UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GERARD CERDA, individually and on behalf of all persons similarly situated, Plaintiff, -against- RESTAURANT ASSOCIATES, INC. and RA TENNIS CORP., Defendants.	No. 04-CV-03394 (NGG)(RML)

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Preliminary Statement

Plaintiff now requests Court approval of the settlement of this class action under Fed. R. Civ. P. 23(e). The class consists of all Hispanic and non-white employees of defendants Restaurant Associates, Inc., and RA Tennis Corp. who worked at the US Open Tennis Tournament in 2003.

Notice of the settlement has been sent to each of the 279 members of the class. Declaration of Laurence B. Jones, ¶¶ 3-4. A total of 101 claim forms have been submitted, of which 97 have been determined by the parties to be eligible for participation in the class action settlement. This memorandum of law is submitted in support of approval of the proposed settlement.

FACTUAL BACKGROUND

Defendant Restaurant Associates, Inc. ("RA") operates and manages the facilities at the US Open for providing food and beverages, both inside and outside the Arthur Ashe stadium. Each summer RA hires several hundred persons to staff these facilities for approximately a three-week period.

Plaintiff alleges that RA has given the higher-paying concession stand jobs to white employees and that he and all Hispanic and non-white employees are shunted off to lower-paying positions, in violation of the federal, state and City employment non-discrimination statutes. Amended Complaint, ¶¶ 15-16. Defendant has denied these allegations and denies any liability

to plaintiff or to the proposed class.

In discovery the RA payroll records for concession stand vendors at the US Open in 2003 have been produced and exhaustively reviewed by counsel for the parties. While plaintiff contends that these records demonstrate that the pay of non-whites working at food and beverage stands is systematically lower than that of whites working at those stands, defendant has identified instances where the pay of a black employee is higher than that of white employees. Given the conflicting evidence, establishment of discrimination against non-whites therefore remains uncertain.

As the Court is aware, extensive settlement negotiations took place during 2004-2005 that were supervised by the Court. These negotiations did not result in a settlement. In December of 2005 plaintiff served a motion for class certification on defendant as well as a motion to amend the complaint. Settlement negotiations resumed in January of 2006 before the full briefing and filing of these motions; plaintiff and an executive of defendant, in addition to their respective counsel, participated in these negotiations.

Eventually the negotiations resulted in a settlement which calls for defendant to establish a $90,000 settlement fund to be divided *pro rata* among non-white employees and employees of non-U.S. national origin who file claims. Counsel fees of $50,000 and an incentive award to the named plaintiff of $7,500

are provided for separately in the settlement agreement, and these payments are not charged against the $90,000 class member fund. Reference is made to the attached settlement agreement for a complete statement of the settlement terms. Approximately 100 class members have filed claim forms. Therefore the payment to each class member will be approximately $900.

Based on comparison of the wages paid by RA to white and non-white employees, plaintiff's counsel estimate that the average lost wage claim of each class member is in the vicinity of $400.00. This estimate is the result of extensive review and analysis by plaintiff's counsel (with the participation of plaintiff himself) of the data in defendant's files concerning the job assignments and wages of persons employed by RA at the 2003 US Open.

Besides considering race and ethnicity, they reviewed such factors as type and location of concession, day of the week and point of time within the overall tournament to obtain an accurate cross-section of the differential in compensation between white non-Hispanic employees and class members. The small (but internally consistent) amount of the differential reflects the short period of employment (two-three weeks) and the low pay for these jobs. The amount to be received by each class member in excess of $400 is applicable to each class member's non-economic claim for damages other than lost wages under the employment discrimination statutes.

ARGUMENT

APPROVAL OF THE SETTLEMENT IS APPROPRIATE

The parties have conducted substantial discovery and have engaged in court-supervised negotiations followed by arms-length separate negotiations that resulted in the proposed settlement. The undersigned counsel have achieved a thorough understanding of the strengths and weaknesses of the claims and of the potential defenses. The state of the evidence is such that it is far from a foregone conclusion that the class would achieve a more favorable result if the case went to trial. In particular, it is uncertain what damages a jury would award in excess of the wage differential being recovered by means of the settlement.

