Workshop B:
Best Practices in Settling Wage-Hour Disputes

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Best Practices in Settling Wage-Hour Disputes

I. Summary of *Cheeks*

Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015):

1. Take-away FLSA claims cannot be dismissed with prejudice pursuant to a R. 41(a)(1)(A)(ii) stipulation absent court approval.
2. Underlying claims were for overtime, liquidated damages, and attorneys' fees under FLSA and NYLL
3. The parties reached a private settlement filed for R. 41(a)(1)(A)(ii) dismissal with prejudice, but the district court refused to enter stipulation on the basis that settlement of FLSA claims required court or DOL approval.
    a. Court ordered the parties to file a copy of the settlement agreement on the public docket and provide additional information demonstrating why the settlement was fair and reasonable.
4. On both parties' request, the the court stayed proceedings and certified for interlocutory appeal the question of whether FLSA settlements are an exception to the general rule that parties may stipulate to a dismissal without court approval
5. Holding: "Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect" because of the "unique policy considerations underlying the FLSA." *Id.* at 206.
6. The court also highlighted several areas of potential abuse in FLSA settlements that demonstrate need for judicial review:
    a. highly restrictive confidentiality provisions
    b. overbroad releases, including general releases and releases that otherwise release claims wholly unrelated to wage-and-hour law
    c. attorneys' fees provisions including high percentages (e.g. over 40%) and "without adequate documentation to support such a fee award."
    d. agreement by plaintiffs' attorneys not to represent anyone in the future bringing similar claims against defendants.

II. Sample Cases Post-*Cheeks* (non-exhaustive list):

A. Confidentiality Provisions:
    1. Generally have been rejected
    2. *Jones v. Smith*, No. 16 Civ. 2194, 2018 WL 2227990 (E.D.N.Y. May 14, 2018): Parties tried to defend confidentiality provision and avoid filing settlement on the public docket by stipulating for settlement purposes only that the plaintiff was an independent contractor and therefore the FLSA did not apply to him, and by arguing for a "celebrity" exception to filing the settlement on the public docket.

Court rejected settlement and instructed the parties to revise the agreement so that it did not include "any impermissible confidentiality provisions." *Id.* at *5.

3. *Souza v. 65 St. Marks Bistro*, *Souza v. 65 St. Marks Bistro*, No. 15 Civ. 327, 2015 WL 7271747, at *4-5 (S.D.N.Y. Nov. 6, 2015): rejecting confidentiality provision as conflicting with Congressional intent to advance employees' awareness of their FLSA rights and ensure implementation of the FLSA. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *3 (S.D.N.Y. Apr. 21, 2016): rejecting confidentiality provision that required the plaintiff "to keep the existence, terms, and events leading up to and incorporated within this Agreement strictly and forever confidential[,]" not to "directly or indirectly encourage, induce, solicit, or assist anyone to file a wage and hour action or collective or class action against" Defendants, and imposed a $10,000 penalty for each breach.

B. Releases:

1. Courts have generally been more approving of general releases when they are mutual, but not when the defendant releasees are too broadly defined.
2. *Burgos v. Ne. Logistics, Inc.*, No. 15 Civ. 6840, 2018 WL 2376481, at *6 (E.D.N.Y. Apr. 26, 2018), *report and recommendation adopted*, 2018 WL 2376300 (E.D.N.Y. May 24, 2018): rejecting mutual release that was "asymmetrical with respect to the parties" and collecting cases rejecting similar releases. Defendant releasees included defendant, "its parent, subsidiaries, division, affiliates, commonly owned entities and other related entities, [defendant's" customers ... and each of their incumbent and former officers, directors, owners, shareholders, investors, agents, attorneys, employees, fiduciaries, successors, assigns, and representatives."
3. *Bukhari v. Senior*, No. 16 Civ. 9249, 2018 WL 559153, at *2 (S.D.N.Y. Jan. 23, 2018): Rejecting broad release that required employee to "release and forever discharge Defendants ... from any and all claims, known or unknown, asserted or unasserted, which [Bukhari] ha[s] or may have against [defendants] ... arising from or concerning in any way [Bukhari's] employment by or association with Defendants." *Id.* at *2. Fact that release was "facially mutual, although favoring the settlement, does not salvage it, absent a sound explanation for how this broad release benefits the plaintiff employee." *Id.*
4. *Ceesae v. TT's Car Wash Corp.*, No. 17 Civ. 291, 2018 WL 1767866, at *5 (E.D.N.Y. Jan. 3, 2018), *report and recommendation adopted*, 2018 WL 741396 (E.D.N.Y. Feb. 7, 2018): ordering that "the release should be limited to any claims plaintiff did or could have brought under the FLSA, NYLL and New York Code of Rule and Regulations, or it runs the risk of being overbroad and releasing defendant of liability unconnected to plaintiff's wage and hour claims."
5. *Souza v. 65 St. Marks Bistro*, *Souza v. 65 St. Marks Bistro*, No. 15 Civ. 327, 2015 WL 7271747, at *5 (S.D.N.Y. Nov. 6, 2015): approving general release where plaintiffs were former employees on the condition that the parties modify the release to be mutual.

6. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *3 (S.D.N.Y. Apr. 21, 2016): rejecting release of claims that plaintiff "did not know or suspect to exist," and "covenant not to sue Defendants "'in any forum for any reason'" in perpetuity[.]"

C. Attorneys' fees:
   1. Requests for more than a third will be highly scrutinized, as will requested rates, and attorneys should submit contemporaneous billing records
   2. *Lopez v. Ploy Dee, Inc.*, No. 15 Civ. 647, 2016 WL 1626631, at *4 (S.D.N.Y. Apr. 21, 2016) fees and costs that totaled 40% of settlement ($10,000 out of $25,000) were excessive, even though counsel's actual lodestar was higher (based upon rates that the court noted were on the "high end of what is typical in FLSA cases"). Also noting that courts rarely approve fees representing more than a third of the total settlement amount.
   3. *Banegas v. Mirador Corp.*, No. 14 Civ. 8491, 2016 WL 1451550, at *3 (S.D.N.Y. Apr. 12, 2016): Requested attorneys' fee award was "not adequately supported" because "no billing records documenting the expenditure of time on this case [we]re included." Ordering plaintiff's counsel to submit "proper documentation of the billing records from this case in order for the Court to determine what constitutes a reasonable attorneys' fee."
   4. *Lazaro-Garcia v. Sengupta Food Servs.*, No. 15 Civ. 4259, 2015 WL 9162701, at *3-4 (S.D.N.Y. Dec. 15, 2015): Rejecting settlement on other grounds but noting that attorneys' fee request for 39% of the total settlement would have been "excessive" because case was "fairly straightforward", the reduction in fees directly impacted Plaintiff's recovery, and plaintiffs' counsel's proposed rates were "too high in light of the work performed."

D. Other
   1. Non-disparagement provisions
      a. *Lazaro-Garcia v. Sengupta Food Servs.*, No. 15 Civ. 4259, 2015 WL 9162701 (S.D.N.Y. Dec. 15, 2015): non-disparagement provision was overly restrictive because it contained no carve-out for "'truthful statements about plaintiffs' experience litigating their case.'" *Id.* at *3 (quoting carve-out *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 180 (S.D.N.Y. 2015). Explaining that without the carve-out, plaintiff would be prohibited from informing other employees who might not be award of their rights of the company's failure to pay wages.
   2. Restrictions on re-employment
      a. *Flores v. Hill Country Chicken NY, LLC*, No. 16 Civ. 2916, 2017 WL 3448018, at *2 (S.D.N.Y. Aug. 11, 2017): finding provision that "bars plaintiffs from ever working, or applying to work, for defendants and the releasees" not permissible.
   3. Assisting in other litigations

a. *Guzman v. Kahala Holdings, LLC*, No. 15 Civ. 9625, 2017 WL 4748389, at *2 (S.D.N.Y. Oct. 18, 2017): rejecting provision that "prohibits plaintiffs from assisting in any other wage and hour litigation against defendants." Also rejecting no reemployment provision.

III. Open Issues Following *Cheeks*

A. Rule 68 Offers of Judgment

1. Do they also require Court approval in light of Cheeks?
2. Split of authority among district courts, issue is now pending at the 2nd Circuit in *Yu v. Hasaki*, No. 17-3388-cv
    a. District Court found that concerns about potential for abuse in FLSA settlements "apply no less to settlements under Rule 68 than they do to settlements under Rule 41." *Yu v. Hasaki Rest.*, 319 F.R.D. 111, 115 (S.D.N.Y. 2017).
    b. District court in *Yu* explained that: "[a]lthough *Cheeks* may not apply *a fortiori* to a Rule 68 FLSA settlement given its reliance on the language of Rule 41, its reasoning—combined with the fact that Rule 68 is not always, as the majority of courts in the Circuit have assumed, mandatory—compels the conclusion that parties may not evade the requirement for judicial (or DOL) approval by way of Rule 68." *Id.* at 116 (collecting cases holding same).
    c. Certified for interlocutory appeal and now fully briefed at the Second Circuit. Oral argument on **October 10**

B. Dismissals without Prejudice

1. Most courts have concluded dismissal without prejudice is not permissible if its purpose is an "end-run" around *Cheeks*, since the potential preclusive effect of a dismissal without prejudice coupled with the statute of limitations could create a de facto dismissal with prejudice.
2. *Carson v. Team Brown Consulting, Inc.*, No. 16 Civ. 4206, 2017 WL 4357393 (E.D.N.Y. Sept. 29, 2017): after reaching a settlement and being instructed by the magistrate judge to file the settlement documents, plaintiff's counsel filed a notice of voluntary dismissal under R. 41(a)(1)(A)(i) to avoid a *Cheeks* review of the settlement. Before filing the dismissal, the parties had already suggested to the court that there may be issues with the breadth of the release and that a *Cheeks* review would "directly impact" the terms of the settlement. The district court ordered the parties to submit papers sufficient to allow a *Cheeks* review, explaining that "[n]otices of dismissal without prejudice should not be used in FLSA cases as a mechanism to effect an end-run around the policy concerns articulated in *Cheeks*." *Id.* at *4.
3. *But see Martinez v. SJG Foods LLC*, No. 16 Civ. 7890, 2017 WL 2169234, at *3 n. 3 (S.D.N.Y. May 16, 2017): "The parties may stipulate to a dismissal of this

action without prejudice, as the Second Circuit has not expressly held that such settlement agreements require court approval."

