UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL SHORT, *on behalf of himself and all others similarly situated*,

Plaintiff,

v.

CHURCHILL BENEFIT CORPORATION d/b/a YURCOR, FRAMESTORE, INC., RICHARD MCCANN and MARK TICAR,

Defendants.

MEMORANDUM & ORDER OF PRELIMINARY SETTLEMENT APPROVAL
14-CV-4561 (MKB)

MARGO K. BRODIE, United States District Judge:

On July 30, 2014, Plaintiffs Daniel Short and John Volny filed this action against eleven defendants, including Churchill Benefit Corporation d/b/a "Yurcor" ("Yurcor") and Framestore, Inc. ("Framestore"), on behalf of a putative class of similarly situated individuals, asserting claims for (1) unlawful deductions from wages in violation of section 193 of the New York Labor Law ("NYLL"), N.Y. Lab. Law. § 193, (2) failure to provide proper wage notices in violation of section 195(1) of the NYLL, N.Y. Lab. Law. § 195(1), and (3) conversion of wages in violation of New York state common law. (Compl. ¶¶ 44–59, Docket Entry No. 1.) Plaintiffs subsequently filed an Amended Complaint, asserting the same claims against only Framestore and Yurcor.[1] (Am. Compl. ¶¶ 44–59, Docket Entry No. 19.) After the Court denied cross-motions for summary judgment, (Mem. & Order dated Apr. 8, 2016 ("April 8 Decision"), Docket Entry No. 105), Plaintiff Short filed a Second Amended Complaint ("SAC") on May 13,

[1] Volny settled his claims and was dismissed from this action on May 1, 2015. (Docket Entry No. 59.)

2016, asserting the same claims and adding as defendants Yurcor's co-owners, Richard McCann and Mark Ticar, (SAC ¶ 1, Docket Entry No. 114).[2]

On December 5, 2016, the parties filed a joint motion for preliminary approval of a settlement governing Plaintiff's claims, individually and on behalf of the class of individuals he seeks to represent (the "Class Members"). (Notice of Joint Mot. for Prelim. Approval ("Joint Mot."), Docket Entry No. 147.) For the reasons discussed below, the Court grants the parties' motion for preliminary approval of class settlement, conditionally certifies the proposed settlement class, approves the form of notice and manner of disseminating notice and appoints the proposed class counsel, class representative and claims administrator.

I. Preliminary class action certification

"Before certification is proper for any purpose — settlement, litigation or otherwise — a court must ensure that the requirements of Rule 23(a) and (b) have been met." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006) (citing Fed. R. Civ. P. 23); *see also In re Am. Int'l Grp., Inc. Sec. Litig. ("In re AIG")*, 689 F.3d 229, 238 (2d Cir. 2012). This applies even to conditional certification for settlement purposes. *See Tart v. Lions Gate Entm't Corp.*, No. 14-CV-8004, 2015 WL 5945846, at *1 (S.D.N.Y. Oct. 13, 2015); *Long v. HSBC USA Inc.*, No. 14-CV-6233, 2015 WL 5444651, at *5 (S.D.N.Y. Sept. 11, 2015).

Rule 23(a) sets forth "threshold requirements" for a class action. *See In re AIG*, 689 F.3d at 238; *see also* Fed. R. Civ. P. 23(a). Rule 23(a) has four requirements: numerosity,

[2] For purposes of this Memorandum and Order, the Court assumes familiarity with the facts and claims as set forth in the April 8 Decision. In brief, Plaintiff's claims arise from Yurcor and Framestore's alleged improper deductions from his wages while he worked as a freelance artist for Framestore but was technically on Yurcor's payroll as an employee. (SAC ¶¶ 1–5.) Plaintiff alleges that before he and putative class members were paid their wages as "independent contractors," Yurcor deducted employer payroll taxes under a line-item titled "Administrative Overhead," in violation of New York Labor Laws and common law. (*Id.*)

commonality, typicality and adequacy of representation. *In re AIG*, 689 F.3d at 238. If a proposed class action satisfies these requirements, it must also satisfy the requirements of Rule 23(b). *See id.*; *see also* Fed. R. Civ. P. 23(b). Rule 23(b)(3), relevant here, provides that class certification is appropriate if common questions predominate over individual questions and a "class action is superior to other methods" of proceeding. Fed. R. Civ. P. 23(b)(3). The Court evaluates each of these requirements below.

