IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

James Regan, Jesse Faircloth, Michael Pack, Thomas Haffey, Jacob Stafford, and Kyle Watkins, Each on Behalf of Himself and All Others Similarly Situated,	)	
Plaintiffs,	)	C.A. No.: 2:13-cv-3046-PMD
v.	)	**ORDER**
City of Charleston, South Carolina,	)	
Defendant.	)	

This action arises under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). Before the Court is Plaintiffs' Unopposed Motion for Approval of Settlement (ECF No. 178). For the reasons stated herein, the Court grants the motion, approves the settlement, and dismisses the case with prejudice.

BACKGROUND

This settlement follows two years of spirited litigation over the legality of the City of Charleston's former pay plan for its firefighters. The six named Plaintiffs filed this action on November 7, 2013, alleging that several aspects of the plan violated portions of the FLSA and related Department of Labor regulations.[1] The City has steadfastly defended the legality of its pay plan throughout the case.

After the Court certified a class under the FLSA's collective-action provision, more than 200 firefighters joined the case. The parties then engaged in formal discovery for nearly a year.

1. For a detailed explanation of this case's factual background, its procedural history, and the claims involved, see this Court's summary judgment orders dated September 14 and November 3, 2015 (ECF Nos. 167 & 172).

They produced over 60,000 documents and took approximately twenty depositions. The discovery period ended in June 2015.

During and after the discovery stage, the parties filed summary judgment motions on an array of issues, including liability, good faith, liquidated damages, and the statute of limitations. After extensive briefing, the Court granted summary judgment to Plaintiffs on some issues and summary judgment to the City on others. The Court held that the City had violated the FLSA and associated regulations in several respects. However, it also held that the City had acted in good faith, not willfully. Accordingly, it concluded that the shorter limitations period barred some of Plaintiffs' claims and that liquidated damages would not be awarded. Thus, both sides obtained a substantial degree of success.

While the summary judgment motions were pending, the City also moved to decertify or narrow the class. The Court declined to decertify, but it narrowed the class to exclude firefighters whose claims were completely time-barred under the Court's ruling on the statute of limitations.

The parties then mediated the case before attorney David B. McCormack, an experienced employment-law mediator and practitioner. Through that mediation and other arms-length negotiations, the parties agreed upon a settlement. The proposed settlement has three main provisions. First, each of the six named Plaintiffs is to receive a $3,500.00 incentive payment. Second, the City has set aside a pool of $522,333.33 for paying the class members' individual claims. The parties have already calculated each member's pro rata share of that pool, based on his share of the total amount of unpaid overtime wages the City owes. Class members must file claims to receive their shares. Any money not timely claimed reverts to the City. Finally, Plaintiffs' counsel are to receive $271,667.67 in attorney's fees and costs. In total, the City will

pay a total of $815,000.00. The parties agree these provisions constitute a fair and reasonable settlement of a *bona fide* dispute of the claims in this case.

Once the parties reached their agreement, Plaintiffs filed their motion for approval of the settlement. The City joins in Plaintiffs' request.

ANALYSIS

Settlements of FLSA collective actions require court approval. *E.g.*, *DeWitt v. Darlington County*, No. 4:11-cv-740-RBH, 2013 WL 6408371, at *3 (D.S.C. Dec. 6, 2013). Generally, "[c]ourts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes." *Id.* at *4 (citation and quotation marks omitted). "Although the district court has broad discretion in approving a settlement of a class action case, there is a 'strong presumption in favor of finding a settlement fair.'" *Id.* (quoting *Lomascolo v. Parons Brinkerhoff, Inc.*, No. 1:08cv1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009)).

The United States Court of Appeals for the Fourth Circuit has not set a standard for evaluating settlements of FLSA collective actions. Often, district courts in this circuit apply the standard generally used to evaluate settlements of Rule 23 class actions. *See, e.g.*, *DeWitt*, 2013 WL 6408371, at *3; *Lomascolo*, 2009 WL 3094955, at *11; *Hoffman v. First Student, Inc.*, No. WDQ-06-1882, 2010 WL 1176641, at *2 (D. Md. Mar. 23, 2010). That standard instructs courts to consider the following factors: (1) the extent of discovery conducted, (2) the stage of the proceedings, (3) the absence of bad faith or collusion in the settlement, and (4) the experience of counsel who represented plaintiffs in the settlement negotiations. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975).