C. Bifurcation of Approval of FLSA and non-FLSA Claims

1. *Yunda v. SAFI-G, Inc.*, No. 15 CIV. 8861, 2017 WL 1608898, at *2 (S.D.N.Y. Apr. 28, 2017): parties entered into two separate settlement agreements: (1) one for FLSA claims, and (2) 1 for NYLL claims. The NYLL agreement "contains several provisions that would be impermissible in an FLSA settlement" and parties included those provisions in the NYLL agreement "to immunize them from judicial review." *Id.* at *2. Court found that the bifurcated settlement agreement was permissible.
2. *Gallardo v. PS Chicken Inc.*, 285 F. Supp. 3d 549, 553 (E.D.N.Y. 2018): generally agreeing that separate settlement agreements for FLSA and non-FLSA claims is permissible and the non-FLSA agreement generally would not be subject to judicial review, but nonetheless requiring judicial review. Without review, court would not be able to determine whether the dismissal was a "true dismissal without prejudice" or "whether the agreement contains other conditions relating to or otherwise affecting the FLSA claims that would be impermissible if executed in an FLSA settlement agreement."

***Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488 (2017)**

The New York Court of Appeals held that pursuant to CPLR 908 putative class members must be notified of a settlement even if the case settles prior to class certification.

Procedural Background

This case involved appeals from two separate wage and hour class actions: *Desrosiers v. Perry Ellis Menswear* and *Vasquez v. National Securities Corporation.*

In *Desrosiers,* the defendant made an offer of compromise to the plaintiff which was accepted. The defendant subsequently moved to dismiss the action. At the time of the dismissal, the time by which the plaintiff was required to move for class certification had expired. In response to the defendant's motion to dismiss, the plaintiff filed a cross motion seeking leave to provide notice of the proposed dismissal to the putative class members pursuant to CPLR 908 despite there being no class certification. The Supreme Court dismissed the complaint and denied plaintiff's cross motion. On appeal, however, the First Department reversed the order, concluding that CPLR 908 "is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired." The First Department also noted that notice to putative class members, at this stage, is "particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action."

In *Vasquez*, the parties agreed to postpone a motion for class certification in order to complete precertification discovery. Before the plaintiff moved for class certification, he accepted a settlement offer and the defendant thereafter moved to dismiss the complaint. The plaintiff filed a cross motion to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. The Supreme Court granted the cross motion to provide notice to putative class members and directed that the action would not be dismissed until after notice had been issued.

The New York Court of Appeals Holds that Notice to Potential Class Members is Required Prior to Class Certification

On appeal, the New York Court of Appeals first commented that "[t]he text of CPLR 908 is ambiguous with respect to this [precertification notice] issue." The Court then noted that the only case to address the issue was *Avena v Ford Motor Co.* (85 AD2d 149, 447 NYS2d 278 (1st Dept 1982). In that case, the named plaintiffs settled with the defendant before class certification. The Supreme Court would not approve the settlement until notice was provided to the putative class members. The First Department affirmed, holding that CPLR 908 applied to settlements reached before class certification because the "potential for abuse by private settlement at this stage is . . . obvious and recognized." The First Department also found that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members.

The Court of Appeals reasoned that, "the fact that the legislature has not amended CPLR 908 in the decades since *Avena* has been decided is particularly persuasive evidence that the Court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted in light of

developments occurring in the years after *Avena* was decided." Specifically, the Court of Appeals noted that in 2003, Federal Rule of Civil Procedure Rule 23(e) was amended to clarify that settlement notice only had to be sent to putative class members of certified classes. That same year, multiple New York City Bar Committees recommended changes to CPLR 908 to clarify similarly the class member notice requirements at the precertification stage. However, no legislative action was taken to amend CPLR 908.

The Court of Appeals observed that "[n]otwithstanding these repeated proposals, and the legislature's awareness of this issue . . . the legislature has left CPLR 908 untouched from its original version as enacted in 1975." Therefore, because the legislature has declined to amend CPLR 908 since the *Avena* decision, the Court of Appeals determined that the *Avena* court had correctly interpreted the legislature's intent concerning CPLR 908 and that any "practical difficulties and policy concerns" that arise from this interpretation of CPLR 908 should be addressed by the legislature. Consequently, the Court affirmed both cases.

14-299-cv
Cheeks v. Freeport Pancake House, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: November 14, 2014 Decided: August 7, 2015)

Docket No. 14-299-cv

DORIAN CHEEKS,

Plaintiff-Appellant,

v.

FREEPORT PANCAKE HOUSE, INC., W.P.S. INDUSTRIES, INC.,

Defendants-Appellees.

Before: POOLER, PARKER and WESLEY, *Circuit Judges*.

Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of the United States District Court for the Eastern District of New York (Joanna Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with prejudice, Cheeks' claims under the Fair Labor Standards Act ("FLSA") and New

York Labor Law. We agree that absent such approval, plaintiffs cannot settle their FLSA claims through a private stipulated dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus affirm, and remand for further proceedings consistent with this opinion.

Affirmed.

ABDUL HASSAN, Queens Village, NY, *for Plaintiff-Appellant Dorian Cheeks*.

JEFFREY MEYER, Kaufman, Dolowich & Voluck, LLP (Keith Gutstein, *on the brief*),Woodbury, NY, *for Defendants-Appellees Freeport Pancake House, Inc. and W.P.S. Industries, Inc.*

Laura Moskowitz, Senior Attorney, U.S. Department of Labor, Office of the Solicitor, (M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, *on the brief*), Washington, D.C., *for Amicus Curiae U.S. Department of Labor*.

POOLER, *Circuit Judge*:

Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of the United States District Court for the Eastern District of New York (Joanna Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with

prejudice, Cheeks' claims under the Fair Labor Standards Act ("FLSA") and New York Labor Law. The district court held that parties cannot enter into private settlements of FLSA claims without either the approval of the district court or the Department of Labor ("DOL"). We agree that absent such approval, parties cannot settle their FLSA claims through a private stipulated dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus affirm, and remand for further proceedings consistent with this opinion.

BACKGROUND

Cheeks worked at both Freeport Pancake House, Inc. and W.P.S. Industries, Inc. (together, "Freeport Pancake House") as a restaurant server and manager over the course of several years. In August 2012, Cheeks sued Freeport Pancake House seeking to recover overtime wages, liquidated damages and attorneys' fees under both the FLSA and New York Labor Law. Cheeks also alleged he was demoted, and ultimately fired, for complaining about Freeport Pancake House's failure to pay him and other employees the required overtime wage. Cheeks sought back pay, front pay in lieu of reinstatement, and damages for the unlawful retaliation. Freeport Pancake House denied Cheeks' allegations.

After appearing at an initial conference with the district court, and

engaging in a period of discovery, the parties agreed on a private settlement of Cheeks' action. The parties then filed a joint stipulation and order of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii). Cheeks v. Freeport Pancake House, Inc., No. 2:12-cv-04199 (E.D.N.Y. Dec. 27, 2013) ECF No. 15. The district court declined to accept the stipulation as submitted, concluding that Cheeks could not agree to a private settlement of his FLSA claims without either the approval of the district court or the supervision of the DOL. The district court directed the parties to "file a copy of the settlement agreement on the public docket," and to "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." App'x at 35 (internal quotation marks omitted). The district court further ordered the parties to "show cause by providing the Court with additional information in the form of affidavits or other documentary evidence explaining why the proposed settlement is fair and reasonable." App'x at 35.

Rather than disclose the terms of their settlement, the parties instead asked the district court to stay further proceedings and to certify, pursuant to 28 U.S.C. § 1292(b), the question of whether FLSA actions are an exception to Rule

41(a)(1)(A)(ii)'s general rule that parties may stipulate to the dismissal of an action without the involvement of the court. On February 20, 2014, the district court entered an order staying the case and certifying the question for interlocutory appeal. Our Court granted the motion. Cheeks v. Freeport Pancake House, Inc., 14-299-cv (2d Cir. May 7, 2014), ECF No. 44 . Our Court heard oral argument on November 14, 2014. As both parties advocated in favor of reversal, following oral argument we solicited the views of the DOL on the issues raised in this matter. The DOL submitted a letter brief on March 27, 2015, taking the position that the FLSA falls within the "applicable federal statute" exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without the involvement of a court or the DOL." Cheeks submitted supplemental briefing in response to the DOL's submission on April 20, 2015, and we find no need for additional oral argument.

DISCUSSION

The current appeal raises the issue of determining whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision[1],

[1] Pursuant to Section 216(c) of the FLSA, the Secretary of Labor has the authority to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under" the

under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The question of whether judicial approval of, and public access to, FLSA settlements is required is an open one in our Circuit.[2] We review this question of law de novo. *See Cmty. Health Care Ass'n of N.Y. v. Shah*, 770 F.3d 129, 150 (2d Cir. 2014).

Rule 41(a)(1)(A) provides in relevant part that:

> Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> > (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
> >
> > (ii) a stipulation of dismissal signed by all parties who have appeared.

Fed. R. Civ. P. 41(a)(1)(A).

The FLSA is silent as to Rule 41. We must determine, then, if the FLSA is an

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FLSA. 29 U.S.C. § 216(c). "[T]he agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . to such unpaid minimum wages or unpaid overtime compensation and" liquidated damages due under the FLSA. *Id.*

[2]As it is not before us, we leave for another day the question of whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.

"applicable federal statute" within the meaning of the rule. If it is not, then Cheeks' case was dismissed by operation of Rule 41(a)(1)(A)(ii), and the parties did not need approval from the district court for the dismissal to be effective. *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) ("The judge's signature on the stipulation did not change the nature of the dismissal. Because the dismissal was effectuated by stipulation of the parties, the court lacked the authority to condition [the] dismissal . . . .") (collecting cases).

We start with a relatively blank slate, as neither the Supreme Court nor our sister Circuits have addressed the precise issue before us. District courts in our Circuit, however, have grappled with the issue to differing results. Those requiring court approval of private FLSA settlements regularly base their analysis on a pair of Supreme Court cases: *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

Brooklyn Savings involved a night watchman who worked at Brooklyn Savings Bank for two years. 324 U.S. at 699. The watchman was entitled to overtime pay for his work, but was not compensated for his overtime while he worked for the bank. *Id.* at 700. The watchman left the bank's employ, and two years later the bank computed the statutory overtime it owed him and offered the

watchman a check for $423.16 in exchange for a release of all his FLSA rights. *Id.* The watchman signed the release, took the check, and then sued the bank for liquidated damages pursuant to the FLSA, which were admittedly not included in the settlement. *Id.*

The Supreme Court held that in the absence of a genuine dispute as to whether employees are entitled to damages, employees could not waive their rights to such damages in a private FLSA settlement. *Id.* at 704. Because the only issue before the court was the issue of liquidated damages, which were a matter of statutory calculation, the Court concluded that there was no bona fide dispute between the parties as to the amount in dispute. *Id.* at 703. The Court noted that the FLSA's legislative history "shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Id*. at 706. In addition, the FLSA "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate

commerce." *Id.* at 706–07. Concluding that the FLSA's statutory language indicated that "Congress did not intend that an employee should be allowed to waive his right to liquidated damages," the Court refused to enforce the release and allowed the watchman to proceed on his claim for liquidated damages. *Id*. at 706. However, the Court left unaddressed the issue of whether parties could privately settle FLSA claims if such settlements resolved "a bona fide dispute between the parties." *Id.* at 703.