a. Numerosity

In order to proceed as a class action, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 474, 483 (2d Cir. 1995). Because the class here contains an estimated 132 individuals, (*see* Pl. Mem. in Supp. of Joint Mot. ("Pl. Mem.") 8, Docket Entry No. 147-1), Plaintiffs satisfy the numerosity requirement of Rule 23(a)(1).

b. Commonality

Under Rule 23(a)(2), there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or fact."). It is not enough to raise questions at such a high level of generality that they become common to the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Instead, plaintiffs must demonstrate "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution" of the case. *Id.* (emphasis in original). One relevant factor in this analysis is whether there is "significant proof" of a "general policy" on a pertinent issue. *Id.* at 353. "Even a single common legal or factual question will suffice" to prove commonality.

Freeland v. AT&T Corp., 238 F.R.D. 130, 140 (S.D.N.Y. 2006) (citing *In re Agent Orange Prod. Liab.*, 818 F.2d 145, 166–67 (2d Cir. 1987)).

Here, the Class Members share multiple common questions of law and fact, including: each contracted with Framestore to work as a freelancer between 2008 and 2014, and each had his or her employment processed by, wages issued through and wages deducted by Yurcor, which provided Framestore with employer-of-record ("EOR") services during that time period. (SAC ¶ 19; Joint Mot. ¶ 4.) Furthermore, the SAC alleges that Defendants "maintained a uniform policy as to unauthorized and improper wage deductions and payroll processing," (SAC ¶ 30), namely, a policy in which Yurcor denominated the Class Members as employees, rather than independent contractors, to benefit Framestore; used Class Members' wages to pay Framestore's share of payroll taxes as to those employees; and avoided providing Class Members with the fringe benefits to which they would have been entitled as properly classified employees of Framestore, (*id.* ¶¶ 3–5). This common policy and its applicability to all Class Members demonstrates that the class action is capable of "generat[ing] common answers" to the claims raised in the SAC, *see Dukes*, 564 U.S. at 350, including whether the Class Members were employed by Framestore and Yurcor or by Framestore alone, and whether the "Administrative Overhead" costs violated New York Labor Laws because they came from employees' "wages" as defined in the relevant statutory provisions. As a result, the class satisfies the Rule 23(a)(2) commonality requirement.

c. Typicality

The typicality prong of Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement "is satisfied when each class member's claim arises from

the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). "The commonality and typicality requirements often 'tend to merge into one another, so that similar considerations animate analysis' of both." *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010) (quoting *Marisol A.*, 126 F.3d at 376).

As explained above, the Class Members, like Plaintiff, will "make[] similar legal arguments to prove" that Defendants misclassified them and improperly deducted employer payroll taxes from their wages. *See Shahriar*, 659 F.3d at 252. In so doing, the Class Members, like the named Plaintiff, will rely heavily on the same contracts between Yurcor and Framestore and policies between Framestore and its freelance artists. (*See* Mem. & Order dated Apr. 8, 2016 at 4–5.) This is sufficient to satisfy the typicality requirement.

d. Adequacy of representation

Rule 23(a)(4) provides that a class action is only appropriate if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Determination of adequacy typically entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes v. Edwards*, 502 F.3d 91, 104 (2d Cir. 2007).