In at least two other FLSA collective actions against local government bodies, this Court has also used the factors from *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974),[2] to assess the substantive fairness of the proposed settlements. *See, e.g.*, *DeWitt*, 2013 WL 6408371, at *3 (citing *Grinnell*, 495 F.2d at 463); *Faile v. Lancaster County*, No. 0:10-cv-2809-CMC, slip op., at 6–7 (D.S.C. Mar. 8, 2012) (citing *Grinnell*, 495 F.2d at 463). *Grinnell* encourages courts to consider the following:

> (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 (citations omitted). The Court finds it appropriate to subject the proposed settlement here both to the *Flinn* factors and to the additional scrutiny of the *Grinnell* factors.

I. Payments to Plaintiffs

A. Overview

Applying the *Flinn* and *Grinnell* factors to this case confirms that the settlement is in the best interests of the class.

As to the *Flinn* factors, both sides conducted extensive discovery in this case for over a year. As mentioned above, the parties produced over 60,000 pages of documents and took approximately twenty depositions. The City also issued—and Plaintiffs responded to—over forty sets of interrogatories directed to the named Plaintiffs and to certain other class members. Mediation occurred approximately two years into the litigation, well after the discovery period

2. *Abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

had closed and after this Court had made summary judgment rulings that resolved most of the issues in the case. There is absolutely no evidence that the proposed settlement is the product of fraud by, or collusion between, the parties or their attorneys. To the contrary, the parties' attorneys—all of whom have substantial experience in the litigation of FLSA matters—zealously advocated for their clients throughout every stage of the case. The parties reached an agreement only after they and their experienced attorneys engaged in extensive arms-length negotiations, and even then only with the assistance of a skilled mediator.

As to the *Grinnell* factors,[3] this case was quite complex, both legally and factually. Plaintiffs attacked several portions of a very sophisticated pay plan that was governed by detailed federal regulations. As the parties' briefs and this Court's summary judgment orders indicate, assessing the legality of those challenged portions involved extensive research and analysis of the FLSA, related regulations, and court opinions. The participation of over two hundred plaintiffs made the case factually complex. For each class member, months or sometimes years of time and payment records had to be carefully analyzed. That complexity surely contributed to the expense involved in the case; Plaintiffs' counsel's time sheets and invoices indicate that counsel performed a great deal of research and writing. The case's complexity also contributed to its two-year duration, and had the case not settled, a trial even solely on damages would likely have been lengthy.

The class members appear to have had a generally positive response to the proposed settlement. Only two class members appeared for this Court's fairness hearing. Both spoke, and although one expressed some frustration with the City for the amount of overtime he and his

3. The *Grinnell* factors overlap somewhat with the *Flinn* factors. The third *Grinnell* factor is the same as the first and second *Flinn* factors, and the fourth *Flinn* factor is relevant to the risks in the fourth, fifth, sixth, and ninth *Grinnell* factors. The Court has already discussed those matters above.

fellow firefighters worked, both stated that they did not object to the settlement. Having received no other comments from class members, the Court interprets the lack of a response to indicate approval.

The risks of establishing liability and maintaining class status through trial were non-existent. This Court granted Plaintiffs summary judgment on many liability issues, and it turned down the City's request to decertify the class. However, the risks of proving damages at trial were significant. Proving 202[4] claims to the satisfaction of a jury may well have been difficult, and it almost certainly would have been tedious.

Although the parties have not provided any information on whether the City could withstand a judgment larger than the $815,000 total proposed settlement, the Court imagines that it could. However, the Court does not believe it should reject the settlement based solely on that speculative basis.

Finally, the total settlement amount is a fair, adequate, and reasonable resolution of the numerous claims in this case. It represents 92.2% of what the parties have calculated to be the maximum amount of damages recoverable in this case: $883,955.99. When one takes into account the attendant risks of litigation, $815,000 is an even more reasonable figure.

B. Pro-Rata Payments to Class Members

As compensation for their unpaid wages, the proposed settlement makes available to the class members $522,333.33—the remainder of the $815,000 after incentive payments and attorney's fees and costs are deducted. The parties have calculated an exact amount of each class

4. The settlement agreement contains a list of 209 class members, including the named Plaintiffs. Plaintiffs' counsel have informed the Court that the list inadvertently includes one person, identified only as "Grisham," who is not actually a class member. Of the 208 actual class members, the parties have identified six who have no unpaid wages during the applicable time period and thus will not receive any settlement payout.

member's pro rata share of that $522,333.33 pool. The settlement agreement contains a spreadsheet listing that exact figure for each member.

