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

ANTHONY MORANGELLI and FRANK ERCOLE, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY,** **Defendants.**	**1:10-CV-00876 (BMC)**

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, APPROVAL OF PLAINTIFFS' PROPOSED NOTICE OF SETTLEMENT, AND OTHER RELIEF

Respectfully submitted,

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PRELIMINARY STATEMENT

Subject to Court approval, the parties have settled Plaintiffs' and class members' claims against Defendants Chemed Corporation and Roto-Rooter Services Company (collectively, "Roto-Rooter" or "Defendants"), for $14,274,585.00. The proposed settlement resolves all claims in this federal lawsuit and a related arbitration proceeding[1] alleging that Roto-Rooter failed to pay their commissioned service technicians correctly pursuant to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA") and sixteen state wage and hour laws.

By this motion, Plaintiffs respectfully request that the Court: (i) grant preliminary approval of the Settlement Agreement and Release ("Settlement Agreement") attached as Exhibit B to the Declaration of Michael J.D. Sweeney in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement ("Sweeney Decl.")[2]; (ii) provisionally certify the agreed changes to the definitions of the previously certified federal classes; and (iii) approve the Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing ("Proposed Settlement Notice") to be issued to the federal and arbitration classes (Exhibit 1 to the Notice of Motion).

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural History

A. The Federal Action

[1] The arbitration proceeding before the American Arbitration Association, styled, *Colquhoun, et al., v. Chemed Corporation, et al*., AAA Case No. 11-160-001581-10 (hereinafter the "Arbitration"), was filed as a result of the Court's July 9, 2010 Order granting Defendants' motion to compel arbitration with respect to those plaintiffs who had signed Arbitration Agreement A. (*See* Docket Entry dated 7/9/2010). After the arbitrator permitted the Arbitration to proceed under the AAA's Supplemental Class Arbitration Rules, the parties agreed to stay the proceeding pending the resolution of the federal litigation. As a result of the settlement agreement, the arbitrator has provisionally certified the arbitration classes for purposes of settlement.

[2] Unless otherwise indicated, all exhibits are attached to the Sweeney Decl.

On February 25, 2010, Plaintiffs Anthony Morangelli ("Morangelli") and Frank Ercole ("Ercole") filed a class and collective action complaint in the United States District Court for the Eastern District of New York, asserting violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*. and the New York and New Jersey state wage and hour laws (hereafter "Federal Action"). (Sweeney Decl. at ¶ 24). Morangelli and Ercole were former commissioned service technicians ("Technicians"), who alleged that they and all other Roto-Rooter Technicians who were paid on a commissioned basis were not paid minimum wages and overtime premiums, and were further subject to unlawful wage deductions and kickbacks for which they sought unpaid wages, attorneys' fees and costs, and liquidated damages. (*Id.*). Defendants' filed their Answer on April 27, 2010, disputing the material allegations and denying any liability in the proposed class and collective actions. (*Id.*).

On April 26, 2010, Morangelli and Ercole filed their Motion to Conditionally Certify a FLSA Collective Action and Authorize Notice to Be Issued to All Persons Similarly Situated. (*Id.* at ¶ 25). Oral arguments on the motion were held before the Honorable Brian M. Cogan on June 7, 2010. (*Id.*). In an Order dated June 15, 2010, Judge Cogan granted Plaintiffs' motion to certify a nationwide FLSA collective action. (*Id.*). On June 21, 2010, Defendants filed their Motion to Compel Arbitration. (*Id.*). The evidence showed that some Technicians had signed one version of the arbitration agreement while others had signed a different version. (*Id.*). The Court found that Technicians who had signed one version, Agreement A, were required to arbitrate their claims and ordered approximately half of the class to arbitrate their claims. (*Id.*). Those Technicians who had signed the other version, Agreement B, were allowed to proceed in federal court. (*Id.*). Notice of the federal FLSA claim was mailed to all current and former Technicians who worked for Roto-Rooter at any time within three (3) years prior to the notice

being mailed except those that signed Agreement A. (*Id.*). Four hundred and thirty-two (432) plaintiffs, representing approximately 48 branches in 25 states, opted-in to the collective action. (*Id.*).

Subsequently, on November 12, 2010, the Plaintiffs filed a Motion to Certify a Federal Rule of Civil Procedure 23 Class for fourteen states. (*Id.* at ¶ 26). In a Memorandum Decision and Order dated June 16, 2011, the Court certified 14 state law class actions for liability purposes only. (*Id.*); *see Morangelli v. Chemed Corp.*, 275 F.R.D. 99 (E.D.N.Y. 2011). After reconsideration, the Court modified its ruling to amend the definition of the class. (*Id.*). Notice of the certified class action was sent to approximately 1,971 current and former Roto-Rooter Technicians (the "Federal Class Members"). (*Id.*). Of the Federal Class Members, three (3) Technicians opted not to participate in this litigation. (*Id.*).