The settlement in this case has drawn no objections and has received support from nearly 100 class members who desire to participate in it. The recovery for class members is certain and represents well more than the average lower-pay claim that each class member has. And further prosecution of this action would take significantly more time for remaining discovery, motions, trial, and any appeal, for an uncertain result. For these reasons, as supported by the applicable case law factors, the settlement should be approved.

1. Standards for Approval of a Class Action Settlement

"The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable

and adequate." Schenek v. FSI Futures, Inc., 1999 U.S. Dist. LEXIS 707 at *3-4, (S.D.N.Y. 1999), citing Weinberger v. Kendrick, 698 F.2d 61, 73 (2nd Cir. 1982), *cert. denied,* 464 U.S. 818 (1983); *accord*, Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir. 1995). A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arms-length negotiations conducted by capable counsel experienced in class action litigation. *See, e.g.*, In re Sumitomo Copper Litig., 189 F.R.D. 274, 280 (S.D.N.Y. 1999; New York & Maryland v. Nintendo of Am., Inc., 775 F. Supp. 676, 680-81 (S.D.N.Y. 1991). Moreover, "(s)ettlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'") Sumitomo, supra, 189 F.R.D. at 280 (citation omitted).

The factors governing approval of class action settlements are well-established in this Circuit. In City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), the Second Circuit Court of Appeals held that the following factors are to be considered in evaluating a proposed class action settlement:

> (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.

Id. at 463(citations omitted); s*ee also* County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323-24 (2d Cir. 1990). These factors support the settlement achieved in this case or are neutral; none of them disfavors the settlement. As to factor (1), the settlement saves the significant time that would be required for the remaining discovery (depositions of RA staff, among others), for class certification briefing and decision, for disposing of the likely summary judgment motion, and for trial. As to (2), the reaction of the class is overwhelmingly favorable: nearly 100 eligible class members have filed claims and no class member has objected. As to (3), sufficient discovery has been obtained from defendant's pay records to establish the likely damages and the possible difficulties of maintaining a class action. As to (4) and (5), while plaintiff does not perceive a significant risk as to whether liability will be established, it is not realistic to ignore the risk that defendant's counter-examples will be credited by a jury. As to (6), class action certification has not yet been granted, so there is the risk that it will not be granted at all if the settlement and settlement class are not approved. Factor (7) is neutral: there is no question as to the ability of the defendant to withstand a larger judgment and the case is not being settled on that basis; rather,

the dollar amount reflects the low wage amounts paid in a period of only three weeks. As to (8), the range of reasonableness of the settlement fund in relation to the best possible recovery, it suffices to state that the recovery is greater than the lost wage claim alone (determined in the manner summarized above at p. 3). No one can say whether a jury would award significant non-economic damages in this case. As to (9), given all the risks already discussed, the amount to be paid is more than reasonable in light of the litigation risks and the uncertainty as to what might be recovered through further litigation.

In short, the $90,000 settlement in this case is within a range which reasonable and experienced attorneys, and class representatives, could accept, considering the size of the class, the low dollar amounts at issue in a wage case involving three weeks, and all of the risks, facts and circumstances in the case. The range for an acceptable settlement, as once defined by Judge Friendly, "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 . . . ." Newman v. Stein, 464 F.2d 689, 693 (2nd Cir. 1972).

Finally, we note that the class action notice procedures met the requirements of Fed. R. Civ. P. 23(c)(2). All class members had provided their home addresses to their employer, and notice was sent to all class members at their last known address. This satisfies the requirements of Rule 23.

Martens v. Smith Barney, Inc., 1998 WL 1661385 (S.D.N.Y. 1998) (court ordered that class notice be distributed by first-class mail to the last known addresses of all members of the class); Langford v. Devitt, 127 F.R.D. 41, 45 (S.D.N.Y. 1989) ("notice mailed by first class mail has been approved repeatedly as sufficient notice of a proposed settlement") (citation omitted). Moreover, as a practical matter, close to 100% individual notice was achieved. Individual mailed notice was provided through first-class mail to all class members at their last known addresses.

In sum, considering the risks, delays and expenses associated with trial, we submit that the proposed $90,000 settlement is well within the range of reasonableness considering the number of class members, the wage amounts involved, and the

short (three-week) duration of the wage differential.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the settlement be approved by the Court.

Dated: New York, New York
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