The $522,333.33 allocated to the class equals 59.09% of the maximum amount that Plaintiffs could, in theory, collectively recover if this Court held a trial for Plaintiffs' unpaid wages.[5] The Court finds that under the *Flinn* and *Grinnell* factors, such a recovery percentage is a fair, adequate, and reasonable amount of compensation to settle each class member's individual claim.

C. Incentive Payments to the Named Plaintiffs

The proposed settlement allocates $3,500.00 to each of the six named Plaintiffs for the additional efforts they have made and risks they have taken in serving as lead plaintiffs. They are to be paid that amount in addition to their shares of the $522,333.33 residue.

As Judge Harwell has noted in the course of approving similar payments in a FLSA settlement:

> It is very common in class action cases for service or incentive payments to be paid to named Plaintiffs or class representatives in addition to their proportionate share of the recovery. Such payments compensate Plaintiffs for their additional efforts, risks, and hardships they have undertaken as class representatives on behalf of the group in filing and prosecuting the action. Service or incentive payments are especially appropriate in employment litigation, where "the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class [as] a whole, undertaken the risk of adverse actions by the employer or coworkers."

DeWitt, 2013 WL 6408371, at *14 (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005)); *see also id.* (stating "[c]ourts around the country have approved substantial

5. The parties originally proposed that, in order for a class member to receive his calculated settlement payment, he would sign a form releasing all claims "he/she might have arising out all claims for wages, including those which were included in *Regan, et al v. City of Charleston*, C.A. 2:13-cv-3046-PMD, *and any claims which could have been included in Regan*." (Mem. Supp. Pls.' Unopposed Mot. Approval Settlement, Ex. A-5, Release, at ¶ 1 (emphasis added).) At the Court's request, the parties will now use a revised release form that omits the emphasized language.

incentive payments in FLSA collective actions and other employment-related class actions" and collecting cases).

Here, the proposed incentive payments total $21,000.00, which represents approximately 2.58% of the gross settlement amount of the settlement in this case. When compared to the $522,333.33 allocated for the class members, it equals 4.02% of that pool. The Court finds it fair and adequate for the named Plaintiffs to receive such a percentage of the available finds. They have devoted hundreds of hours to the case, including interviewing and selecting counsel, reviewing pleadings, assisting with discovery responses, sitting for depositions, communicating with counsel about all aspects of the case, and participating in mediation. The proposed compensation for that service is reasonable and does not unduly reduce the amount of funds available to the class.

II. Payment of Attorney's Fees and Costs

The parties propose that $271,666.67 of the available $815,000.00 be paid to Plaintiffs' counsel. That amount is intended to cover attorney's fees, $12,068.85 in litigation costs, and the costs that Plaintiffs' counsel anticipate they will incur in administering the settlement.

Successful plaintiffs in FLSA collective actions may recover attorney's fees and costs. *See* 29 U.S.C. § 216(b). Such fees must "be reasonable and are subject to court approval." *McClaran v. Carolina Ale House Operating Co.*, No. 3:14-cv-3884-MBS, 2015 WL 5037836, at *2 (D.S.C. Aug. 26, 2015). Under Local Civil Rule 54.02(A) (D.S.C.), "any petition for attorney's fees shall comply with the requirements set out in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir. 1978)," which directs courts to analyze such petitions under the following factors:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the

> litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Barber, 577 F.2d at 226 n.28. Local Civil Rule 54.02(A) further states the *Barber* factors are "relevant" where, as here, "a common fund is created and a percentage-fee method is sought in the application."

A. Application of the *Barber* Factors

As explained herein, the Court finds that the facts relating to nearly all of the *Barber* factors indicate the requested fee is reasonable.

1. The Time and Labor Expended

Plaintiffs' counsel spent 1,168.4 hours working on this case. Their staff spent 332.3 hours on it. The time sheets and invoices submitted by counsel reflect the great deal of time spent researching and preparing motions on the complex legal issues in the case. Counsel anticipate that they and their staff will spend an additional twenty to thirty hours disbursing funds and communicating with defense counsel and class members during the administration of the settlement.