On February 10, 2012, the parties both moved for summary judgment. (*Id.* at ¶ 27). Plaintiffs moved for summary judgment on the following four grounds: (1) that Defendants' policy of shifting expenses to Plaintiffs violates the FLSA and state minimum wage laws when it has the effect of bringing earnings below the applicable minimum wage (the "Business Expense Claim"); (2) that Defendants violated their record-keeping duties under the FLSA; (3) that Defendants' taking of wage deductions for warranty call-back work violated state laws regulating wage deductions (the "Illegal Deductions Claim"); and (4) that Plaintiffs are entitled to liquidated damages under the FLSA for Defendants' alleged minimum wage violations. (*Id.*). The Plaintiffs also moved to amend the definition of the certified classes. (*Id.*). Separately, Defendants' moved for decertification or dismissal of the Business Expense Claim, the Illegal Deductions Claim, and Plaintiffs' claim that Roto-Rooter failed to compensate them for all hours they worked, including time shaved from their actual working hours and time spent at "turn-in"

(the "Uncompensated Hours Claim"). (*Id.*). Defendants also moved for summary judgment on all claims against Chemed, arguing that it was not Plaintiffs' employer. (*Id.*).

On February 4, 2013, the Court (1) denied Plaintiffs' motion for summary judgment and for amendment of the definition of the certified classes, and (2) granted in part and denied in part Defendants' motion for summary judgment. (*Id.* at ¶ 28); *see Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278 (E.D.N.Y. 2013). The Court maintained the certification of Plaintiffs' Business Expense and Uncompensated Hours claims for turn-in time and for shaving shown by a specific record analysis, the Query 4 analysis. (*Id.*). The Court dismissed the Illegal Deductions claims on summary judgment and limited various California and Hawaii state claims to certain time periods. (*Id.*).

B. The Arbitration

Several plaintiffs who signed Agreement A and who were, therefore, dismissed from the federal action filed arbitration claims with the American Arbitration Association (AAA) on August 9, 2010. (*Id.* at ¶ 29). The Arbitration, styled *Colquhoun et al. v. Chemed Corp., et al.,* AAA Case No. 19 166 00167 09, raised substantially the same claims as those raised in the Federal Court complaint on behalf of seven state opt-out classes and a nationwide FLSA opt-out class.[3] (*Id.*). After the Arbitrator (Ruth Raisfeld) found the arbitration agreement allowed for class arbitration and that Claimants could proceed under the AAA's supplemental class rules, the parties agreed to stay the Arbitration. (*Id.*). Pursuant to the parties settlement agreement, the

[3] Five of the seven arbitration state classes are also certified classes in the Federal action – i.e. New York, Indiana, North Carolina, Ohio, and Washington. (Sweeney Decl. at ¶ 29, fn 1). Two of the arbitration State classes, Pennsylvania and Massachusetts, are not certified in the Federal action because no representative who had not signed Agreement A came forward. (*Id.*). The arbitration FLSA class is an opt-out class because the AAA supplemental class rules permit all class claims, including FLSA claims, to proceed as opt-out, rather than opt-in, claims. (*Id.*).

Arbitrator provisionally certified the arbitration classes for purposes of settlement. (*Id.*). Because the Federal Action and the Arbitration address similar claims and factual circumstances, the parties propose to submit the proposed settlement to the Court for preliminary approval, a fairness hearing, and final approval. (*Id.*).

II. Overview of Investigation and Discovery

Plaintiffs' counsel has conducted extensive investigation and prosecution of the claims in the lawsuit, including, but not limited to, taking and defending 45 depositions around the country, engaging in full discovery for 39 Opt-in Plaintiffs, interviewing hundreds of putative class members and Opt-in Plaintiffs, reviewing hundreds of thousands of documents produced by Defendants, reviewing and analyzing time and payroll data, drafting and filing motions for conditional certification under 29 U.S.C. § 216(b), class certification under Federal Rule of Civil Procedure 23, and for summary judgment, engaging in discovery motion practice, fielding questions from potential opt-in plaintiffs and class members, modeling damages, preparing for and attending a full-day mediation, and engaging in extensive settlement negotiations. (*Id.* at ¶ 30).