A year later, in *D.A. Schulte*, the Supreme Court answered that question in part, barring enforcement of private settlements of bona fide disputes where the dispute centered on whether or not the employer is covered by the FLSA. 328 U.S. at 114. Again, the Supreme Court looked to the purpose of the FLSA, which "was to secure for the lowest paid segment of the nation's workers a subsistence wage," and determined "that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." *Id.* at 116. However, the Supreme Court again specifically declined to opine as to "the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment." *Id.* at 114–15.

Brooklyn Savings and *Gangi* establish that (1) employees may not waive the right to recover liquidated damages due under the FLSA; and (2) that employees may not privately settle the issue of whether an employer is covered under the FLSA. These cases leave open the question of whether employees can enforce private settlements of FLSA claims where there is a bona fide dispute as to liability, i.e., the number of hours worked or the amount of compensation due. In considering that question, the Eleventh Circuit answered "yes," but only if the DOL or a district court first determines that the proposed settlement "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. United States Dep't of Labor*, 679 F.2d 1350, 1355 (11th Cir. 1982).[3]

In *Lynn's Foods*, an employer sought a declaratory judgment that the private settlements it had entered into with its employees absolved it of any future liability under the FLSA. *Id.* at 1351–52. The private settlements were entered into after the DOL found the employer "was liable to its employees for back wages and liquidated damages," *id*. at 1352, but were not made with DOL

[3] Because this appeal was certified before the parties presented the district court with evidence to support their proposed settlement, we express no opinion as to whether a bona fide dispute exists here, or what the district court must consider in deciding whether to approve the putative settlement of Cheeks' claims.

approval. The putative settlements paid the employees far less than the DOL had calculated the employees were owed.

In rejecting the settlements, the Eleventh Circuit noted that "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (internal quotation marks omitted). The court reasoned that requiring DOL or district court involvement maintains fairness in the settlement process given the great disparity in bargaining power between employers and employees. *Id.* The Eleventh Circuit noted that the employer's actions were "a virtual catalog of the sort of practices which the FLSA was intended to prohibit." *Id*. at 1354. For example, the employees had not brought suit under the FLSA and were seemingly "unaware that the Department of Labor had determined that Lynn's owed them back wages under the FLSA, or that they had any rights at all under the statute." *Id*. Despite that, the employer "insinuated that the employees were not really entitled to any back wages," and suggested "that only malcontents would accept back wages owed them under the FLSA." *Id*. The employees were not represented by counsel, and in some cases did not speak English. *Id*. The Eleventh Circuit noted that these practices were "illustrative of

the many harms which may occur when employers are allowed to 'bargain' with their employees over minimum wages and overtime compensation, and convinces us of the necessity of a rule to prohibit such invidious practices." *Id.* at 1354-55.[4]

The Fifth Circuit, however, concluded that a private settlement agreement containing a release of FLSA claims entered into between a union and an employer waived employees' FLSA claims, even without district court approval or DOL supervision. *Martin v. Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 253–57 (5th Cir. 2012). In *Martin*, the plaintiffs were members of a union, and the union had entered into a collective bargaining agreement with the employer. *Id.* at 249. The plaintiffs filed a grievance with the union regarding the employer's alleged failure to pay wages for work performed by the plaintiffs. *Id*. Following an investigation, the union entered into an agreement with the employer settling the disputed compensation for hours worked. *Id*. However, before the settlement

[4] Other Circuits agree with the Eleventh Circuit's conclusion that waiver of a FLSA claim in a private settlement is not valid. *Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008) ("FLSA rights are statutory and cannot be waived"); *see also Taylor v. Progress Energy, Inc.*, 680 F. Supp. 2d 750, 753 (D. Md. 201) *aff'd* 493 F.3d 454, 460 (4th Cir. 2007) *superseded by regulation on other grounds as stated in Whiting v. The Johns Hopkins Hosp.*, 416 F. App'x 312 (4th Cir. 2011) (same); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) (same).

agreement was executed, the plaintiffs sued, seeking to recover unpaid wages pursuant to the FLSA. *Id*. at 249–50.

The Fifth Circuit concluded that the agreement between the union and employer was binding on the plaintiffs and barred the plaintiffs from filing a FLSA claim against the employer. *Id.* at 253–54. The Fifth Circuit carved out an exception from the general rule barring employees' waiver of FLSA claims and adopted the rationale set forth in *Martinez v. Bohls Bearing Equipment Co.*, 361 F. Supp. 2d 608, 633 (W.D. Tex. 2005) ("[A] private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability."). The Fifth Circuit reasoned that "[t]he Settlement Agreement was a way to resolve a bona fide dispute as to the number of hours worked–not the rate at which Appellants would be paid for those hours–and though Appellants contend they are yet not satisfied, they received agreed-upon compensation for the disputed number of hours worked." *Martin*, 688 F.3d at 256. The Fifth Circuit noted that the concerns identified in *Lynn's Foods*–unrepresented workers unaware of their FLSA rights–"[were] not implicated." *Id.* at 256 n.10. *Martin*, however, cannot be read as a wholesale rejection of *Lynn's Foods:* it relies heavily on evidence that a bona fide dispute between the parties existed, and that the employees who

accepted the earlier settlement were represented by counsel. *Id.* at 255, 256 n.10; *Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 165 (5th Cir. 2015) (emphasizing that the private settlements approved in *Martin* did not "undermine the purpose of the FLSA because the plaintiffs did not waive their claims through some sort of bargain but instead received compensation for the disputed hours").

While offering useful guidance, the cases discussed above all arise in the context of whether a private FLSA settlement is enforceable. The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable. The parties do not cite, and our research did not reveal, any cases that speak directly to the issue before us: whether the FLSA is an"applicable federal statute" within the meaning of Rule 41(a)(1)(A). Nor are we aided by the Advisory Committee's notes, which simply state that the language "any applicable federal statute" serves to "preserve" provisions in "such statutes as" 8 U.S.C. § 1329 (immigration violations) and 31 U.S.C. § 3730 (qui tam actions), both of which explicitly require court approval before dismissal. Fed. R. Civ. P. 41 advisory committee's note to 1937 Adoption. As noted above, the FLSA itself is silent on the issue. One district court in our

Circuit found that this silence supports the conclusion that the FLSA is not an "applicable federal statute" within the meaning of Rule 41. *Picerni v. Bilingual Seit & Preschool Inc.*, 925 F. Supp. 2d 368, 375 (E.D.N.Y. 2013) ("[W]hile the FLSA expressly authorizes an individual or collective action for wage violations, it does not condition their dismissal upon court approval. The absence of such a requirement is a strong indication that Congress did not intend it, as it has expressly conditioned dismissals under other statutes upon court approval."). The *Picerni* court concluded that:

> Nothing in *Brooklyn Savings*, *Gangi*, or any of their reasoned progeny expressly holds that the FLSA is one of those Rule 41–exempted statutes. For it is one thing to say that a release given to an employer in a private settlement will not, under certain circumstances, be enforced in subsequent litigation—that is the holding of *Brooklyn Savings* and *Gangi*—it is quite another to say that even if the parties want to take their chances that their settlement will not be effective, the Court will not permit them to do so.

Id. at 373.

The *Picerni* court also noted that "the vast majority of FLSA cases . . . are simply too small, and the employer's finances too marginal, to have the parties take further action if the Court is not satisfied with the settlement." *Id.* at 377.

Thus, the *Picerni* court concluded, "the FLSA is not one of the qualifying statutes that fall within the exemption from Rule 41." *Id.* at 375; *see also Lima v. Hatsuhana of USA, Inc.*, No. 13 Civ. 3389(JMF), 2014 WL 177412, at *1–2 (S.D.N.Y. Jan. 16, 2014) (indicating a willingness to follow *Picerni* but declining to do so given the inadequacy of the parties' briefing on the issue).

Seemingly unpersuaded by *Picerni*, the majority of district courts in our Circuit continue to require judicial approval of private FLSA settlements. *See, e.g.*, *Lopez v. Nights of Cabiria, LLC*, --- F. Supp. 3d ----, No. 14-cv-1274 (LAK), 2015 WL 1455689, at *3 (S.D.N.Y. March 30, 2015) ("Some disagreement has arisen among district courts in this circuit as to whether such settlements do in fact require court approval, or may be consummated as a matter of right under Rule 41. The trend among district courts is nonetheless to continue subjecting FLSA settlements to judicial scrutiny.") (citation omitted); *Armenta v. Dirty Bird Grp., LLC*, No. 13cv4603, 2014 WL 3344287, at *4 (S.D.N.Y. June 27, 2014) (same) (collecting cases), *Archer v. TNT USA Inc.*, 12 F. Supp. 3d 373, 384 n.2 (E.D.N.Y. 2014) (same); *Files*, 2013 WL 1874602, at *1–3 (same).

In *Socias v. Vornado Realty L.P.*, the district court explained its disagreement with *Picerni*:

> Low wage employees, even when represented in the context of a pending lawsuit, often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or more likely to accept unreasonable, discounted settlement offers quickly. In recognition of this problem, the FLSA is distinct from all other employment statutes.

297 F.R.D. 38, 40 (E.D.N.Y. 2014). The *Socias* court further noted that "although employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections." *Id.* at 41 (internal quotation marks, alteration, and emphasis omitted). Finally, the *Socias* court observed that judicial approval furthers the purposes of the FLSA, because "[w]ithout judicial oversight, . . . employers may be more inclined to offer, and employees, even when represented by counsel, may be more inclined to accept, private settlements that ultimately are cheaper to the employer than compliance with the Act." *Id.*; *see also Armenta*, 2014 WL 3344287, at *4 ("Taken to its logical conclusion, *Picerni* would permit defendants to circumvent the FLSA's 'deterrent effect' and eviscerate FLSA protections.*")*.

We conclude that the cases discussed above, read in light of the unique

policy considerations underlying the FLSA, place the FLSA within Rule 41's "applicable federal statute" exception. Thus, Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect. Requiring judicial or DOL approval of such settlements is consistent with what both the Supreme Court and our Court have long recognized as the FLSA's underlying purpose: "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks omitted). "[T]hese provisions were designed to remedy the evil of overwork by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (internal quotation marks omitted). Thus, "[i]n service of the statute's remedial and humanitarian goals, the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage." *Id.* at 285.