As to the first prong, there is no indication that Plaintiff's interests are antagonistic to those of the Class Members. "To the contrary, [C]lass [M]embers and named [P]laintiff[] have a common pecuniary interest in receiving compensation for work performed for Defendants." *See Tart*, 2015 WL 5945846, at *3. As to the second prong, The Brualdi Law Firm, P.C., Feinstein

Doyle Payne & Kravec, LLC ("FDPK"), Arthur Grebow of Grebow & Rubin LLP, and Schwartz, Steinsapir, Dohrmann & Sommers, LLP appear to be experienced and well-qualified class-action attorneys. (*See* Firm Resumes, annexed to Decl. of Gaitri Boodhoo ("Boodhoo Decl.") as Exs. D–G, Docket Entry No. 147-2.) The substantial work that Plaintiff's counsel has performed in investigating, litigating and reaching a settlement in this case demonstrates their commitment to the class and representing the class's interests, as well as their general ability to conduct this litigation.[3] *See In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d at 291.

As a result, Plaintiff and counsel satisfy Rule 23(a)(4)'s requirements.

e. Predominance

Rule 23(b) allows a case to proceed as a class action if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1993) ("Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement [of predominance]."). "The predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538 (2d Cir.), *as amended*, (July 2, 2015) (quoting *In re U.S.*

[3] The Court observes that the settlement agreement prevents Defendants from objecting to an award of attorneys' fees below forty percent of the total settlement amount. (Settlement Agreement at 5, annexed to Boodhoo Decl. as Ex. A; *see also* Pl. Mem. 4 ("Plaintiff's Counsel's lodestar is considerably larger than forty percent of the Total Settlement Amount.").) Counsel are advised that if and when they petition the Court for an award of fees, they should attach lodestar information and explain why their proposed fee award is appropriate in light of the six traditional criteria for assessing reasonable fees outlined in *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000). *See also Goldberger*, 209 F.3d at 52 (discussing the 25% "benchmark" for fees). Until that time, the Court reserves decision on attorneys' fees.

Foodservice Inc. Pricing Litig., 729 F.3d 108, 118 (2d Cir. 2013)). Typically, common issues predominate when liability is determinable on a class-wide basis, even where class members have individualized damages. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001). Furthermore, the Supreme Court has advised that in the context of settlement-only class certification, "a district court need not inquire whether the case, if tried, would present intractable management problems" under Rule 23(b)(3)(D) because settlement obviates the need for trial. *Amchem*, 521 U.S. at 620. The Second Circuit has elaborated on this principle, noting that "the predominance inquiry will sometimes be easier to satisfy in the settlement context." *In re AIG*, 689 F.3d at 237.

Nearly all of Plaintiff's and Class Members' issues can be answered with "generalized proof." *See Glatt*, 811 F.3d at 538. The Class Members' legal theories under New York Labor Law and common law conversion arise from Defendants' alleged uniform practice of underpaying Class Members. The Class Members are unified by common factual allegations, including that they were all required to pay their employer's share of payroll taxes. Although there will be individual questions of damages based on the number of hours each freelance artist worked, the commonalities predominate these minor variations. *Cf. In re AIG*, 689 F.3d at 241 (noting that although at trial the securities-investor plaintiffs would have to prove each plaintiff's reliance on a fraudulent representation, those issues did not bar class certification for settlement). Thus, the class in this case satisfies Rule 23(b)(3)'s predominance requirement for settlement purposes.

f. Superiority

Rule 23(b)(3) further provides that a class may proceed as a class action if the other factors are satisfied and "a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). First, the class action device achieves an economy of scale, here, where the total loss to 132 individuals was predicted to be $526,523.91 — under $4,000 per person, on average. (*See* Settlement Agreement at 7.) These relatively "small recoveries" do not "provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (citation omitted). Second, rather than individually settling all 132 claims, the proposed settlement allows for Plaintiff and the Class Members to resolve all claims arising from Defendants' alleged policy at once, avoiding inconsistent adjudications of those claims. *See Tart*, 2015 WL 5945846, at *5 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)); *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). As a result, the class satisfies Rule 23(b)(3)'s superiority requirement.