III. Settlement Negotiations

Over the course of approximately three and a half (3.5) years of litigation, the parties engaged in informal and formal settlement negotiations to resolve both the Federal Action and the Arbitration. (*Id.* at ¶ 31). After the Court's decision on the summary judgment and decertification motions in February 2013, the parties agreed to attempt to resolve the litigation through non-binding private mediation. (*Id.*). To that end, the Plaintiffs prepared and exchanged with Defendants a comprehensive damages analysis. (*Id.*). The parties held several telephone conferences to discuss the analysis in advance of the mediation to ensure a common understanding of Plaintiffs' calculations. (*Id.*). On June 4, 2013, the parties attended a full-day

mediation session under the direction of experienced class action mediator, Linda Singer of JAMS. (*Id.*). Although the parties did not settle the litigation at the mediation, they made significant progress and agreed to continue to work towards a resolution and to keep Ms. Singer involved. (*Id.*).

After several weeks of continued negotiating and the exchange of additional information and calculations, the parties ultimately agreed on a settlement amount to resolve both the Federal Action and the Arbitration and other key terms on or around June 20, 2013. (*Id.* at ¶ 32). During the next several weeks, the parties negotiated the remaining terms of the settlement. (*Id.*). The amount and terms of the settlement were approved by Defendants' Board of Directors and were memorialized in a formal Settlement and Release ("Settlement Agreement"). (*Id.*). At all times during the settlement negotiation process, negotiations were conducted at an arms-length basis. (*Id.*).

SUMMARY OF THE SETTLEMENT TERMS

I. Scope of Settlement and Agreement to Certify the Arbitration Classes for Purposes of Settlement

The Settlement Agreement resolves the claims of the Federal Named and opt-in Plaintiffs as well as the claims of all of the members of the certified classes in the Federal Action. (*Id.* at ¶ 33). The Settlement Agreement also resolves the claims of the Named and Opt-in Claimants in the Arbitration as well as the claims of the members of the seven State classes and the FLSA classes certified in the Arbitration. (*Id.*).

II. Federal Approval of the Settlement and Arbitration Classes

Because the Settlement Agreement is a single, indivisible settlement of all of the Federal and Arbitration claims, the parties have agreed to waive their right to have the arbitrator approve the settlement of the class claims asserted in the Arbitration and instead to seek approval of the

settlement of those claims in conjunction with the Court's approval of the settlement of the class and collective action claims asserted in the Federal Action. (*Id.* at ¶ 34). In that way, all aspects of the Settlement Agreement can be considered as a whole in one forum, as the parties intended. (*Id.*). Accordingly, the Arbitration Class Members will be included, for settlement purposes only, in the group of Plaintiffs for which the instant motion seeks approval of the Rule 23 class settlement. (*Id.*).

III. The Settlement Fund

The Settlement Agreement creates a fund of $14,274,585.00 to settle this action (the "Fund"). (*Id.* at ¶ 35).

IV. Eligible Employees

All Named and Opt-in Plaintiffs, named and opt-in Arbitration claimants and all members of the Federal Classes and certified Arbitration Classes who do not opt-out of the settlement are entitled to share in the settlement fund. (*Id.* at ¶ 36). The parties have agreed to expand the Federal Classes to include the individuals who were hired in the class states after federal class notice was issued but before the date on which Defendants implemented new pay policies that implicate the practices challenged by plaintiffs in this litigation (the "practice conversion date"). (*Id.*). Defendants rolled out the new pay practices on a branch-by-branch basis over a 12-month period so the practice conversion date varies from branch-to-branch. (*Id.*). The Chart referred to as Exhibit A to the Settlement Agreement indicates the practice conversion dates for each of the Federal classes and each of the Arbitration classes.[4] (*Id.*). The individuals entitled to participate in the Settlement Fund are hereafter referred to as "Plaintiffs." (*Id.*).

[4] The agreed Arbitration classes include in their definitions the end date when practice conversion occurred. (Sweeney Decl. at ¶ 36, fn 2). Plaintiffs are merely proposing to add the same end dates to each of the previously certified federal classes. (*Id.*).

V. Allocation Formula

The parties have agreed that Plaintiffs may petition the Court for an award from the Settlement Fund for attorneys' fees and costs (including the costs of the Settlement Administrator) as well as for Service Awards for the named parties and discovery plaintiffs. (*Id.* at ¶ 37). These amounts are discussed below. After these amounts have been deducted from the Settlement Fund, the remaining funds (the "net settlement fund") will be allocated among the Plaintiffs using the following formula:

1. The number of weeks that each Plaintiff worked as a commissioned technician within the applicable statute of limitations and ending on the applicable practice conversion date will be totaled and divided into the net settlement fund to determine a "weekly damage amount."

2. The number of weeks that each Plaintiff worked as a commissioned technician within the applicable statute of limitations and ending on the applicable practice conversion date will be multiplied by the "weekly damage amount" to yield the "preliminary individual damage amount."