Examining the basis on which district courts recently rejected several proposed FLSA settlements highlights the potential for abuse in such settlements, and underscores why judicial approval in the FLSA setting is necessary. In *Nights*

of Cabiria, the proposed settlement agreement included (1) "a battery of highly restrictive confidentiality provisions . . . in strong tension with the remedial purposes of the FLSA;" (2) an overbroad release that would "waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues;" and (3) a provision that would set the fee for plaintiff's attorney at "between 40 and 43.6 percent of the total settlement payment" without adequate documentation to support such a fee award. 2015 WL 1455689, at *1–7. In *Guareno v. Vincent Perito, Inc.*, the district court rejected a proposed FLSA settlement in part because it contained a pledge by plaintiff's attorney not to "represent any person bringing similar claims against Defendants." No. 14cv1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept. 26, 2014). "Such a provision raises the specter of defendants settling FLSA claims with plaintiffs, perhaps at a premium, in order to avoid a collective action or individual lawsuits from other employees whose rights have been similarly violated." *Id.; see also, e.g., Nall v. Mai-Motels, Inc.*, 723 F.3d 1304, 1306 (11th Cir. 2013) (employee testified she felt pressured to accept employer's out-of-court settlement offer because "she trusted [the employer] and she was homeless at the time and needed money") (internal quotation marks omitted);

Walker v. Vital Recovery Servs., Inc., 300 F.R.D. 599, 600 n.4 (N.D. Ga. 2014) ("According to Plaintiff's counsel, twenty-two plaintiffs accepted the offers of judgment—many for $100—because "they are unemployed and desperate for any money they can find.").

We are mindful of the concerns articulated in *Picerni*, particularly the court's observation that the "vast majority of FLSA cases" before it "are simply too small, and the employer's finances too marginal," for proceeding with litigation to make financial sense if the district court rejects the proposed settlement. 925 F. Supp. 2d at 377 (noting that FLSA cases tend to "settle for less than $20,000 in combined recovery and attorneys' fees, and usually for far less than that; often the employee will settle for between $500 and $2000 dollars in unpaid wages."). However, the FLSA is a uniquely protective statute. The burdens described in *Picerni* must be balanced against the FLSA's primary remedial purpose: to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees. *See Brooklyn Sav. Bank*, 324 U.S. at 706-07. As the cases described above illustrate, the need for such employee protections, even where the employees are represented by counsel, remains.

CONCLUSION

For the reasons given above, we affirm and remand for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

No. 121
Geoffrey Desrosiers, &c.,
Respondents,
v.
Perry Ellis Menswear, LLC,
et al.,
Appellants.

No. 122
Christopher Vasquez, &c.,
Respondent,
v.
National Securities Corporation,
Appellant,
Mark Goldwasser,
Defendant.

Case No. 121:
Frank H. Henry, for appellants.
LaDonna M. Lusher, for respondents.

Case No. 122:
Daniel J. Buzzetta, for appellant.
LaDonna M. Lusher, for respondent.

FAHEY, J.:

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." On this appeal,

we must determine whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been certified. We conclude that CPLR 908 applies in the pre-certification context. As a result, notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given.

I.

Plaintiff Geoffrey Desrosiers worked as an unpaid intern for Perry Ellis Menswear, LLC in 2012. In February 2015, he commenced a class action against defendants Perry Ellis Menswear and an affiliated entity (collectively, Perry Ellis), alleging that Perry Ellis improperly classified employees as interns. He sought wages on behalf of himself and similarly-situated individuals.

In March 2015, Perry Ellis sent an offer of compromise to Desrosiers, which he accepted. On May 18, 2015, Perry Ellis moved to dismiss the complaint. By that date, the time within which Desrosiers was required to move for class certification pursuant to CPLR 902 had expired. Desrosiers did not oppose dismissal of the complaint, but he filed a cross motion seeking leave to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. Perry Ellis opposed the cross motion, arguing that notice to putative class members was inappropriate because Desrosiers had not moved for class certification within the required time. Supreme Court dismissed

the complaint but denied the cross motion to provide notice to putative class members.

On appeal, the Appellate Division reversed the order insofar as appealed from by Desrosiers (Desrosiers v Perry Ellis Menswear, LLC, 139 AD3d 473 [1st Dept 2016]). The court concluded that CPLR 908 "is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired," and that notice to putative class members is "particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action" (id. at 474).

Plaintiff Christopher Vasquez was employed by defendant National Securities Corporation (NSC) as a financial products salesperson in 2007 and 2008. In June 2014, he filed a class action against NSC on behalf of himself and all similarly-situated individuals who worked for NSC after June 2008. Vasquez alleged that the compensation paid by NSC fell below the required minimum wage, and he sought wage and overtime compensation for himself and similarly-situated individuals.

The parties agreed to postpone a motion for class certification in order to complete pre-certification discovery. In February 2015, before Vasquez had moved for class certification, NSC made a settlement offer, which Vasquez accepted the following month. NSC thereafter moved to dismiss

the complaint. Vasquez cross-moved to provide notice of the proposed dismissal to putative class members pursuant to CPLR 908. NSC opposed the cross motion, asserting that CPLR 908 applies only to certified class actions.

Supreme Court granted the cross motion to provide notice to putative class members and granted NSC's motion to dismiss the complaint, but directed that the action would not be marked disposed until after notice had been issued (Vasquez v National Sec. Corp., 48 Misc 3d 597, 601 [Sup Ct, NY County 2015]). On appeal, the Appellate Division affirmed (Vasquez v National Sec. Corp., 139 AD3d 503 [1st Dept 2016]). Adhering to its 1982 decision in Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]), the First Department reasoned that "[t]he legislature, presumably aware of the law as stated in Avena, has not amended CPLR 908" (Vasquez, 139 AD3d at 503).

In each case, the Appellate Division granted the defendant leave to appeal to this Court, certifying the question whether its order was properly made. We now affirm in both cases.

II.

"In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities, 19 NY3d 106, 120 [2012]). "The statutory text is the clearest indicator of legislative

intent and courts should construe unambiguous language to give effect to its plain meaning" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006]; see Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]).

The text of CPLR 908 is ambiguous with respect to this issue. Defendants argue that the statute's reference to a "class action" means a "certified class action," but the legislature did not use those words, or a phrase such as "maintained as a class action," which appears in CPLR 905 and 909. Plaintiffs assert that an action is a "class action" within the meaning of the statute from the moment the complaint containing class allegations is filed, but the statutory text does not make that clear.

Similarly, the statute's instruction that notice of a proposed dismissal, discontinuance, or compromise must be provided to "all members of the class" is inconclusive. Defendants contend that there are no "members of the class" until class certification is granted pursuant to CPLR 902 and the class is defined pursuant to CPLR 903. Yet the legislature did not state that notice should be provided to "all members of the certified class," or "all members of the class who would be bound" by the proposed termination, or some other phrase that would have made the legislature's intent clear. In the context of these ambiguities, we turn to other principles of statutory interpretation and sources beyond the statutory text itself to

discern the intent of the legislature (see Albany Law School, 19 NY3d at 120; Matter of Shannon, 25 NY3d 345, 351 [2015]).

CPLR article 9 was enacted in 1975, replacing former CPLR 1005. The Governor's Approval Memorandum stated that the legislation would "enable individuals injured by the same pattern of conduct by another to pool their resources and collectively seek relief" where their individual damages "may not be sufficient to justify the costs of litigation" (Governor's Approval Mem, Bill Jacket, L 1975, ch 207, 1975 NY Legis Ann at 426, 1975 McKinney's Session Laws of NY at 1748). With respect to CPLR 908, which the legislature has not amended since it was originally enacted in 1975, the State Consumer Protection Board observed that the purpose of that statute "is to safeguard the class against a 'quickie' settlement that primarily benefits the named plaintiff or his or her attorney, without substantially aiding the class" (Mem from State Consumer Protection Board, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207).

The New York State Bar Association's Banking Law, Business Law, and CPLR Committees, which opposed the bill, recommended that CPLR 908 be amended such that its notice provisions would apply only to certified class actions (see Letter from NY State Bar Association Banking Law, Business Law, and CPLR Committees, at 5, Bill Jacket, L 1975, ch 207). Those committees "agree[d] that any settlement or withdrawal of an action commenced as a class action should be subject to court

approval," but expressed the view that "if the dismissal, discontinuance or compromise is effected prior to the determination that a class action is proper, the court should be permitted to dispense with notice to class members" (id.).

In addition, CPLR article 9 was "modeled on similar federal law," specifically, Federal Rules of Civil Procedure rule 23 (Governor's Approval Mem, L 1975, ch 207; see Siegel, NY Prac § 139 at 247 [5th ed 2011]). At the time, rule 23 (e) was virtually indistinguishable from the current text of CPLR 908; it provided that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" (former Fed Rules Civ Pro rule 23 [e]).

The majority of federal circuit courts of appeal to address the issue concluded that the prior version of rule 23 (e) also applied in the pre-certification context, but that notice to putative class members before certification was discretionary, after consideration of factors such as potential collusion and the publicity the class action had received (see e.g. Doe v Lexington-Fayette Urban County Govt., 407 F3d 755, 761-763 [6th Cir 2005], cert denied 546 US 1094 [2006]; Crawford v F. Hoffman-La Roche Ltd., 267 F3d 760, 764-765 [8th Cir 2001]; Diaz v Trust Territory of Pac. Is., 876 F2d 1401, 1408-1409 [9th Cir 1989]; Glidden v Chromalloy Am. Corp., 808 F2d 621, 626-628 [7th Cir

1986]).[1] Conversely, the United States Court of Appeals for the Fourth Circuit concluded that the prior version of the rule mandated notice to class members only in certified class actions (see Shelton v Pargo, Inc., 582 F2d 1298, 1314-1316 [4th Cir 1978]).[2] Thus, faced with virtually identical language in the former version of Federal Rule of Civil Procedure rule 23 (e), most federal circuit courts of appeal to consider the issue concluded that rule 23 (e) applied even before a class had been certified.[3]

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[1] Although these federal courts held that notice to putative class members before certification was discretionary under the former version of rule 23 (e), the parties do not ask us to read discretion into CPLR 908, nor could we based on the text of that statute. CPLR 908 states that notice "shall" be provided, but that the *manner* of notice will be "as the court directs." The only question on this appeal is whether mandatory notice is required only after certification or also before certification. For similar reasons, we reject plaintiffs' contention that the Appellate Division ordered notice in an exercise of its discretion, and therefore that its orders are reviewable by this Court only for an abuse of discretion as a matter of law. These appeals present an issue of law.

[2] The Fourth Circuit shared the concern that pre-certification settlements between the named plaintiff and the defendant might involve collusion. The circuit court instructed district courts to examine proposed settlements for collusion or prejudice to absent putative class members and, if such collusion or prejudice existed, to hold a certification hearing and give notice to members of the class in the event that certification was granted (see Shelton, 582 F2d at 1315-1316).

[3] Other circuit courts of appeal did not directly address this issue before the 2003 amendment to rule 23 (e) (see e.g. Rice v Ford Motor Co., 88 F3d 914, 919 n 8 [11th Cir 1996] ["In this Circuit, the applicability of Rule 23(e) to proposed classes prior to their certification is an open question"]). Many federal district courts also considered this issue (see generally

In New York, the only appellate-level decision to address this issue as it pertains to CPLR 908 (other than the two decisions on appeal here) is Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]). In that case, the named plaintiffs settled with the defendant before class certification, and the settlement was without prejudice to putative class members (see id. at 151). The trial court refused to approve the settlement without first providing notice to the putative class members (see id.). The Appellate Division affirmed that determination, concluding that CPLR 908 applied to settlements reached before certification. The First Department reasoned that the "potential for abuse by private settlement at this stage is . . . obvious and recognized" (id. at 152), and that the named plaintiffs had a fiduciary obligation to disclose relevant facts to putative class members (see id. at 153, 156).