2. The Novelty and Difficulty of the Questions Raised

"FLSA claims typically involve complex mixed questions of fact and law." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981); *see also DeWitt*, 2013 WL 6408371, at *11 ("[O]vertime cases under the [FLSA] can be very complex and difficult, involving the interaction among various statutes, regulations, and evolving case-law."). The parties' extensive briefing and this Court's detailed orders on summary judgment demonstrate that this case was no exception.

3. The Skill Required to Properly Perform the Legal Services Rendered

It takes skilled counsel to manage any class action, to analyze complicated legal claims and defenses under FLSA, and to synthesize all the technical pay-plan-related issues that were presented in this case. Plaintiffs' counsel demonstrated that level of skill. They also responded effectively to the zealous and informed advocacy of the City's attorney, who is both well-versed in FLSA issues and intimately familiar with the City's pay plan. *See Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 571 (D.S.C. 2015) ("[A]dditional skill is required when the opponent is a sophisticated corporation with sophisticated counsel." (citation and quotation marks omitted)).

4. The Attorneys' Opportunity Costs in Pressing the Instant Litigation

The 1,168 hours of attorney time spent on this case over two years is a significant opportunity cost. *Cf. Savani*, 121 F. Supp. 3d at 571 (finding investment of 3,260 hours over more than nine years of litigation to be a "not insignificant" opportunity cost). Additionally, Plaintiffs' counsel's investment of $12,068.85 in litigation costs is, itself, an opportunity cost. Although counsel have achieved a gross payout that comes very close to the limit of what their clients could conceivably recover through a judgment, counsel could well have put their time and money into other cases with more plaintiffs, higher gross payouts, or both.

5. The Customary Fee for Like Work

"A one-third contingency fee is reasonable and customary in employment cases in South Carolina." *DeWitt*, 2013 WL 6408371, at *12. In this Court's experience, a one-third fee is customary even when the case is resolved by settlement before trial. The $271,666.67 here equals exactly 33.33% of the proposed total settlement. With the $12,068.85 in costs deducted,

the $259,597.82 in requested fees equals 31.85% of the proposed total settlement. The Court therefore believes the proposed fee falls within the customary fee for like work.

6. The Attorneys' Expectations at the Outset of the Litigation

"In complex and multi-year class action cases, the risks of the litigation are immense and the risk of receiving little or no recovery is a major factor in awarding attorney's fees. The risk of no recovery in complex cases . . . is not merely hypothetical." *Savani*, 121 F. Supp. 3d at 572 (internal citation omitted). That risk was quite real here. Early in the case, an experienced employment attorney reviewed the issues and advised Plaintiffs' counsel that the City had not violated the FLSA. Perhaps for that reason, the named Plaintiffs promised in their representation agreements to pay counsel at least 35% of what they might recover.

7. The Time Limitations Imposed by the Client or Circumstances

The Court has not been notified of any unusual time limitations imposed on counsel by their clients or by circumstances.

8. The Amount in Controversy and the Results Obtained

"'[T]he most critical factor' in calculating a reasonable fee award 'is the degree of success obtained.'" *Brodziak v. Runyon*, 145 F.3d 194, 196 (4th Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The Court's summary judgment rulings and the class members' pay and time records enabled the parties to calculate the precise amount in controversy: $883,955.99, the amount of wages owed. To be sure, the settlement provides Plaintiffs substantially less than that. As mentioned above, the $522,333.33 allocated to Plaintiffs as compensatory damages amounts to 59.09% of the maximum amount Plaintiffs could collectively recover in a trial. However, the Court does not find that disparity unreasonable. Even assuming that a jury would award every cent of that $883,955.99, the City almost certainly

would have appealed a number of this Court's rulings, which would have further delayed a resolution of the case. Given the uncertainties of trial and the delay of appeal (which could, in turn, be followed by more uncertainties of trial), the discount reflected in the settlement is not disconcerting.

Moreover, the $815,000.00 total proposed payout amounts to 92.2% of the $883,955.99 maximum recovery. A deviation of 7.8% reasonably reflects how far a jury might vary from the maximum possible recovery, particularly in a case where over 200 claims would have to be established. In that sense, the only difference between this settlement proposal and a reasonably likely verdict is that the attorney's fee award here comes out of Plaintiffs' recovery instead of being added onto the verdict. In light of that, the award appears to be an acceptable trade-off for foregoing a long trial and whatever might follow.