3. A multiplier will then be applied to the "preliminary individual damage amount" to produce an "adjusted individual damage amount." The multipliers are as follows: 183% For Federal and Arbitration Named Plaintiffs and Opt-In Plaintiffs; 100% for Arbitration class members; 66% for Federal Action State Class members. As recovery of damages would require each Plaintiff to come forward with evidence of their damages, the varying multipliers reflect the chances of recovery that each of these groups would likely have if the litigation continued. The Named and Opt-in Plaintiffs and Arbitration Claimants have the best chance of recovery because they have come forward to participate in the litigation. The passive Federal Action State class members would likely have the greatest difficulty recovering if the litigation continued because of this Court's decision to certify the Federal Action State classes for purposes of liability only. This group has received notice of the opportunity to join the action and chose not to actively participate. The Arbitration class members are in the middle because no decision has yet been made on those classes. It remains possible, but is far from guaranteed, that if the litigation continued the Arbitrator would certify those classes for liability and damages, but it is also possible that the Arbitrator would follow the Federal Court and limit certification to liability only.

4. The "adjusted individual damage amounts" will then be pro-rated to ensure that they add up to the Net Settlement Fund and the resulting amount will be the "final damage amounts" for each Plaintiff with the proviso that any

Plaintiff whose final damage amount is less than $250, including Plaintiffs with claims outside the applicable statute of limitations, will receive $250 as a minimum amount.[5]

5. Upon approval of the settlement and the expiration of all appeals, if any, checks for the final damage amounts will be mailed to the Plaintiffs. Any check that is not cashed within 120 days of mailing will be cancelled and the monies will revert to Defendants.

(*Id.*).

VI. Taxes

The parties have agreed that 50% of the final damage amounts will be treated as wages and will be paid net of applicable payroll taxes and reported on an IRS form W-2. (*Id.* at ¶ 38). 50% will be treated as interest and/or liquidated damages and will be reported on an IRS form 1099. (*Id.*). Attorneys' fees and Service Awards will also be reported on an IRS form 1099s. (*Id.*).

VII. Releases

The Settlement Agreement provides that, upon Final Approval of the Settlement, the Named and Opt-in Federal and Arbitration Plaintiffs and every Federal and Arbitration class member who does not timely opt out of the settlement will release Defendants, their parents, affiliates, directors, agents etc. from any and all wage and hour claims arising under federal, state, or local law relating to the Plaintiff's employment with Roto Rooter up to and including the date the Court grants Preliminary Approval of the Settlement. (*Id.* at ¶ 39).

[5] The parties have agreed to hold back $180,000 from the Net Settlement Fund to cover any errors that may be discovered in the payroll data that would affect the damage calculation, such as errors in a worker's start or end date. (Sweeney Decl. at ¶ 37, fn 3)/ Upon the Court's Final Approval of the settlement, the allocation calculation will be run again and any of the $180,000 remaining at the time of Final Approval will be redistributed among the Plaintiffs on a pro-rata basis. (*Id.*).

VIII. Attorneys' Fees and Litigation Costs

While the Settlement Agreement provides that Plaintiffs' counsel may apply for reimbursement from the Fund for their actual litigation costs and for no more than one-third (33.33%) from the Fund to compensate them for attorneys' fees, Plaintiffs' counsel is requesting no more than 23% from the Fund to compensate them for attorneys' fees. (*Id.* at ¶ 40). Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), Plaintiffs' counsel will file a motion for approval of attorneys' fees, and reimbursement of expenses along with its motion for final approval of the settlement. (*Id.*). The Settlement Agreement is not contingent on the amount of attorneys' fees and costs awarded by the Court.

IX. Service Awards

In addition to their individualized awards under the allocation formula, various Plaintiffs will apply for service payments ("Service Awards") in recognition of the services they rendered on behalf of the class. (*Id.* at ¶ 41). Original Plaintiffs Anthony Morangelli and Frank Ercole will each apply to receive up to $12,000 as a Service Award from the Settlement Fund.[6] (*Id.*).

