivers and helpers Flaum hired after April 1, 2018—for eligible employees is approximately $1,501,565.95.[3] The Net Settlement Amount for these claims is $182,707.22. (Settlement Breakdown attached as Ex. C to Decl. of Bruce E. Menken dated May 11, 2021, Dkt. No. 138 at 2 (listing the allocation of the Net Settlement Amount and total potential damages by type of claim)). The settlement fund is thus 12.17% of the maximum potential recovery for the employees' unpaid wages claims.

These percentages represent a recovery that is fair and reasonable. Other FLSA settlements with similar—or even smaller—percentages of recovery have been approved by courts in this Circuit. *See, e.g.*, *Cronk v. Hudson Valley Roofing & Sheetmetal, Inc.*, 538 F. Supp. 3d 310, 323 (S.D.N.Y. 2021) (approving settlement amount of "just under 13% of Plaintiff's potential recovery at trial"); *Aguilar v. N & A Prods. Inc.*, No. 19-CV-1703, 2019 WL 5449061, at *1 (S.D.N.Y. Oct. 24, 2019) (approving settlement amount of 7% of "estimated potential recovery" net fees and denying motion for settlement approval on other grounds); *Rodriguez-Hernandez v. K Bread & Co., Inc.*, No. 15-CV-6848, 2017 WL 2266874, at *4 (S.D.N.Y. May 23, 2017) (approving a settlement of 26% of potential damages given "bona fide disputes" between the parties and litigation risks).

[3] The parties do not provide an estimate for unpaid wages for employees hired after April 1, 2018. That being said, only $4,300 is allocated to such claims, which suggests these claims are limited (and they accrued after the suit was filed).

B. Attorney's Fees and Costs

The motion seeks attorney's fees of $160,947.93 and costs of $4,875.80. (Final Settlement Agreement § 1.10). The Court approves the fees and costs request. *See* 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.").

The Court finds that the attorney's fees and costs portion of the settlement is reasonable and commensurate with the degree of success obtained. *See Fisher*, 948 F.3d at 606–07. The amount of requested attorney's fees and costs equals one-third of the settlement fund of $482,843.78. (Final Settlement Agreement §§ 1.10, 1.38). The percentage sought is in line with what courts have approved. *See, e g.*, *Cumbe v. Peter Pan Donuts & Pastries Inc.*, No. 16-CV-392, 2018 WL 3742689, at *1 (E.D.N.Y. May 15, 2018), *report and recommendation adopted*, 2018 WL 3742634, at *1 (May 30, 2018). The Court notes also that the fund is not reversionary, and so the percentage is of a gross amount actually being paid by defendants to settle the case.

The $4,875.80 in costs sought are for the filing fee, costs incurred in serving Defendants, a payment of $28.75 to the New York Department of Labor, and fees of $4,250 to JAMS for mediation services. (Aronauer Decl. ¶ 53). Plaintiffs' counsel substantiated these costs by providing invoices that describe the costs incurred, including dates and dollar amounts. (Invoice dated Mar. 15, 2022, attached as Ex. A to Aronauer Decl. at 1–25; Combined Time and Expenses dated Mar. 15, 2022, attached as Ex. B to Decl. of Bruce E. Menken dated Mar. 15, 2022, Dkt. No. 155 at 1–16).

The Court therefore approves the $160,947.93 fees and $4,875.80 costs request. *See, e.g.*, *Karic v. Major Auto. Cos.*, 09-CV-5708, 2016 WL 1745037, at *8 (E.D.N.Y.

Apr. 27, 2016) (approving attorney's fees in the amount of one-third of the settlement fund and noting that "[c]ourts in this Circuit have often approved requests for attorneys' fees amounting to 33.3% of a settlement fund"); *Johnson v. Brennan*, No. 10 Civ. 4712, 2011 WL 4357376, at *12 (S.D.N.Y. Sept. 16, 2011).

C. Scope of the Waiver

The release in the settlement agreement is limited in scope and is not a barrier to settlement approval. Employees who opted into the collective were paid for and waived their FLSA claims. Employees who were members of the NYLL class and did not opt out of the class waived their NYLL claims. (Final Settlement Agreement § 1.34). Neither collective nor class members are waiving claims beyond wage and hour claims. Given the narrow release in the settlement agreement, the Court finds that this portion of the settlement is appropriate. *See, e.g.*, *Weston v. TechSol, LLC*, No. 17-CV-0141, 2018 WL 4693527, at *5 (E.D.N.Y. Sept. 26, 2018) (finding in a FLSA settlement that "the releases to be executed are fair and reasonable and limited to the wage claims that the participating collective members have against defendant").