Because the putative class satisfies the requirements of Rule 23(a) and (b), the Court provisionally certifies, for settlement purposes only, a Rule 23 class consisting of all individuals who "worked as an Artist for or through Yurcor at Framestore in the State of New York" after July 30, 2008, who were paid by Yurcor for services they rendered to Framestore and who had "Administrative Overhead" costs deducted from their pay. (Settlement Agreement at 4.)

II. Appointment of class counsel

Rule 23(g) of the Federal Rules of Civil Procedure provides that "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). The Court finds that The Brualdi Law Firm, P.C., FDPK, Arthur Grebow and Schwartz, Steinsapir, Dohrmann & Sommers, LLP meet the requirements of Rule 23(g). *See* Fed. R. Civ. P. 23(g)(1)(A) (mandating consideration of work done "in identifying or investigating potential claims," "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "resources that

counsel will commit to representing the class"). As noted above, these firms have extensive individual and combined experience in class actions and have devoted considerable time to formal discovery, mediation and settlement of this matter on behalf of Class Members. As a result, the Court appoints them as class counsel for settlement purposes only.

III. Preliminary approval of class settlement

Courts favor settlement of complex class-action litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (citing *In re Paine Webber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). Federal Rule of Civil Procedure 23(e) requires court approval of any settlement that effects the dismissal of a class action. Fed. R. Civ. P. 23(e). Final approval of a proposed settlement may only be granted "after a hearing and on finding that it is fair, reasonable, and adequate." *Id.*; *see, e.g.*, *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *Cent. States Se. and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 247 (2d Cir. 2007). Determining whether a settlement is fair, reasonable and adequate, requires consideration of the "'negotiating process leading up to the settlement, *i.e.*, procedural fairness, as well as the settlement's substantive terms, *i.e.*, substantive fairness.'" *McReynolds*, 588 F.3d at 803–04 (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)).

With respect to procedural fairness, the reviewing court must "ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel . . . possessed the necessary experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests." *Id.* at 804 (internal quotation marks omitted). Under such circumstances, the Second Circuit has recognized a presumption of fairness, reasonableness and adequacy as to proposed settlements. *See id.* at 803; *Wal-Mart Stores, Inc.*, 396 F.3d at 116.

With respect to substantive fairness, the reviewing court must consider nine factors:

> (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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). *See McReynolds*, 588 F.3d at 804; *Wal-Mart Stores, Inc.*, 396 F.3d at 117.

Preliminary approval of a class-action settlement, in contrast to final approval, "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010) (quoting *In re Traffic Exec. Ass'n–E. R.R.*, 627 F.2d 631, 634 (2d Cir. 1980)). As such, "it is appropriate where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies . . . , and where the settlement appears to fall within the range of possible approval." *Id.* (quoting *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 33 (E.D.N.Y. 2006)); *see, e.g.*, *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-2440, 2017 WL 366247, at *1 (S.D.N.Y. Jan. 24, 2017); *In re LIBOR-based Fin. Instruments Antitrust Litig.*, No. 11-CV-5450, 2016 WL 7625708, at *2 (S.D.N.Y. Dec. 21, 2016).

Here, the Court has reviewed the proposed Settlement Agreement and finds that it falls within the range of possible approval. As set forth in the Settlement Agreement, Framestore has agreed to pay $995,500 and Yurcor has agreed to pay $75,000 for a total settlement amount of $1,074,500. (Settlement Agreement at 5.) Each Class Member who timely submits a completed

claim form will receive an amount calculated in proportion to that individual's Administrative Overhead deduction as compared to the overall Administrative Overhead deductions for all Class Members. (Settlement Agreement at 10.) All uncollected funds will be reverted to Framestore, but not to Yurcor. (*Id.* at 11.)