[6] The amounts being sought are common in wage and hours actions. *See Massiah v. MetroPlus Health Plan, Inc.*, No. 11–cv–05669 (BMC), 2012 WL 5874655, *2 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) (finding reasonable and approving service awards of $5,000 in overtime class action), *citing Toure v. Amerigroup Corp.,* No. 10 Civ. 5391, 2012 WL 3240461, at *5 (E.D.N.Y. Aug. 6, 2012) (approving service awards of $10,000 and $5,000); *Sewell v. Bovis Lend Lease, Inc.,* No. 09 Civ. 6548, 2012 WL 1320124, at *14-15 (S.D.N.Y. Apr. 16, 2012) (finding reasonable and approving service awards of $15,000 and $10,000 in wage and hour action); *Reyes v. Altamarea Grp., LLC*, 10-CV-6451 RLE, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011) (approving service awards of $15,000 to three class representatives and $5,000 to fourth class representative in restaurant case challenging tip and minimum wage policies); *Willix v. Healthfirst, Inc.,* No. 07 Civ. 1143, 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving service awards of $30,000, $15,000, and $7,500); *Torres v. Gristede's Operating Corp.,* Nos. 04 Civ. 3316, 08 Civ. 8531, 08 Civ. 9627, 2010 WL 5507892, at *8 (S.D.N.Y. Dec. 21, 2010) (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); *Khait v. Whirlpool Corp.,* No. 06 Civ. 6381, 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of $15,000 and $10,000, respectively, in wage and hour class action).

Eighteen (18) Named Plaintiffs who were Discovery Representatives will each apply to receive up to $5,000 as a Service Award from the Settlement Fund. (*Id.*). Nineteen (19) non-Named Plaintiffs who were Discovery Representatives will each apply to receive up to $2,500 as a Service Award from the Settlement Fund. (*Id.*). Six (6) Named Plaintiffs who were not Discovery Representatives (including Named Plaintiffs in the Arbitration) will each apply to receive up to $500 as a Service Award from the Settlement Fund. (*Id.*). These Plaintiffs have served the class by assisting with the preparation of the complaint, executing declarations, sitting for depositions, producing documents in response to Defendants' discovery requests, and by assuming the burden associated with being a named Plaintiff. (*Id.*). Service Awards of this type are commonly awarded in complex wage and hour litigation.[7] The Court need not rule on the proposed Service Awards now. Plaintiffs will move for Court approval of the Service Awards simultaneously with Plaintiffs' Motion for Final Approval of the Settlement. (*Id.*).

X. Settlement Administrator

Under the Settlement Agreement, Class Counsel is responsible for retaining the services of a Settlement Administrator. (*Id.* at ¶ 42). The parties have agreed to use Simpluris, Inc., Class Action Settlement Administration, 3176 Pullman St., Suite 123, Costa Mesa, CA as Settlement Administrator. (*Id.*). The Settlement Administrator will be responsible for the mailing of Notices and Claim Forms to Class Members in accordance with this Court's Order, receiving the Claim Forms, calculating the settlement checks for participating Class Members, and performing claims

[7] *See Massiah v. MetroPlus Health Plan, Inc.*, No. 11–cv–05669 (BMC), 2012 WL 5874655, *2 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) ("Such service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiff."); *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819, No. 04 Civ. 2295, 2009 WL 5841128, at *4 (S.D.N.Y. July 27, 2009) (same); *Reyes v. Buddha-Bar NYC*, 08 CIV. 02494(DF), 2009 WL 5841177, at *5 (S.D.N.Y. May 28, 2009) (same).

administration and distribution of the settlement checks to participating Class Members, including all tax withholding, submission and reporting duties. (*Id.*). The Settlement Administrator's fees will be paid from the Settlement Fund. (*Id.*).

XI. Agreed Procedure for Approval of the Settlement

The parties respectfully submit the following proposed schedule for final resolution of this matter for the Court's consideration and approval:

1. The Settlement and the proposed Notice to the Federal and Arbitration class members is submitted to the Federal Court for preliminary approval.

2. Class Counsel provides the Settlement Administrator with a list, in electronic form, of the name; RRSC AB number; Social Security Number; last known addresses, and last known telephone number (as and to the extent such information exists on file with Defendants); and Final Minimum Damage Amount of all class members (the "Class List") within 10 days of this Court's Preliminary Approval Order of the Settlement.

3. The Settlement Administrator shall mail the court-approved notices to Plaintiffs via First Class United States Mail, postage prepaid within 10 days of receiving the Class List from Class Counsel.

4. Class Members shall have 30 days after the date the Notices are mailed to opt out of the settlement and/or object to the settlement.

5. A final fairness hearing will be held as soon as is convenient for the Court but no earlier than 100 days from the date of the Court's Preliminary Approval Order of the Settlement.

6. Not later than fifteen (15) days before the Fairness Hearing, Named Plaintiffs will submit a Motion for Judgment and Final Approval.

7. If the Court grants Plaintiffs' Motion for Final Approval of the Settlement, the Court will issue a Final Order and Judgment for Dismissal.

8. The Settlement Administrator will mail settlement checks to the Plaintiffs and the attorneys' fees and costs checks mailed to Class Counsel within ten (10) days after the Effective Date as defined in Section 1.12 of the Settlement Agreement.