D. Other Provisions

There are no other provisions that make the Court question whether the agreement was the product of overreaching. *See, e.g.*, *Cumbe*, 2018 WL 3742689, at *1.

In light of the foregoing, the Court concludes that the *Wolinsky* factors have been satisfied, and the settlement is consistent with *Cheeks*. The Court therefore grants final approval to the FLSA settlement pursuant to *Cheeks* and *Wolinsky*. *See, e.g.*, *Brack v. MTA New York City Transit*, No. 18-CV-846, 2019 WL 8806149, at *2–*6 (E.D.N.Y. Apr. 26, 2019).

II. Final Approval of NYLL Class Action

Under the Federal Rule of Civil Procedure 23(e), "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Courts may approve class action settlements where the settlement is found to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(c); *People v. Annucci*, 180 F. Supp. 3d 294, 307 (S.D.N.Y. 2016). "To determine whether a settlement is fair, reasonable, and adequate, the Second Circuit instructs district courts to examine 'the negotiating process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement's substantive terms, *i.e.*, substantive fairness.'" *Stinson v. City of New York*, 256 F. Supp. 3d 283, 288 (S.D.N.Y., 2017) (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803–804 (2d Cir. 2009)). In making this determination, courts in the Second Circuit consider the nine "*Grinnell*" factors outlined in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974):

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (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.

Of these factors, "[i]t 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." *In re Bear Stearns Cos., Inc. Sec., Derivative, and ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012) (quotations omitted).

"Settlement approval is within the Court's discretion, which should be exercised in light of the general judicial policy favoring settlement." *In re Giant Interactive*

Group, Inc. Sec. Litig., 279 F.R.D. 151, 159–60 (S.D.N.Y. 2011) (quotations omitted); *see also Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context.") (quotations omitted). As such, "absent fraud or collusion, courts should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Annucci*, 180 F. Supp. 3d at 307 (citations and quotations omitted).

For the reasons stated in the Court's order granting preliminary approval and the rationale for final approval of settlement under *Cheeks*, the Court finds that the NYLL class action should also be approved. As noted, no objections were made, many of the collective action members are class members, and the range of recovery analysis that the Court previously conducted applies with equal force to the class action claims (because, among other reasons, employees receive a single check, reflecting a consolidated amount for recovery under FLSA and NYLL).[4] *See Sealock v. Covance, Inc.*, No. 17-CV-5857, 2020 U.S. Dist. LEXIS 44753, *6 (S.D.N.Y. Mar. 13, 2020) (considering *Wolinsky* and *Grinnell* factors together); *Riedel v. Acqua Ancien Bath New York LLC*, No. 14-CV-7238, 2016 WL 3144375, at *7 (S.D.N.Y. May 19, 2016) (same).

This action is hereby dismissed on the merits with prejudice. Though the Court retains jurisdiction over this action for the purpose of enforcing the settlement agreement, the Clerk is directed to use this order as a basis to enter final judgment. The parties shall abide by all terms of the settlement agreement and this order.

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[4] The Court also awards service awards of $10,000 to Diego Perechu and $7,500 to Cesar Duran. *See* Final Settlement Agreement §§ 1.33, 3.3. These awards are reasonable in light of their efforts in prosecuting the case. *See, e.g.*, *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 434 (S.D.N.Y. 2014) (awarding service awards of $20,000 to each class representative).

CONCLUSION

For the reasons explained above, the Court grants the motion and finds that:

1. The FLSA settlement satisfies the requirements of *Cheeks*;
2. The NYLL class action settlement is fair, reasonable, and adequate, and satisfies the requirements of Rule 23(e);
3. Plaintiffs' counsel are entitled to a fee award of $160,947.93;
4. Plaintiffs' counsel are entitled to $4,875.80 for costs and expenses;
5. Diego Perechu is entitled to a service award of $10,000;
6. Cesar Duran is entitled to a service award of $7,500; and
7. Rust Consulting is entitled to a payment of $15,000 for fees and costs, and payment for additional fees incurred with a third distribution as indicated in the settlement agreement.

The Clerk of Court is directed to enter final judgment consistent with this order and to close this case.

SO ORDERED.

/s/ Sanket J. Bulsara 4/8/2022
SANKET J. BULSARA
United States Magistrate Judge

Brooklyn, New York