The risks of litigation also militate in favor of settling this matter. The case is over two years old, the parties have already filed dispositive motions, and class-wide discovery would prove expensive and time-consuming in view of the predicted recovery of approximately $4000 per Class Member, on average. (*See id.* at 7.) In addition, Plaintiff informs the Court that Yurcor has discontinued operations, which suggests that recovery may be limited in the event of a trial. (Pl. Mem. 7.) Finally, Plaintiff represents that the Class Members "stand to recover all or substantially all of the administrative overhead which Plaintiff alleges was unlawfully deducted from their pay," (*id.*), which weighs in favor of approving the settlement.

Finally, the proposed settlement does not appear to have been collusive, although the Court notes its concern as to Plaintiff's incentive award below. The Court otherwise finds that the Settlement Agreement is the result of both mediation and arms-length negotiations by experienced counsel after extensive discovery and motions practice. Accordingly, the Court grants preliminary approval of the settlement memorialized in the Settlement Agreement, with the caveats expressed above and below regarding attorneys' fees and Plaintiff's incentive award.

a. Plaintiff's incentive award

The Settlement Agreement provides that Plaintiff may petition for a "service payment" of up to $10,000.00. (*Id.* at 6.) These types of "incentive awards" are not uncommon in class action cases and are within the discretion of the court. *Torres v. Toback, Bernstein & Reiss LLP*, No. 11-CV-1368, 2014 WL 1330957, at *3 (E.D.N.Y. Mar. 31, 2014) (citing *In re AOL Time*

Warner ERISA Litig., No. 02-CV-8853, 2007 WL 3145111, at *2 (S.D.N.Y. Oct. 26, 2007)); *Gortat v. Capala Bros.*, 949 F. Supp. 2d 374, 384 (E.D.N.Y. 2013) (noting that incentive awards are discretionary); *see also Silverberg v. People's Bank*, 23 F. App'x 46, 47–48 (2d Cir. 2001) (noting that "the abuse-of-discretion standard of review" applies to district court decisions "as to what expenses were reasonable and necessary, and hence should be reimbursed out of settlement funds," including "the grant or denial of incentive awards for class representatives").[4] Courts look for the existence of "special circumstances" when determining whether an award is justified. *In re AOL Time Warner*, 2007 WL 3145111, at *2. Incentive awards thus vary widely in the methodology underlying their calculation and in their size. *See id.* (collecting cases). Courts in this Circuit typically consider several factors, including the plaintiff's personal risk in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the litigation, and any other burdens associated with the litigation. *Id.* at *2, 4 (finding appropriate a $1000 incentive award for each deposed named plaintiff and a $500 award for each un-deposed named plaintiff); *see also Torres*, 2014 WL 1330957, at *3; *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 200 (S.D.N.Y. 1997).

Incentive awards raise concerns that a named plaintiff's ability to faithfully represent the class may be compromised. "A class representative is a fiduciary to the class. If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard." *Torres*, 2014 WL 1330957, at *3

[4] *See also* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1303 (2006) ("This study of 374 opinions from 1993 to 2002 finds that [incentive] awards were granted in about 28 percent of settled class actions . . . . When given, incentive awards constituted, on average, 0.16 percent of the class recovery, with a median of 0.02 percent.").

(quoting *Roberts*, 979 F. Supp. at 200–01 (collecting cases)); *see also Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D.N.Y. 1989) (rejecting incentive award of $5000 for plaintiff's time and inconvenience of serving as class representative where he performed only the "normal obligations of class representation" and "did not perform any extraordinary services to the class"). Courts will not hesitate to reduce requested incentive awards where they are "grossly disproportionate to the compensation to be paid to the absent class members the plaintiffs seek to represent." *See, e.g.*, *Torres*, 2014 WL 1330957, at *4 (reserving decision on plaintiff's $10,000 incentive award but expressing concern that it was "grossly disproportionate" to class compensation of $60 per person); *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, No. 94-CV-403, 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2002) (reducing incentive awards to one-sixth of the proposed amount); *In re AOL Time Warner*, 2007 WL 3145111, at *4 (reducing $20,000 incentive awards to $1000 and $500); *Roberts*, 979 F. Supp. at 205 (reducing $200,000 and $100,000 incentive awards to $85,000 and below in employment discrimination case).

