IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT GUICE, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civ. No. 17-3379**
	:	
DIRECTV, LLC and	:	
DIRECTSAT, USA, LLC	:	
Defendants.	:	

O R D E R

On July 28, 2017, Plaintiffs filed this FLSA action against Defendants DIRECTV, LLC, and a DIRECTV Home Service Provider, DirectSat USA, LLC. (Doc. No. 1.) Plaintiffs now move for approval of a Proposed FLSA Settlement. (Doc. No. 57.) I will grant the Motion in part.

I. FACTS AND PROCEDURAL HISTORY

In March 2010, 2,995 current and former employees of several DIRECTV HSPs (including DirectSat) brought an FLSA collective action in the Eastern District of Missouri, alleging, *inter alia*, that the HSPs failed to compensate Plaintiffs fully for overtime hours and "non-productive" tasks. See Arnold v. Aerosat USA, LLC, No. 10-352 (E.D. Mo). In March 2017, the *Arnold* Court decertified the collective action, causing 416 of the *Arnold* plaintiffs to file smaller, "individual" actions in other districts. (Pls.' Unopposed Mot. Approval of FLSA Settl. 4, Doc. No. 57.) On July 28, 2017, Plaintiffs—fifty-one former *Arnold* plaintiffs—filed the instant action. (Compl., Doc. No. 1.)

In November 2017, the Parties participated in omnibus settlement discussions, resulting in separate Proposed Settlements in all the post-*Arnold* matters. Because this is not a collective action, each Plaintiff reviewed and approved (with the assistance of Counsel) a separate,

individualized "Settlement Agreement" compromising his or her own claims against Defendants. (Decl. George A. Hanson ¶ 14, Doc. No. 57.) Under each Agreement, the Plaintiff "will receive between $3,500 and $11,190 based on his or her tenure with DirectSat, plus an additional $250 if he or she was previously deposed." (Pls.' Unopposed Mot. Approval of FLSA Settl. 20, Doc. No. 57.) Additionally, Plaintiffs' Counsel will receive $8,000 in fees for each of the fifty-one instant Plaintiffs. (Id.)

Similar Proposed Settlements have already been approved in three other post-*Arnold* actions. (Pls.' Notice Supp. Authority, Doc. No. 59.) On March 5, 2018, Plaintiffs moved for approval of the instant Proposed Settlement. (Doc. No. 47.) At my order, Plaintiffs filed additional briefing and submitted *ex parte* billing records supporting the Proposed Settlement and Counsel's fee request. (Doc. Nos. 49, 52, 55, 57, 60, 61.)

II. LEGAL STANDARDS

An FLSA settlement must be supervised by the Department of Labor or approved by the court. Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 522 (E.D. Pa. 2016). "When parties present . . . a proposed settlement, [I] may enter a stipulated judgment if [I] determine[] that the compromise reached 'is a fair and reasonable resolution of a *bona fide* dispute over FLSA provisions' rather than 'a mere waiver of statutory rights brought about by an employer's overreaching.'" Cuttic v. Cozer-Chester Medical Center, 868 F. Supp. 2d 464, 466 (E.D. Pa. 2012) (quoting Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982)). "A dispute is '*bona fide*' where it involves 'factual issues rather than legal issues such as the statute's coverage and applicability.'" Kraus, 155 F. Supp. 3d at 530 (quoting Creed v. Benco Dental Supply Co., No. 12-1571, 2013 WL 5276109, at *1 (M.D. Pa. Sept. 17, 2013)); see also Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 256 (5th Cir. 2012) (a *bona fide* dispute

must relate "to the number of hours worked—not the rate at which [the employee] would be paid for those hours"). After determining that the Proposed Settlement resolves a *bona fide* dispute, I must then "ensure that (1) the settlement is fair and reasonable for the employee(s), and (2) the agreement furthers the FLSA's implementation in the workplace." Kraus, 155 F. Supp. 3d at 523 (footnote omitted). Finally, the FLSA authorizes me to order a defendant to pay a plaintiff's reasonable counsel's fees and costs. 29 U.S.C. § 216(b).