9. The Court will retain jurisdiction over the case following the entry of the Judgment for Dismissal until 30 days after the end of the Acceptance Period as defined in Section 1.3 of the Settlement Agreement.

(*Id.* at ¶ 43).

ARGUMENT

I. Standards Governing Preliminary Approval

Because this is a class action, and because it involves FLSA claims, the Court must approve the settlement. The procedure for approval includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval, including preliminary approval of any agreed settlement classes;

2. Dissemination of mailed and/or published notice of settlement to all affected class members; and

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*"), §§ 11.22, *et seq.* (4th ed. 2002). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests.

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Churchill Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 575 (9th Cir. 2004); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988).

Preliminary approval requires only an "initial evaluation" of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties. *Newberg* § 11.25. To grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980); *Newberg* § 11.25

("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should permit notice of the settlement to be sent to class members).

"Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). Courts examine procedural and substantive fairness in light of the "strong judicial policy favoring settlements" of class action suits. *Massiah v. MetroPlus Health Plan, Inc.*, No. 11–cv–05669 (BMC), 2012 WL 5874655, *2 (E.D.N.Y. Nov. 20, 2012) (Cogan, J.) *citing Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116 (2d Cir. 2005). "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 quotations omitted); *Massiah*, 2012 WL 5874655 at *2 (same) (citations omitted); *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) ("When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("A strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor.").

If 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." *Massiah*, 2012 WL 5874655 at *2. *citing In re EVCI Career Colls. Holding Corp. Sec. Litig.,* No. 05 Civ. 10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007); *In re Top Tankers, Inc. Sec. Litig.*, 06 CIV. 13761 (CM), 2008 WL 2944620, at

*3 (S.D.N.Y. July 31, 2008) (same); "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Massiah*, 2012 WL 5874655 at *2. *citing Clark v. Ecolab Inc .,* Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672, 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010). "The Court gives weight to the parties' judgment that the settlement is fair and reasonable." *Massiah*, 2012 WL 5874655 at *2 (citations omitted).

II. The Settlement is Fair, Reasonable, and Adequate

In evaluating a class action settlement, courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). *Massiah*, 2012 WL 5874655 at *2. Although the Court's task on a motion for preliminary approval is merely to perform an "initial evaluation," *Newberg* § 11.25, to determine whether the settlement falls within the range of possible final approval, or "the range of reasonableness," *id.* at § 11.26, it is useful for the Court to consider the criteria on which it will ultimately judge the settlement.

The *Grinnell* factors are (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. *Grinnell*, 495 F.2d at 463. Because "the standard for approval of an FLSA settlement is lower than for a Rule 23

settlement," *Massiah v. MetroPlus Health Plan, Inc.*, 11-CV-05669 BMC, 2012 WL 5874655 (E.D.N.Y. Nov. 20, 2012), the *Grinnell* factor analysis applies to settlement of the FLSA claims as well. All of the *Grinnell* factors weigh in favor of approval of the Settlement Agreement, and certainly in favor of preliminary approval.

A. Litigation Through Trial Would be Complex, Costly, and Long (*Grinnell* Factor 1)

By reaching a favorable settlement before trial, Plaintiffs seek to avoid significant expense and delay, and instead 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 more than 4,200 Class Members. (Sweeney Decl. ¶ 44).

Although the parties have already undertaken considerable time and expense in litigating this matter (*Id.* at ¶¶ 24-30), further litigation without settlement would necessarily result in additional expense and delay. Moreover, because the Court bifurcated the case into separate stages for liability and damages, two different trial phases would be required. A complicated trial on liability would be necessary, featuring extensive testimony by Defendants, Plaintiffs, and numerous class members. Preparing and putting on evidence on the complex factual and legal issues at such a trial would consume tremendous amounts of time and resources for both sides, as well as requiring substantial judicial resources to adjudicate the parties' disputes. Additionally, hundreds of individual trials for non-certified claims would be needed. A separate trial phase on the damages issues, even on a representative basis, would be costly and would further defer closure. Further, because damages classes have not been certified, it is possible that damages would have to be tried on an individual basis, necessitating potentially thousands of hearings.

Any judgment would likely be appealed, thereby extending the duration of the litigation. This settlement, on the other hand, makes monetary relief available to class members in a prompt and efficient manger. Therefore, the first Grinnell factor weighs in favor of preliminary approval.