9. The Experience, Reputation and Ability of the Attorneys

The facts relevant to this factor are discussed in section II.A.3 above.

10. The Undesirability of the Case Within The Local Legal Community

"In the Court's experience, employment cases do not appear to be eagerly sought out by the majority of the plaintiffs' bar in South Carolina, because of the difficulty of the cases and the complexity of the issues usually involved." *DeWitt*, 2013 WL 6408371, at *10. Those obstacles and the consequentially substantial risk of no recovery can make FLSA cases undesirable. Additionally, plaintiffs in FLSA cases tend not to have the resources to pay costs up front, which requires counsel to shoulder that burden. Third, individual FLSA claims often are so small that the attorney must aggregate a large number of claims in order to have a chance of earning a fee large enough to justify the risk of taking the case. Given those concerns, "public policy favors

adequate awards of attorney's fees in cases under the FLSA to encourage aggrieved plaintiffs to bring these actions and to provide incentives for plaintiffs' counsel to take such cases." *Id.*

This case may have been especially undesirable because of its connection to a great tragedy in this community. In 2007, nine of the City's firefighters perished in a structure fire. One of the many reforms born from that loss was the firefighter pay plan at issue in this case. Attorneys might have been unwilling to publicly attack the City's attempt to move forward after a horrifying event.

11. The Nature and Length of the Attorney–Client Relationship

Plaintiffs' counsel represented their clients for approximately two years during the course of this litigation. According to Plaintiffs' counsel, this is the first matter for which they have provided any legal services to any of the named Plaintiffs. Therefore, this factor does not carry much weight in the Court's analysis.

12. Attorney's Fees Awards in Similar Cases

The amount requested is fairly in line with awards that this Court has approved in other employment litigation settlements. *See, e.g.*, *MaClaran*, 2015 WL 5037836, at *5 (approving fee equaling 21.5% of settlement fund, and also noting cases in which courts found that a fee award of one-third of the settlement fund was reasonable); *DeWitt*, 2013 WL 6408371, at *13 (approving award of one-third of the settlement fund, and discussing opinions from this Court).

B. Lodestar Cross-Check

Although counsel has requested fees pursuant to the percentage-of-recovery method, this Court frequently uses the lodestar method to cross-check the reasonableness of the fees. The lodestar is "the number of hours reasonably expended, multiplied by a reasonable hourly rate." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994). The *Barber* factors

are to act as a guide for deciding the reasonable amount of time and rate. *See DeWitt*, 2013 WL 6408371, at *10–11. Based on the above discussion of the *Barber* factors, the Court finds that the amount of hours worked and the suggested billing rates shown on counsels' time sheets are all reasonable. The product of those hours and those rates is $438,570.00, which greatly exceeds what Plaintiffs' counsel seeks. Because awards that double or even quadruple the lodestar amount have generally been held reasonable, *see McClaran*, 2015 WL 5037836, at *5, the cross-check demonstrates that the amount requested here is reasonable, *see DeWitt*, 2013 WL 6408371, at *13 (approving award that was less than lodestar).

III. Procedural Fairness

The above discussion addresses whether the proposed settlement's terms are substantively fair to the parties, and the Court finds that they are. To approve a collective action settlement, the Court must also be satisfied that the proposed settlement is procedurally fair. Procedural fairness is accomplished by providing court-approved notice of the proposed settlement to those whose rights may be affected by the settlement and by affording them an opportunity for their opinions on the settlement to be heard.

Here, the Court scheduled a fairness hearing on the proposed settlement for March 23, 2016. It then directed Plaintiffs' counsel to notify all class members about the proposed settlements' terms, to give them the time, date, and location of the hearing, and to explain that they had a right to appear and be heard in support or opposition of the settlement. Two members appeared at the hearing and stated they had no objections to the settlement's terms. At the hearing, Plaintiffs' counsel represented that they were not aware of any objections from class members. The Court finds that the notice and opportunity to be heard provided in this case were adequate, and thus the settlement is procedurally fair.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is **GRANTED**. The Court hereby approves the proposed settlement in this case, including the proposed apportionment of the settlement proceeds to individual Plaintiffs, the payment of service payments to the named Plaintiffs, and the payment of attorney's fees and costs to Plaintiffs' counsel from the gross settlement proceeds.

IT IS FURTHER ORDERED that this action is **DISMISSED** with prejudice.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

March 23, 2016
Charleston, South Carolina