This Court has never overruled Avena or addressed this particular issue, and no other department of the Appellate Division has expressed a contrary view. Consequently, for 35 years Avena has been New York's sole appellate judicial interpretation of whether notice to putative class members before certification is required by CPLR 908.

Generally, "we have often been reluctant to ascribe

Annotation, Notice of Proposed Dismissal or Compromise of Class Action to Absent Putative Class Members in Uncertified Class Action Under Rule 23 (e) of Federal Rules of Civil Procedure, 68 ALR Fed 290).

persuasive significance to legislative inaction" (Boreali v Axelrod, 71 NY2d 1, 13 [1987]; see Clark v Cuomo, 66 NY2d 185, 190-191 [1985]). We have distinguished, however, "instances in which the legislative inactivity has continued in the face of a prevailing statutory construction" (Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 NY2d 84, 90 [1976]). Thus, "[w]hen the Legislature, with presumed knowledge of the judicial construction of a statute, forgoes specific invitations and requests to amend its provisions to effect a different result, we have construed that to be some manifestation of legislative approbation of the judicial interpretation, albeit of the lower courts" (Matter of Alonzo M. v New York City Dept. of Probation, 72 NY2d 662, 667 [1988]). Stated another way, "it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained" (Matter of Knight-Ridder Broadcasting v Greenberg, 70 NY2d 151, 157 [1987]). "The underlying concern, of course, is that public policy determined by the Legislature is not to be altered by a court by reason of its notion of what the public policy ought to be" (id. at 158).

Granted, the persuasive significance of legislative inaction in this context carries more weight where the legislature has amended the statute after the judicial

interpretation but its amendments "do not alter the judicial interpretation" (id. at 157), or when the judicial interpretation stems from a decision of this Court or "unanimous judgment of the intermediate appellate courts" (Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 334 [1988]). Nevertheless, the fact that the legislature has not amended CPLR 908 in the decades since Avena has been decided is particularly persuasive evidence that the court correctly interpreted the legislature's intent as it existed when CPLR 908 was enacted in light of developments occurring in the years after Avena was decided.

Specifically, in 2003, Federal Rules of Civil Procedure rule 23 (e) was amended to clarify that the district court must approve any settlement, voluntary dismissal, or compromise involving a "certified class," and that the court must provide notice of such to "all class members who would be bound" by the proposal (Fed Rules Civ Pro rule 23 [e]). Thus, under the current federal rule, mandatory approval and notice of a proposed settlement is now required only for certified classes.

That same year, the New York City Bar Association's Council on Judicial Administration recommended several changes to CPLR article 9, including amendments to CPLR 908. The Council opined that, unlike the updated federal rule, CPLR 908 should continue to require judicial approval of settlement at the pre-certification stage, but that notice to putative class members before certification should be discretionary, not mandatory, and

should be provided when necessary to protect members of the putative class (see New York City Bar Association, Council on Judicial Administration, State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules, 58 Rec of Assn of Bar of City of NY at 316 [2003], available at http://www.nycbar.org/pdf/report/Art9.draft.082703.MWord.pdf [last accessed Dec. 7, 2017]). Various committees of the City Bar made the same recommendation in 2015 (see New York City Bar Association, State Courts of Superior Jurisdiction Committee, Council on Judicial Administration, and Litigation Committee, Proposed Amendments to Article 9 of the Civil Practice Law and Rules to Reform and Modernize the Administration of Class Actions in NYS Courts, Nov. 5, 2015, available at http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf [last accessed Dec. 7, 2017]). Notwithstanding these repeated proposals, and the legislature's awareness of this issue (see 2016 NY Assembly Bill A9573; cf. Roberts v Tishman Speyer Props., L.P., 13 NY3d 270, 287 [2009]), the legislature has left CPLR 908 untouched from its original version as enacted in 1975.

Thus, despite criticisms of the Avena decision (see e.g. Joseph M. McLaughlin, 1982 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 908 [1976 ed], 2005 Cumulative Pocket Part at 248-249), the 2003 amendment of the federal rule upon which CPLR 908 was modeled to address this

situation, and specific and repeated calls to the legislature to amend the statute, the legislature has not amended CPLR 908, either to state that Avena was not a correct interpretation of its original intent or to express its revised, present intent. Under these circumstances, and in light of the legislative history discussed above, we conclude that the legislature's refusal to amend CPLR 908 in the decades since Avena was decided indicates that the Avena decision correctly ascertained the legislature's intent (see Alonzo M., 72 NY2d at 667; Knight-Ridder, 70 NY2d at 157).

Any practical difficulties and policy concerns that may arise from Avena's interpretation of CPLR 908 are best addressed by the legislature (see Knight-Ridder, 70 NY2d at 158), especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced (see Avena, 85 AD2d at 152-155; see also Diaz, 876 F2d at 1409; Glidden, 808 F2d at 627; Vincent C. Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR 908, at 224-225). The balancing of these concerns is for the legislature, not this Court, to resolve.

Accordingly, in both Desrosiers and Vasquez, the orders of the Appellate Division should be affirmed, with costs, and the certified questions answered in the affirmative.

Desrosiers, &c. v Perry Ellis Menswear, LLC, et al.;
Vasquez, &c. National Securities Corporation, et al.

Nos. 121 & 122

STEIN, J.(dissenting):

The majority finds ambiguity in CPLR 908 where none exists and, in my view, places undue weight on the First Department's holding in Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]). Even a cursory reading of the analysis in Avena reveals that it is not grounded in the unambiguous statutory text. We are not bound by the result in that case or by subsequent legislative inaction, and the passage of time does not alter that conclusion. Instead, it is within the province of this Court of last resort to interpret the statute as a matter of law, guided by our principles of statutory interpretation.

In that regard, the requirement in CPLR 908 that notice be provided "to all members of the class" is expressly limited to a "class action." In each of the actions here, plaintiffs did not comply with the requirements under article 9 of the CPLR that are necessary to transform the purported class action into an actual class action, with members of a class bound by the disposition of the litigation. Thus, there is no class action here, and no basis under the statutory scheme to mandate CPLR 908 notice to putative members of an undefined class that an individual claim -- of which they had received no prior notice

and in which they had taken no part -- is being settled, but the settlement is not binding on them. For these reasons, I respectfully dissent.

-I-

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should . . . give effect to the plain meaning of the words used" (Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 208 [1976]). Therefore, "the starting point in any case of interpretation must always be the language itself" (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]), considering the various statutory sections together with reference to each other (see Matter of New York County Lawyers' Assn. v Bloomberg, 19 NY3d 712, 721 [2012]). We are also guided by the principle that "resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (Majewski, 91 NY2d at 583 [internal quotation marks and citation omitted]).

Article 9 of the CPLR begins with CPLR 901, which specifies the prerequisites that must be satisfied for one or more members of a designated class to sue or be sued as

representative parties on behalf of the other members of that class. CPLR 902 requires the plaintiff "in an action brought as a class action" to "move for an order to determine whether it is to be so maintained" within 60 days after expiration of the time in which a defendant must serve responsive pleadings. Thereafter, "[t]he action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" (CPLR 902). In determining whether the action "may proceed as a class action," the court must consider certain factors, including the interests of the members of the purported class, the impracticability or inefficiency of proceeding separately, any pending litigation, the desirability of concentrating the litigation, and class action management difficulties that may arise (see CPLR 902 [1]-[5]). If the court allows the action to proceed as a class action, the order "permitting [the] class action" must describe the class (CPLR 903; see also CPLR 907).

Once the prerequisites of sections 901 and 902 have been met, reasonable notice of the commencement of the class action must be given to the certified class "in such manner as the court directs," except in the case of class actions brought primarily for equitable relief, in which case, the court has discretion to determine whether notice is necessary and appropriate (CPL 904 [a], [b]; see also Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR

904). Any judgment in a class action must describe the class, and such a judgment is binding only upon "those whom the court finds to be members of the class" (CPLR 905; see also CPLR 909).

CPLR 908 -- the provision at issue here -- prescribes that a "class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The question before us is whether this provision requires notice to putative class members if the action is settled or dismissed prior to class certification. In my view, it does not.

CPLR 908 must be considered in the context of the statutory scheme set forth in the entirety of article 9. Inasmuch as "[an] action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied" upon a motion brought within the specified time period pursuant to CPLR 902 (emphasis added), it follows that a purported class action is not actually "a class action" until so adjudicated by the court; concomitantly, prior to class certification, there are no "members of the class" to whom notice could be provided. Thus, there is no statutory basis for applying the CPLR 908 notice requirement when, as here, the litigation is resolved during the pre-certification phase without prejudice to the rights of putative class members.

There is nothing talismanic about styling a complaint

as a class action. Indeed, any plaintiff may merely allege that a claim is being brought "on behalf of all others similarly situated." However, under article 9 of the CPLR, the court, not a would-be class representative, has the power to determine whether an action "brought as a class action" may be maintained as such, and may do so only upon a showing that the prerequisites set forth in CPLR 901 have been satisfied (CPLR 902).[1] Logically, the converse of that proposition must also be true -- i.e., if the court has not made an affirmative finding that the CPLR 901 prerequisites have been met, the action may not be maintained as a class action. Here, the fact that plaintiffs did not comply with CPLR 902 and did not obtain orders adjudicating

[1] Contrary to the majority's reasoning, CPLR 908 is not ambiguous because it uses the phrase "class action" instead of "maintained as a class action." These phrases are used interchangeably throughout CPLR article 9 to refer to an action that has been adjudicated a class action by the court pursuant to the mechanism set forth in CPLR 902. The phrase "class action" is repeatedly used throughout article 9 in instances, like CPLR 908, where it is readily apparent that the intent of the legislature is to refer to an actual "class action," not merely a purported class action (see CPLR 903 ["(t)he order permitting a class action shall describe the class"], 904 [certification notice requirement referring to "class actions"], 907 [permitting certain court orders in the "conduct of class actions"]). The majority also posits that CPLR 908 is ambiguous because the phrases "class action" and "all members of the class" do not also include the word "certified." This reasoning is unsound. Insofar as "[t]he language is certain and definite, intelligible and has an unequivocal meaning" (People ex rel. New York Cent. & Hudson Riv. R.R. Co. v Woodbury, 208 NY 421, 424 [1913]), within the context of the statutory scheme (see Bloomberg, 19 NY3d at 721), there is no occasion to engage in "conjecture about or to add to or to subtract from [the] words" used by the legislature (McKinney's Statutes, § 76, cmt).

their actions as class actions is fatal to their argument that notice of their settlements to purported class members is required.