III. DISCUSSION

A. Proposed Settlement

The Proposed Settlement resolves a *bona fide* dispute: the wage and hour claims in the Amended Complaint. (Doc. No. 50.) Although Defendants relied on a statute-of-limitations defense in their Motion to Dismiss, they also argued that they had paid Plaintiffs all wages required by the FLSA. (Defs.' Mot. Dismiss 9–22, Doc. No. 26-2 ("[T]he FLSA simply does not consider or afford a recovery for gap-time hours . . . so long as the employee was paid a minimum wage." (quotation marks omitted)); see also Pls.' Renewed Unopposed Mot. Approval FLSA Settl. 22, Doc. No. 57 ("[D]isputes of fact exist[] as to whether Plaintiffs were paid for all hours worked.").) Moreover, each Plaintiff's claim raises a factual dispute over "whether there was an agreement or understanding as to what was covered by piece rate pay, whether and how often each Plaintiff performed 'nonproductive' tasks, [and] whether they recorded that time." Arnold v. DIRECTV, LLC, No. 10-352, 2017 WL 1251033, at *10 (E.D. Mo. Mar. 31, 2017); see also (Pls.' Renewed Unopposed Mot. Approval FLSA Settl. 22, Doc. No. 57 ("The principal liability issue in this case is the factual question of whether Plaintiffs' alleged 'piece-rate' pay covered all of Plaintiffs' working time or only the time related to actually installing and servicing DIRECTV systems."); DeGraff v. SMA Behavioral Health Servs., Inc., 945 F. Supp. 2d 1324,

1328 (M.D. Fla. 2013). Accordingly, a *bona fide* dispute exists as to "the number of hours worked or the amount of compensation due." Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 203 (2d Cir. 2015).

The Proposed Settlement is also fair and reasonable. Plaintiffs concede that Defendants have several potentially successful defenses. (See Pls.' Renewed Unopposed Mot. Approval FLSA Settl. 22–27, Doc. No. 57.) Nonetheless, as to Plaintiffs' principal overtime claims, even if 25% of the average Plaintiff's working hours were spent on unpaid, "non-productive" tasks, the $3,500-minimum settlement amount would still equal: (1) 41% of the average "best day" recovery for a Plaintiff who had worked 100 weeks in the two-year limitations period; and (2) 26.2% of the average "best day" recovery for a Plaintiff who worked 156 weeks in the three-year limitations period for willful FLSA violations. (Decl. George A. Hanson, Ex. A ¶ 12, Doc. No. 47-1.) Moreover, because the settlement amounts are set according to each Plaintiff's tenure with DirectSat, they reflect a reasonable compromise based on the disputed amount of overtime and "non-productive time" worked by each Plaintiff. Accordingly, given the potential defenses to Plaintiffs' claims, and Defendants' potential exposure in this and the other post-*Arnold* matters, the Proposed Settlement is a fair and reasonable compromise.

The Proposed Settlement will not impede the implementation of the FLSA. To the contrary, because Defendants will pay substantial sums in this and other post-*Arnold* actions for their allegedly unlawful employment practices, the settlement—in addition to the litigation costs already expended—will promote compliance with the FLSA. Moreover, the Settlement Agreements do not contain an overly-broad release or other impermissible waiver provisions. See Kraus v. PA Fit II, LLC, 155 F. Supp. 3d 516, 522 (E.D. Pa. 2016).

I will not approve, however, the Proposed Settlement's confidentiality provision. Paragraph Eleven of each of the Settlement Agreements provides that Plaintiffs "agree[] to keep confidential and not to otherwise disclose the terms of this Agreement . . . [except] as required by valid court order, subpoena, or in response to a valid government investigation." (Decl. George A. Hanson, Ex. A ¶ 11, Doc. No. 47-1.) Courts repeatedly have held that FLSA settlements may not be subject to a general confidentiality provision. See, e.g., Mabry v. Hildebrandt, No. 14-5525, 2015 WL 5025810, at *2–3 (E.D. Pa. Aug. 24, 2015); Lopez v. Nights of Cabiria, LLC, 96 F. Supp. 3d 170, 177–80 (S.D.N.Y. 2015). Because each Settlement Agreement contains a severability clause, I will order the Parties to strike the confidentiality provision from the Agreements, and will approve the remainder of the Proposed Settlement terms as fair and reasonable. (See Decl. George A. Hanson, Ex. A ¶ 13, Doc. No. 47-1.)