B. The Reaction of the Class Has Been Positive (*Grinnell* Factor 2)

Although notice of the settlement and its details has not yet issued to the class, word of the settlement has spread. (Sweeney Decl. ¶ 45). Plaintiffs' counsel has already received calls from class members who have reacted positively to the settlement. (*Id.*). Additionally, all of the Named Plaintiffs support the settlement, as evidenced by their signatures on the Settlement Agreement. (*Id.*). Although the Court should more fully analyze this factor after notice issues and class members are given the opportunity to opt-out or object, it weighs in favor of preliminary approval.

C. 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 thousands more hours of discovery work for both sides, the parties have completed enough discovery to recommend settlement. "The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Massiah*, 2012 WL 5874655 at *4 (citation omitted); see also *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004). "The 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*, 80 F. Supp. 2d at 176 (internal quotations omitted).

The parties' discovery here meets this standard. Class Counsel interviewed hundreds of current and former Technicians to gather information relevant to the claims in the litigation; took

multiple depositions; defended depositions of 39 Plaintiffs; obtained, reviewed, and analyzed hundreds of thousands of pages of hard-copy documents and electronically-stored data including, but not limited to, time and payroll records, human resources documents and employee personnel files; engaged in numerous discovery disputes which required court intervention; responded to multiple discovery requests. (Sweeney Decl. ¶ 30). Discovery here was "an aggressive effort" to litigate the case. *See Massiah*, 2012 WL 5874655 at *4.

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

Although Plaintiffs believe their case is strong, it is subject to considerable risk as to liability and damages. 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 quotations omitted). A trial on the merits would involve significant risks to Plaintiffs because of the fact-intensive nature of proving liability under the FLSA and fourteen separate state wage and hour laws, and in light of the defenses available to Defendants, which would pose substantial risk as to both liability and damages. Even if Plaintiffs prevail on liability, they would still have to litigate damages individually as the Court certified the class for liability purposes only.

While Plaintiffs believe that they could ultimately establish Defendant's liability and damages on these claims, to do so would require significant factual development at trial. While Plaintiffs believe that their claims are meritorious and class-wide damages provable, their 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. See *Massiah*, 2012 WL 5874655 at *4 ("Litigation inherently involves

risks."). The proposed settlement alleviates this uncertainty. This factor weighs heavily in favor of preliminary approval.

E. Maintaining a Class Through Trial Would Not Be Simple (*Grinnell* Factor 6)

The risk of maintaining the class status through trial is also present. While the Court has ordered that the classes should be maintained for trial for some of the Plaintiffs' claims, establishing damages at trial on a class-wide basis on such claims is a difficult endeavor that poses risks given the nature of the time and payroll records, and the inherent difficulty of using representational testimony at trial. Moreover, Defendants have already informed the Court of their intention to file an additional motion to decertify the classes based upon the Supreme Court's recent ruling regarding Rule 23 certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) and to decertify part of the Uncompensated Hours claims on additional grounds. There is a real risk that the Court could decertify the classes with respect to additional claims in light of the individualized damages calculations that Defendants allege will be necessary at trial.

Risk, expense, and delay are involved in these steps. "Settlement eliminates the risk, expense, and delay inherent in this process." *Massiah*, 2012 WL 5874655 at *5. This factor favors preliminary approval.

F. Defendants' Ability to Withstand a Greater Judgment is Not at Issue (*Grinnell* Factor 7)

Defendants' ability to withstand a greater judgment is not currently at issue. Even if the Defendants can withstand a greater judgment, 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*, 80 F. Supp. 2d at 178 n.9). This factor does not hinder this Court from granting preliminary approval.

G. The Settlement Fund is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

Plaintiffs' counsel has determined that this case presents significant risks that militate toward substantial compromise. Defendants have agreed to settle this case for a substantial amount, $14,274,585 for 4,216 Plaintiffs. (Sweeney Decl. at ¶¶ 35, 44). The settlement amount represents a good value given the attendant risks of litigation, even though recovery could be greater if Plaintiffs succeeded on all claims at trial and survived an appeal.

"The determination whether a settlement is reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.' *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) *citing In re Austrian and German Bank Holocaust Litig.*, 80 F.Supp.2d at 178 and *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993). "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. "Moreover, when a 'settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing "speculative payment of a hypothetically larger amount years down the road,"' settlement is reasonable under this factor." *Massiah*, 2012 WL 5874655 at *5.

Here, each Class Member will receive payment based upon his or her relevant weeks of employment with Defendants. (Sweeney Decl. at ¶ 37). As explained in detail above, the actual amount that each class member will receive reflects a careful balancing of the strengths of their underlying claims and the risks that their claims would not ultimately prevail. Weighing the

benefits of the settlement against the risks associated with proceeding in the litigation, the settlement amount is reasonable.