This Court's holding in O'Hara v Del Bello (47 NY2d 363 [1979]) is instructive. In that case, the petitioner commenced a proceeding on behalf of himself and others similarly situated who were denied payment of authorized and approved travel vouchers by their employer. Supreme Court granted the petitioner summary judgment, directing the respondents to pay all properly submitted travel vouchers, including those to be submitted in the future. This Court ultimately affirmed the award of summary judgment to the petitioner, but modified the judgment to limit relief to only the named petitioner. We held that, "[i]nasmuch as there was a failure to comply with the procedural and substantive provisions of CPLR article 9 with respect to class action[s] . . . there [was] no basis for granting relief other than to the individual party who brought the proceeding" (O'Hara, 47 NY2d at 368). The Court reasoned that "[t]he explicit design of article 9 . . . is that a determination [pursuant to CPLR 902] as to the appropriateness of class action relief shall be promptly made at the outset of the litigation" (id.). The Court emphasized that:

> "To countenance making the determination as to the identity of the beneficiaries on whose behalf the litigation had been prosecuted or defended after its outcome is known would be to open the possibility both of conferring a gratuitous benefit on persons who have not been parties and were not at any time exposed to the risk of an adverse adjudication and further of substantially enlarging the liability of the loser

> beyond anything contemplated during the contest and resolution of the issues on their merits"

(id. at 369).

The majority now construes CPLR 908, contrary to its plain language, to permit the results this Court cautioned against in O'Hara. Plaintiffs in both actions failed to make timely CPLR 902 motions for an order to certify the class. Instead, they accepted settlement offers, allowed the deadline for certification to pass, and declined to oppose defendants' motions to dismiss, but nonetheless subsequently asked the court to direct notice to putative class members under CPLR 908. As in O'Hara, by virtue of plaintiffs' failure to comply with CPLR article 9 -- and particularly CPLR 902 -- there is no basis to impose the notice requirements of CPLR 908, which only apply to class actions, not purported class actions.

Directing such notice under these circumstances would lack practical significance. Indeed, the notice would essentially inform putative class members that an individual claim -- of which they received no prior notice -- was being resolved by an agreement that was not binding on them. Moreover, as defendants point out, because no class had been certified under CPLR 902, it is unclear to whom notice was purportedly required. Not only would this uncertainty create administrative difficulties that would entail the expenditure of time and

resources by both the court and the parties,[2] the ultimate purpose of the notice appears, at most, to be to allow plaintiffs' counsel to identify more clients at the expense of the court and defendants.[3]

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[2] Although plaintiffs minimize the significance of this burden, mandating notice of pre-certification dismissals requires that the court and the parties attempt to define both the group of individuals to whom notice should be provided in the absence of a defined class, as well as the content of that notice, all concerning the resolution of individual claims that do not bind the notice recipients in any way. While, in some cases, it may be easy to identify the putative class members, in others, it may be difficult and time-consuming, as well as expensive, to identify and provide notice to them.

[3] Any claimed virtue of plaintiffs' position that notice is required to protect putative class members is a distraction. If plaintiffs desired to obtain relief on behalf of the putative class members, they could have followed the proper procedure to certify the class. Instead, they settled their individual claims. Moreover, while it could reasonably be argued that mandating notice here amounts to no more than solicitation on behalf of plaintiffs' counsel, it is worth noting that directing notice prior to certification could, under some circumstances, actually inure to the detriment of a plaintiff's attorney. For example, a plaintiff's attorney could quickly conclude that a putative class action has little merit, and would not wish to bear the cost of notifying putative class members in a class that could not, for instance, be certified due to lack of typicality or predominance. Therefore, knowing that the majority's rule may impose the costs of notice even if no class is ever certified (see CPLR 904 [d] [presumptively placing the costs of notice on the plaintiff]), members of the plaintiffs' bar may be less likely to commence some class actions in the first place. Relatedly, the majority's rule may also discourage settlement. If a plaintiff's attorney determines that there are deficiencies with either the named plaintiff's claim or the class claim, or both, the attorney would have an incentive to litigate and lose the class certification motion rather than to stipulate to a dismissal, because the stipulation of dismissal would require notice, whereas (presumably, although the majority is unclear about this), no notice would be required in the event that the

-II-

In concluding that CPLR 908 should be applied to actions that were never adjudicated to be class actions, the majority places great weight on the fact that lower courts have been bound to follow Avena (85 AD2d 149 [1st Dept 1982]) because this Court has not yet overruled that case, and no other Appellate Division Department has had the occasion to express a contrary view. However, the interpretation of the plain language of CPLR 908 is now squarely before us, and inaction on the part of other appellate courts -- or the legislature -- in the wake of Avena is no hindrance to our adherence to the statutory text.

In my view, the First Department's decision in Avena was flawed and continued reliance on it is misguided. It is evident, simply from the manner in which the First Department framed its inquiry, that the court departed from the statutory text, contrary to longstanding fundamental rules of construction (see Majewski, 91 NY2d at 583). Instead of starting with the text of CPLR 908 itself -- which by its plain terms applies only to "class actions" -- the Avena court began its analysis by inquiring whether an action that merely "purports to be a class action" should nevertheless "be deemed 'a class action'" to which CPLR 908 would apply (Avena, 85 AD2d at 152 [emphasis added]). Further, noting that the defendant in Avena did not dispute the applicability of CPLR 908, the First Department broadly stated,

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court denied class certification.

without citation, that "[t]he fiduciary obligations of the named plaintiffs in instituting . . . [a class] action are generally recognized and not disputed" (85 AD2d at 152 [emphasis added]). It was solely on this basis that the First Department concluded "that CPLR 908 should apply to even a without prejudice (to the class) settlement and discontinuance of a purported class action before certification or denial of certification" (id.).

However, it is questionable whether a would-be class representative has fiduciary responsibilities in the pre-certification stage in light of the absence of the would-be representative's authority to bind putative class members (see CPLR 905; cf. Standard Fire Ins. Co. v Knowles, 568 US 588, 593 [2013]). Because there is no res judicata impact upon putative class members (see Rodden v Axelrod, 79 AD2d 29, 32 [3d Dept 1981]), their ability to bring their own claims is unimpaired and they are, therefore, not impacted by the resolution of the named plaintiff's individual claim.[4] Under these circumstances, it is difficult to understand why the Avena court would invoke fiduciary considerations in the pre-certification context and hold that CPLR 908 should apply to even a settlement that is without prejudice to the putative class. While the majority

[4] To the extent the Avena court expressed concern about the prospect of disingenuous plaintiffs using a frivolous class action claim as leverage in settlement negotiations, it bears noting that there are other mechanisms in place to prevent such abuse, including, of course, early certification (as required under article 9 of the CPLR) and sanctions.

glosses over whether it actually agrees with Avena, it adopts the rule of that case, following the novel theory espoused by the First Department, without question. I would not acquiesce to the reasoning in Avena; instead, I would interpret the statute before us, which inexorably leads me to conclude that CPLR 908 notice is not required prior to certification.

Further, contrary to the majority's reasoning here, the legislature's failure to amend CPLR 908 after Avena was decided does not compel the conclusion that Avena correctly ascertained the legislature's intent (see Matter of New York State Assn. of Life Underwriters v New York State Banking Dept., 83 NY2d 353, 363 [1994]; see also People v Ocasio, 28 NY3d 178, 183 [2016] [legislative "inaction is susceptible to varying interpretations"]).[5] Despite acknowledging that this case does not present one of the scenarios in which legislative inaction may nonetheless carry some significance (cf. Matter of Knight-

[5] Similarly, the memorandum of the consumer protection board and the bar association letter cited by the majority lack persuasive force (see majority op at 6-7). To the extent the memorandum indicates that the purpose of CPLR 908 is to safeguard against a settlement benefitting only the named plaintiff or plaintiff's counsel to the detriment of the class (see Mem from State Consumer Protection Board, May 29, 1975 at 7, Bill Jacket, L 1975, ch 207), this concern is implicated only when the disposition would bind the class, i.e., after certification. For its part, the bar association advanced its interpretation of CPLR 908 within the context of its advocacy for a discretionary notice regime (see Letter from NY State Bar Association Banking Law, Business Law, and CPLR Committees, at 5, Bill Jacket, L 1975, ch 207) ["the court should be permitted to dispense with notice to class members"]). The legislature clearly rejected that approach.

Ridder Broadcasting v Greenberg, 70 NY2d 151, 157 [1987]; Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 334 [1988]), the majority relies on the length of time that has passed since Avena was decided. Although Avena may enjoy a distinguished patina owing to the passage of time, the decision has not withstood any meaningful consideration by other appellate courts. To the contrary, the case has been followed by only a handful of lower courts (see e.g. Astill v Kumquat Properties, LLC, 2013 NY Slip Op 32964[U] [Sup Ct, NY County 2013]; Diakonikolas v New Horizons Worldwide, Inc., 2011 NY Slip Op 33098[U] [Sup Ct, NY County 2011]), which were bound to do so. Moreover, as Supreme Court observed here, the "wisdom" of the rule announced in Avena "has been questioned by many, including the CPLR commentary." Thus, the existence of Avena is no bar to this Court adopting a more reasoned approach based on the express language of CPLR 908.

Finally, to the extent the majority relies on certain federal cases construing the pre-2003 version of Rule 23 (e) of the Federal Rules of Civil Procedure, each of those cases held that notice to putative class members prior to certification was discretionary, based on various considerations not included in the rule itself (see Diaz v Trust Territory of Pacific Islands, 876 F2d 1401, 1408, 1411 [9th Cir 1989] [adopting the "majority approach" and holding that "(n)otice to the class of pre-certification dismissal is not . . . required in all circumstances"]). Those cases do not address the dispositive

issue in this case, which is -- as the majority acknowledges -- whether notice is mandatory under CPLR 908. Although there may be policy considerations that support the discretionary rule crafted by various federal courts -- which was ultimately rejected by Congress (Fed Rules Civ Pro rule 23 [e]) -- our role here is to interpret the plain language of CPLR 908.

For the reasons stated herein, I would hold that the plain language of CPLR 908, taken in context, does not require notice to putative class members if the action is resolved prior to class certification.

* * * * * * * * * * * * * * * * *

For Each Case: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Fahey. Chief Judge DiFiore and Judges Rivera and Feinman concur. Judge Stein dissents in an opinion, in which Judges Garcia and Wilson concur.

Decided December 12, 2017

Office of the District Court Executive

Edward A. Friedland
District Court Executive

Colleen McMahon
Chief Judge

FOR IMMEDIATE RELEASE
September 28, 2016

CONTACT
Edward Friedland (212) 805-0500

SOUTHERN DISTRICT OF NEW YORK ADR PROGRAM ANOUNCES PILOT PROGRAMS FOR FLSA AND § 1983 EFFECTIVE OCTOBER 3, 2016

The United States District Court for the Southern District of New York announces two pilot programs effective October 3, 2016. Both programs are designed to promote the just, speedy, and inexpensive resolution of civil cases by providing litigants with automatic and expeditious disclosure of critical documents and requiring them to participate in mediation unless ordered otherwise.