B. Attorney's Fees and Costs

Unless a defendant objects, courts are not required to examine the reasonableness of attorney's fees in individual actions. Cf. Bell v. United Princeton Props., Inc., 884 F.2d 713, 719 (3d Cir. 1989) (fee shifting in ERISA action). Nonetheless, because Counsel's requested award comprises a large percentage of Plaintiffs' total recovery and includes fees for work performed in the *Arnold* matter, I ordered Counsel to provide extensive additional briefing and billing records supporting their request. I am now satisfied that Counsel's requested fees are reasonable.

In determining whether Counsel's fees are reasonable, courts use the "lodestar" method, multiplying "the number of hours reasonably worked on a client's case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys." In re Rite Aid Corp. Secs. Litig., 396 F.3d 294, 305 (3d Cir.2005); accord Dino v. Pennsylvania, No. 08-1493, 2013 WL 6504749, at *1 (M.D.

Pa. Dec. 11, 2013). In this and the *Arnold* matter, Plaintiffs' Counsel have worked 18,056.86 hours at a blended hourly rate of $460, and incurred approximately $514,785 in costs, resulting in an $8.82 million lodestar amount. (Decl. George A. Hanson ¶¶ 23–25, Doc. No. 57-1.) In their Motion, Counsel reduced the lodestar amount by 20% for time and fees not reasonably attributable to the Plaintiffs here, and then divided that amount by the 416 post-*Arnold* plaintiffs, resulting in an adjusted lodestar amount of approximately $865,130.85.

Again, each Plaintiff approved his or her individual Settlement Agreement, and Defendants do not object to the amount of fees or costs. Plaintiffs' Counsel seek fees and costs of $408,000—less than 50% of the adjusted lodestar amount. See Sakalas v. Wilkes Barre Hosp. Co., No. 11-546, 2014 WL 1871919, at *7 (M.D. Pa. May 8, 2014) ("[S]ignificantly, the total lodestar of $144,312.50 is actually greater than Class Counsel's requested fee of $128,391.68, further justifying approval of counsel's proposed fee."); see also Dino v. Pennsylvania, No. 08-1493, 2013 WL 6504749, at *3 (M.D. Pa. Dec. 11, 2013) (fee award above lodestar amount appropriate where class action made litigation complex and counsel agreed to represent plaintiffs on a contingency basis). Counsel will thus be paid an effective rate of less than $460 an hour—a rate considerably lower than those approved by courts in this Circuit in wage and hour cases. See, e.g., Sakalas, 2014 WL 1871919, at *7 (rate of $500.56 in PMWA class action).

Finally, although Counsel's request includes fees for work performed on *Arnold*, awarding such fees is appropriate where, as here, "the time spent was 'reasonably expended' to advance the litigation for which the fees [are] sought." Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 419–21 (3d Cir. 1993). Indeed, Counsel have painstakingly combed through thousands of pages of billing records in this and *Arnold* to ensure that the fees sought here include work performed only in furtherance of the instant litigation.

(See Pls.' Supp. Mem, Support Unopp. Mot. Approval FLSA Settl. 18–22, Doc. No. 61.) Moreover, because Defendants were parties to *Arnold* and were aware that they might be subjected to FLSA fee shifting, they had the ability and incentive to reduce the costs of that litigation. See Gulfstream III Associates, Inc., 995 F.2d at 420. I thus may order Defendants to pay Plaintiffs' Counsel's fees for work performed in *Arnold*.

In sum, Plaintiffs' Counsel's request for fees and costs is reasonable because: (1) Defendants do not object to the fee or cost amounts; (2) it is based on a reasonable hourly rate; (3) it is significantly below the adjusted lodestar amount; and (4) it includes only work performed in furtherance of the instant litigation.

IV. CONCLUSION

I will thus approve in part the Proposed Settlement and request for fees and costs, and order the Parties to remove Paragraph Eleven from the final Settlement Agreements. An appropriate Stipulated Judgment follows.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

May 24, 2018 Paul S. Diamond, J.