There is no suggestion of collusion in this case, but the principle remains that a named plaintiff should not receive a special award in addition to his or her share of the recovery unless special circumstances warrant such an award. Although an incentive award may be warranted to compensate Plaintiff for his time sitting for deposition or any other contributions he made to this action, the parties have not provided the Court with any evidence of such contributions. Plaintiff exposed himself to minimal personal risk, and it is not apparent that he participated in the action except to sit for a deposition. Although the Court will reserve decision until final approval of the settlement, it is inclined to reduce the incentive award unless the parties make a showing of why the requested amount is appropriate.

The Court therefore grants preliminary approval of the Settlement Agreement but

reserves decision as to attorneys' fees and Plaintiff's incentive award.

IV. Notice

The parties have provided the Court with a Proposed Class Notice. (Proposed Class Notice, annexed to Boodhoo Decl. as Ex. B.) Rule 23(c)(2)(B) states that a notice in a class action 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 clearly and concisely 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 an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The Proposed Class Notice satisfies each of these requirements and adequately puts Class Members on notice of the proposed settlement.

As a result, the Court approves the Proposed Class Notice and directs its distribution to the class. The Court also approves the Claim Form and Release, which is appended to the Proposed Class Notice. Finally, the Court approves CPT Group, Inc. as the Settlement Administrator to perform duties in accordance with the Settlement Agreement. The Settlement Claims Administrator is authorized to mail the Proposed Class Notice and the Claim Form and Release, after they are updated with the appropriate dates and deadlines, to the applicable Class Members.

V. Class settlement procedure

The Court will conduct a hearing pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure on **May 23, 2017 at 10:30 AM** in Courtroom 6F, 225 Cadman Plaza East, Brooklyn, New York (the "Final Approval Hearing"), for the purposes of (1) hearing any timely and

properly filed objections; (2) making a final determination as to the fairness, adequacy and reasonableness of the settlement terms and procedures; (3) fixing the amount of attorneys' fees, litigation costs, expenses to class counsel and service or incentive awards to Plaintiff, if appropriate; and (4) entering judgment, if appropriate. Any Class Member who does not properly and timely request exclusion will be bound by all the terms and provisions of the Settlement Agreement. Class Members who validly request exclusion will not be entitled to any payment and will not have standing to appear before this Court to object to the Settlement Agreement.

VI. Conclusion

For the foregoing reasons, the parties' joint motion for preliminary approval is granted, with the few reservations expressed in this Memorandum and Order. The following schedule will govern the remainder of this action:

On or before **February 20, 2017**, Defendants' counsel will provide the Settlement Claims Administrator and class counsel with the Class Member mailing list, in electronic form, containing each individual's name, last known address and email address.

On or before **March 6, 2017**, the Settlement Claims Administrator will mail the Proposed Class Notice to each Class Member.

Class Members will have thirty (30) days from the date the Proposed Class Notice is mailed or emailed to submit written objections to the Settlement Agreement.

Class Members will have forty-five (45) days from the date the Proposed Class Notice is mailed to opt out of the Settlement Agreement.

No later than fifteen (15) days before the Final Approval Hearing, the parties will file their motion for final approval of the settlement, and class counsel will file their motion for

attorneys' fees and any additional information regarding Plaintiff's incentive award.

On **May 23, 2017** the Court will conduct a Final Approval Hearing on the Settlement Agreement.

SO ORDERED:

s/ MKB
MARGO K. BRODIE
United States District Judge

Dated: February 10, 2017
Brooklyn, New York