1. Cases filed under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., assigned to District Judges Abrams, Briccetti, Carter, Daniels, Ramos, Seibel, and Woods will, once the defendant appears, be ordered directly to mediation with limited pre-mediation disclosures.
2. Cases against police officers filed in White Plains under 42 U.S.C. § 1983 will automatically participate in a protocol requiring limited pre-mediation disclosures and referral to mediation once the Answer is filed. This pilot replicates the automatic referral program for section 1983 cases in Manhattan under Local Civil Rule 83.10.

More information about both pilot programs, and the Mediation Program Procedures, will be available at http://www.nysd.uscourts.gov/mediation. Questions or comments about either protocol can be directed to the Court's ADR Program at 212-805-0643 or MediationOffice@nysd.uscourts.gov.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FLSA PILOT PROGRAM	:	MEDIATION REFERRAL ORDER FOR CASES THAT INCLUDE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 201 *et seq.*

Briccetti, J.:

As part of a pilot program for cases involving claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, the Clerk of Court is directed to enter this order in all newly filed FLSA cases on my docket. Since cases involving FLSA claims often benefit from early mediation, it is hereby

ORDERED that prior to the case management conference pursuant to a Fed. R. Civ. P. 16(b) the Court is referring this case to mediation under Local Civil Rule 83.9 and that mediation shall be scheduled within sixty days.

IT IS FURTHER ORDERED that to facilitate mediation the parties shall, within four weeks of this Order, confer and provide the following:

1. Both parties shall produce any existing documents that describe Plaintiff's duties and responsibilities.
2. Both parties shall produce any existing records of wages paid to and hours worked by the Plaintiff (e.g., payroll records, time sheets, work schedules, wage statements and wage notices).
3. Plaintiff shall produce a spreadsheet of alleged underpayments and other damages.
4. Defendants shall produce any existing documents describing compensation policies or practices.
5. If Defendants intend to assert an inability to pay then they shall produce proof of financial condition including tax records, business records, or other documents demonstrating their financial status.

IT IS FURTHER ORDERED that in the event the parties reach settlement, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), they shall prepare a joint statement explaining the basis for the proposed settlement, including any provision for attorney fees, and why it should be approved as fair and reasonable. The settlement agreement and joint statement shall be presented to the assigned District Judge, or to the assigned Magistrate Judge should the parties consent to proceed for all purposes before the assigned Magistrate Judge (the appropriate form for which is available at http://nysd.uscourts.gov/file/forms/consent-to-proceed-before-us-magistrate-judge).

IT IS FURTHER ORDERED that, in the event the parties do not reach a settlement, they shall promptly meet and confer pursuant to Fed. R. Civ. P. 26(f) in preparation for their initial

pretrial conference with the Court.

Counsel who have noticed an appearance as of the issuance of this order are directed to notify all other parties' attorneys in this action by serving upon each of them a copy of this order. If unaware of the identity of counsel for any of the parties, counsel receiving this order must send a copy of this order to that party directly.

Dated: August 31, 2016
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge

Wage & Hour Litigation Blog

Money for Nothing! Court Allows Employees to Pursue Lawsuit Despite DOL Settlement

By **Seyfarth Shaw LLP** on July 18, 2017

POSTED IN SETTLEMENT

Co-authored by **Robert S. Whitman** and **Howard M. Wexler**

Seyfarth Synopsis: The majority of courts have held that releases of FLSA rights require approval by a court or the US Department of Labor. A recent case in the Southern District of New York highlights a dilemma employers face when seeking "finality" through DOL-approved settlements.

In ***Wai Hung Chan v. A Taste of Mao, Inc.***, five employees asserted FLSA claims for unpaid minimum wage and overtime. Before the lawsuit was filed, the employer agreed with the DOL to pay back wages of $38,883.80 to 19 of its employees, including four of the five plaintiffs in the lawsuit. During negotiations on that agreement, the DOL confirmed that it had the authority to represent and resolve all of the employees' claims, and it subsequently mailed WH-60 forms notifying them of the settlement and their right to a share of it. Meanwhile, the employer transmitted the settlement funds to the DOL for distribution to the employees.

The five *Chan* Plaintiffs did not sign the WH-60 forms and instead commenced the lawsuit, seeking back pay for a period exceeding that covered by the DOL settlement. The employer sought summary judgment on grounds that the DOL still possessed the settlement funds that it remitted on behalf of the plaintiffs, even though they did not sign the WH-60 forms.

District Judge William H. Pauley, III rejected the employer's argument that the plaintiffs "constructively accepted the funds when the DOL, as their authorized representative, took possession of such funds." He held that the plaintiffs' refusal to sign the WH-60 forms was "tantamount to a rejection" of the settlement offer, invoking a presumption that "employees do not have to take the settlement unless they specifically opt into it." The court held that the employer expressly acknowledged this possibility as part of its settlement with the DOL by agreeing that any unclaimed funds would be disbursed to the U.S. Treasury.

Judge Pauley also rejected the employer's argument that the plaintiffs should be bound to the agreement on grounds that "employers who in good faith strive to settle claims should be afforded the benefit of knowing that they will not face liability in the future." Although he was sympathetic to the employer's predicament, he stated that "it is Congress – not this Court – which must force a solution to that quandary…even if it means compelling an outcome that forces [the employer] to address the same allegations it believed were resolved through the DOL Settlement."

The *Chan* decision highlights yet another potential hurdle to complete and binding settlements of employee wage claims. In the **Second Circuit** and elsewhere, releases of FLSA rights require approval, and agreements submitted for judicial approval are subjected to **close scrutiny** that is difficult to **bypass.** In light of *Chan*, DOL approval doesn't make the process any easier. The circumstances described in *Chan* demonstrate that employers may not be able to obtain true finality in such settlements and may still face the risk of subsequent litigation.

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New York's Highest Court: Pre-Certification Settlements Require Classwide Notice

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Wage & Hour Litigation Blog

New York's Highest Court: Pre-Certification Settlements Require Classwide Notice

By **Robert Whitman** on December 13, 2017

POSTED IN SETTLEMENT

Seyfarth Synopsis: *The New York Court of Appeals holds that the state's class action rules require notice of settlements to be sent to putative class members – even though no class has been certified.*

In a **decision** sure to send shivers up the spines of wage and hour practitioners in New York, the State's highest court has held that notice of a class action settlement must be distributed to all members of the putative class, even when the settlement comes before a class has

been certified. Together with ***Cheeks v. Freeport Pancake House***, a Second Circuit ruling that pertains to FLSA settlements, the decision erects some very high hurdles for parties seeking early settlements in wage and hour cases in New York.

The case involved appeals in two separate wage and hour cases: *Desrosiers v. Perry Ellis Menswear*, brought by an unpaid intern seeking wages, and *Vasquez v. National Securities Corporation*, in which a financial products salesperson alleged that his pay fell below minimum wage. Both cases were brought in state court as putative class actions under the New York Labor Law. Both were settled early – before class certification – but the plaintiffs filed motions seeking leave to send notice of the settlement to members of the putative classes.

In a 4-3 decision, the Court of Appeals (New York's highest court) held that notice is required, even though the classes had not been certified in either case.

At issue was the language of CPLR 908, which states that a class action "shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The defendants argued that the statute's reference to a "class action" means a *certified* class action, while the plaintiffs contended "that an action is a 'class action' within the meaning of the statute from the moment the complaint containing class allegations is filed."

Finding ambiguity in the statutory text, the majority looked to the legislative history and other interpretive guidance. It placed particular weight on the State legislature's failure to amend CPLR 908 in the decades since a 1982 decision from an intermediate appellate court holding that it does apply to pre-certification settlements. The court held that this failure, in the face of the "sole appellate judicial interpretation of whether notice to putative class members before certification is required," amounts to legislative acceptance of that decision's construction of the rule.

The majority also drew a distinction between CPLR 908 and Federal Rule of Civil Procedure 23(e), on which it was modeled. Rule 23 was amended in 2003 to provide that a district court is required to approve settlements only in cases where there is a "certified class" and that notice must be given only to class members "who would be bound" by the settlement. In

contrast, CPLR 908 has not be so amended, despite proposals by the New York City Bar Association and scholarly criticisms of the rule.

Thus persuaded that the text of the rule requires notice before certification, the court declined to consider the practical implications of its decision on the desirability of early settlements in class actions:

> Any practical difficulties and policy concerns that may arise from [the court's] interpretation of CPLR 908 are best addressed by the legislature, especially considering that there are also policy reasons in favor of applying CPLR 908 in the pre-certification context, such as ensuring that the settlement between the named plaintiff and the defendant is free from collusion and that absent putative class members will not be prejudiced. The balancing of these concerns is for the legislature, not this Court, to resolve.

In dissent, three judges took the majority to task for what they described as an unwarranted reading of the rule in light of the overall context of the class action provisions in CPLR Article 9. In their view, the fact that the plaintiffs had never moved for, let alone received, a ruling granting class certification meant that the case was not a class action at all. "In each of the actions here," they said, "plaintiffs did not comply with the requirements under article 9 of the CPLR that are necessary to transform the *purported* class action into an *actual* class action, with members of a class bound by the disposition of the litigation."

Responding in particular to the plaintiffs contention that a case becomes a "class action" from the moment it is filed putatively as such, the dissent said:

> There is nothing talismanic about styling a complaint as a class action. Indeed, any plaintiff may merely allege that a claim is being brought "on behalf of all others similarly situated." However, under article 9 of the CPLR, the court, not a would-be class representative, has the power to determine whether an action "brought as a class action" may be maintained as such, and may do so only upon a showing that the prerequisites set forth in CPLR 901 have been satisfied.

As we have observed repeatedly in this **blog**, the Second Circuit's holding in *Cheeks*, which requires court approval of FLSA settlements and tends to preclude various customary settlement provisions like confidentiality clauses, poses obstacles that may lessen the

desirability of settlements in wage and hour cases. And in ***Yu v. Hasaki Restaurant***, the Second Circuit is now being asked to decide whether court approval is required even for a settlement achieved through an Offer of Judgment under FRCP 68. Now, with *Desrosiers* on the books, the challenges for early settlements have been extended to wage hour settlements brought in state court under New York law. (The case will presumably not apply to New York Labor Law claims brought in *federal* court, where Rule 23 rather than CPLR Article 9 would apply.)

The lesson for New York practitioners is as simple as it is daunting: if you want to settle a wage and hour case early, be prepared to jump through some significant procedural hoops.

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Wage & Hour Litigation Blog

SDNY Pancakes Parties' Attempt to Bypass Cheeks: Requires Approval of Rule 68 Settlement

By **Seyfarth Shaw LLP** on May 1, 2017

POSTED IN SETTLEMENT

Co-authored by **Brett C. Bartlett** and **Samuel Sverdlov**

Seyfarth Synopsis: The Southern District of New York recently held that parties may not settle FLSA claims without court approval through an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure.