Accordingly, all of the *Grinnell* factors weigh in favor of issuing preliminary approval of the settlement. In the event that a substantial number of objectors come forward with meritorious objections, then the Court may reevaluate its determination. Because the settlement, on its face, is "fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000), the Court should grant its preliminary approval.

III. The Addition of Certain New Hires to the Certified Federal Classes Should Be Approved for Purposes of Settlement.

The Court has already ruled on the merits of Rule 23 class certification and decertification with respect to the Federal Class Members (*see Morangelli v. Chemed Corp.*, 275 F.R.D. 99 (E.D.N.Y. 2011) and *Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278 (E.D.N.Y. 2013). The Settlement Agreement provides relief for all members of the currently certified federal classes. In addition, the agreement expands the membership of those classes by including individuals who were hired in the certified States after the date that class notice was issued and before the date on which Defendants implemented the new pay practices. This expansion of the currently certified federal class to include these new hires should be approved. The inclusion of these additional class members does not in any way affect the Rule 23 analysis that the Court previously undertook. To be sure, these additional class members have not previously received notice and are entitled to notice and an opportunity to opt-out of the class, but the Settlement Agreement provides for such notice and, indeed, gives all of the Federal Class members the opportunity to opt-out of the case if they choose to do so. Accordingly the addition of these class members should be approved.

IV. The Proposed Notice Is Appropriate

A. Issuance Of Notice Of The Settlement To The Arbitration Classes As Well As The Federal Classes Is Appropriate

Because the settlement of the Federal and Arbitration claims is a single, indivisible settlement, and in order to avoid unnecessary and duplicative judicial efforts, the parties have agreed that the Federal Court should approve the entire settlement, including the notice of the settlement which will be sent to both the Federal and Arbitration class members. (Sweeney Decl. at ¶ 34). Having the Federal Court approve the settlement as a whole, rather than having the Arbitrator separately approve and issue notice of the settlement to the arbitration classes, is clearly more efficient and less wasteful of judicial resources. Such a request is proper since arbitration is a creature of contract and the parties have the right to modify their arbitration agreement to allow for Federal Court approval of the settlement of their arbitration claims. *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001); *see also Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) (*quoting Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 131 L.Ed.2d 76 (1995) (the Federal Arbitration Act's "'proarbitration policy does not operate without regard to the wishes of the contracting parties.'"). Allowing the Arbitration settlement to be considered along with the Federal settlement is in keeping with the strong judicial policy in favor of settlements, particularly in the class action context. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

B. The Proposed Class Notice Satisfies Due Process

The content of the Proposed Settlement Notice to be sent to both the Arbitration and Federal classes (copy attached to the Notice of Motion for Preliminary Approval as Exhibit 1),

fully complies with the requirements under Federal Rule of Civil Procedure 23.[8] Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3).

The Proposed Settlement Notice here satisfies each of these requirements.[9] The Notice describes the terms of the settlement, informs the class about the allocation of attorneys' fees, provides specific information regarding the date, time, and place of the final approval hearing, and informs each Class Member of the minimum amount he will receive under the settlement.

Accordingly, the detailed information in the Proposed Settlement Notice to the FLSA Collective Action and Rule 23 and Arbitration Class Members is more than adequate to put class members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B). Courts have approved class notices even when they provided only general information about a settlement. *See, e.g., In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). The Proposed Settlement Notice to Rule 23 Class Members far exceeds this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B).

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[8] The Proposed Settlement Notice also complies with the FLSA's requirements for settlement notices. *See Myers v. Hertz Corp.,* 624 F.3d 537, 554 (2d Cir. 2010).

[9] The notice is based on a form previously approved by this Court in *Massiah v. MetroPlus Health Plan, Inc.*, 11-CV-05669 BMC, Doc. No. 85-2 (E.D.N.Y. July 19, 2012).

C. The Notice Plan and Award Distribution Process Are Appropriate

The Settlement Agreement provides that notice to Class Members will be mailed by the Settlement Administrator to the last known address of each class member. (Sweeney Decl. ¶ 43.) The Settlement Administrator will receive the class list within ten calendar days of the Preliminary Approval Order, and will send the notices within ten calendar days of receiving the class list. (*Id.*). The Settlement Administrator will take all reasonable steps to obtain the correct address of any class member for whom a Notice is returned as undeliverable and re-send to the most recent addresses available.

Class Members will have at least 30 days from the date of mailing to submit opt-out requests or to comment on or object to the settlement. (*Id.*). The Settlement Administrator will send the Class Members their individual settlement payment within ten days of the Court's approval becoming final. (*Id.*).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Approval of Class Settlement and enter the Proposed Order.

Dated: September 13, 2013

Respectfully submitted,

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