Background: Rule 68

Under Rule 68, a party defending a claim can make an "offer of judgment" to the other party. If the other party accepts the offer, the clerk must enter judgment pursuant to the offer's terms. However, if the offered party rejects the offer and obtains a less favorable judgment at trial, that party must then pay the costs incurred by the offering party after the offer was made.

Courts have explained that the purpose of Rule 68 is to prompt parties to evaluate the risks and costs of litigation and to balance those risks against the likelihood of success.

Cheeks Decision

As we have previously **discussed**, in *Cheeks v. Freeport Pancake House, Inc.*, a landmark decision of the Second Circuit, the court held that absent approval by either the district court or the DOL, parties "cannot" settle FLSA claims with prejudice. The *Cheeks* decision has made it increasingly **difficult** for parties to reach a settlement of FLSA claims in the Second Circuit, and accordingly, litigants have increasingly tried to avoid the requirement for judicial or DOL approval by entering into settlements pursuant to Rule 68.

Recent SDNY Decision

In the recent case of *Mei Xing Yu v. Hasaki Restaurant, Inc., et al.*, the parties attempted to do just this — bypass judicial scrutiny of an FLSA settlement by settling their claims pursuant to a Rule 68 offer of judgment. The parties in *Hasaki* argued that the language of Rule 68 provides that the clerk "must" enter judgment of an accepted offer of judgment. The SDNY, however, **held** "that parties may not circumvent judicial scrutiny of an FLSA settlement via Rule 68." Judge Furman reasoned that FLSA settlements are ripe for abuse by defendant employers, and that there are a number of scenarios where a settlement must pass judicial scrutiny, even where there is a Rule 68 offer of judgment. For instance, among other examples, judicial scrutiny is required in *qui tam* actions under the False Claims Act, settlements on behalf of a minor, and in cases where injunctive relief is sought.

The majority of district courts in the Second Circuit disagree with Judge Furman, and have held that Rule 68 offers of judgment in FLSA cases do not need to undergo judicial scrutiny. Given the split in authority on this issue within the Second Circuit, Judge Furman certified the decision for interlocutory appeal, noting an immediate appeal would "materially advance the ultimate termination of the litigation." Further, the court held that "resolution [of this issue] by the Second Circuit is plainly desirable, if not necessary."

Outlook for Employers

Until there is resolution of this issue, employers in the Second Circuit should carefully consider whether a Rule 68 offer of judgment in an FLSA case is worth the risk that the district court would nonetheless require scrutiny of the settlement. Given that *Hasaki* has been

certified for appeal to the Second Circuit, we hope to have clarity on whether settlement of an FLSA case pursuant to Rule 68 requires judicial approval.

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SEYFARTH SHAW

17-1067-cv
Yu v. Hasaki Restaurant, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2017

Submitted: September 19, 2017 Decided: October 23, 2017

Docket No. 17-1067

- -

MEI XING YU, individually, on behalf of all other employees similarly situated,

Plaintiff,

v.

HASAKI RESTAURANT, INC., SHUJI YAGI, KUNITSUGU NAKATA, HASHIMOTO GEN,

Defendants-Petitioners,

JOHN DOE AND JANE DOE #1-10,

Defendants.[1]

- -

Before: NEWMAN, WALKER, and POOLER, Circuit Judges.

Petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and for leave to file a late petition.

Petition and late filing granted.

[1] The Clerk is requested to change the official caption as above.

Louis Pechman, Laura Rodríguez, Lillian M. Marquez, Pechman Law Group PLLC, New York, NY, for Defendants-Petitioners.

JON O. NEWMAN, Circuit Judge:

The pending petition for permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) presents a narrow issue concerning the procedure for perfecting such an appeal. The issue is whether, under the circumstances of this case, the petitioners' notice of appeal, which was filed within ten days of the District Court's order sought to be reviewed, is the functional equivalent of a section 1292(b) petition to invoke our jurisdiction over a later filed petition.

Background

The section 1292(b) petition arises out of a suit filed in the District Court for the Southern District of New York by Mei Zing Yu, a sushi chef, against Yu's employer, Hasaki Restaurants, Inc., and three restaurant owners or managers (collectively "Hasaki") for alleged violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. and

New York Labor Law.[2] The complaint was filed "on behalf [of] all other employees similarly situated."

Yu and Hasaki negotiated a settlement. Counsel for Yu then informed the District Court by letter that Yu had accepted the defendants' offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure.

The District Court (Jesse M. Furman, District Judge) ordered the parties to submit the settlement agreement to the Court for the Court's approval and also to submit letters detailing why the settlement was fair and reasonable. In response, counsel for Hasaki sent the Court a letter for all parties, arguing that the District Court lacked authority to review the offer of judgment because entry of a Rule 68 judgment is mandatory. The Judge Furman considered an amicus curiae brief filed by the U.S. Department of Labor in a similar case pending before another District Judge. That brief argued that District Court approval of the settlement was required.

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[2] The complaint also sought relief against "Defendant [*sic*] John Doe and Jane Doe #1-10" alleged to own the stock of Hasaki Restaurant, Inc. and to make decisions about employees' salaries and hours.

On April 10, 2017, the District Court entered an Opinion and Order setting forth its view that judicial review of an FLSA settlement was required before entry of a Rule 68 judgment. *Yu v. Hasaki Restaurant, Inc.*, 319 F.R.D. 111 (S.D.N.Y. 2017). Judge Furman explained that the considerations animating this Court's decision in *Cheeks v. Freeport Pancake House, Inc.*, 769 F.3d 199 (2d Cir. 2015), requiring court approval of FLSA claims sought to be settled by stipulated dismissal, *see* Fed. R. Civ. P. 41(a)(1)(A)(ii), applied to Rule 68 settlements. *See Yu*, 319 F.R.D. at 117. The District Court's Order directed the parties, in the absence of a notice of appeal filed within ten days, to submit a joint letter explaining the basis for their settlement and why it should be approved. Acknowledging the split of authorities on the Rule 68 issue among district courts within the Second Circuit, Judge Furman certified his order for interlocutory review under 28 U.S.C. § 1292(b). He also stayed the FLSA case in the event a timely notice of appeal was filed.

On April 14, 2017, Hasaki filed in the District Court a notice of appeal from the District Court's April 10 Order.[3] The notice of appeal identified the Order appealed from and its date. On the same date, the notice of appeal, the District Court's Order and Opinion sought to be reviewed, and the docket sheet were electronically transferred to this Court by the CM/ECF system. On April 27, 2017, Hasaki filed in this Court Forms C and D, describing the nature of the action and the issues to be raised. On June 21, 2017, Hasaki filed a petition for leave to appeal pursuant to section 1292(b) with a request that it be accepted as timely filed. Yu has filed no response to the petition.

Discussion

Timeliness. Section 1292(b) of Title 28 authorizes a district judge, when entering an order not otherwise appealable in a civil action, to state "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. §

[3] The notice of appeal uses the District Court's caption, identifying the plaintiff as "Mei Xing Yu, on behalf of himself and all others similarly situated."

1292(b). The relevant court of appeals may, in its discretion, permit an appeal from the order if application is made within ten days after entry of the order. *See id*. Rule 5 of the Federal Rules of Appellate Procedure requires a request for permission to file a discretionary appeal to be filed within the time specified by the statute authorizing the appeal. *See* FRAP 5(a)(2).

We acknowledge at the outset that time requirements for invoking appellate jurisdiction are strictly enforced. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (appellate time limits are jurisdictional). In *Bowles v. Russell*, 551 U.S. 205 (2007), for example, the Supreme Court ruled that a court of appeals lacked jurisdiction where a district court had mistakenly told an appellant that his notice of appeal could be filed within seventeen days, instead of the fourteen days specified in the relevant rule, FRAP 4(a)(6). *See id*. at 209-15.

In the pending matter, Hasaki's petition to appeal the District Court's April 10 Order was filed beyond the ten days specified in section 1292(b). However, a notice of appeal was filed within that ten day period. The issue presented is whether the notice of appeal may be deemed the

functional equivalent of a section 1292(b) petition for purposes of invoking this Court's jurisdiction over Hasaki's petition.

In *Casey v. Long Island R.R. Co.*, 406 F.3d 142, 146 (2d Cir. 2005), we ruled that a brief, filed within ten days of a District Court's order, was the functional equivalent of a section 1292(b) petition. A brief is, of course, a far more informative document that a bare notice of appeal. But *Casey* permits us to determine whether, under the circumstances of this case, we should deem Hasaki's notice of appeal, filed in the District Court, sufficient to invoke our appellate jurisdiction over the petition for an interlocutory appeal. That notice identified the Order for which review was sought. It also triggered the automatic electronic transmission to this Court of the notice of appeal and the District Court's Order and Opinion. That Opinion fully informed us of the considerations relevant to whether the District Court's Order was appropriate for a section 1292(b) appeal.

We thus knew, within ten days of the District Court's Order, everything we needed to know in order to exercise our discretion whether to permit the interlocutory appeal.

We note that the District Court's Order required the parties to explain the justification for their settlement "[a]bsent a notice of appeal being filed within ten days, *see* 28 U.S.C. § 1292(b)." *Yu*, 319 F.R.D. at 117. The citation was helpful, but the reference to a notice of appeal was not.

There is a reason why this Court should be somewhat indulgent in determining whether the notice of appeal should be considered the functional equivalent of a section 1292(b) petition. We are not asked to uphold appellate jurisdiction solely for the benefit of a litigant who has not prevailed after plenary proceedings in a district court. *Compare Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 554 (2d Cir. 2000) (rejecting appellate jurisdiction because of an arguably deficient notice of appeal) *with Billino v. Citibank, N.A.*, 123 F.3d 723, 725-26 (2d Cir. 1997) (upholding appellate jurisdiction despite an arguably deficient notice of appeal). Here, the acceptance of appellate jurisdiction would achieve the objective of a conscientious district court judge who has determined, after a comprehensive analysis, that an interlocutory

appeal will serve the interests of efficient judicial administration.

Under all the circumstances, we deem the timely filed notice of appeal sufficient to invoke our appellate jurisdiction over the section 1292(b) petition.[4] Having accepted jurisdiction over the petition by virtue of the timely notice of appeal and timely receipt of related information, we grant Hasaki's request to file his later filed formal section 1292(b) petition.

Appellate discretion. The District Court's Order clearly merits interlocutory review under section 1292(b), as Judge Furman sensibly recognized. The issue of whether Rule 68 settlements in FLSA cases require District Court review and approval is "a controlling question of law," 28 U.S.C. § 1292(b), and "there is substantial ground for difference of opinion," *id.*, as the differing rulings

[4] Our reliance on a timely filed notice of appeal distinguishes this case from *Bowles*, 551 U.S. at 213, where the Supreme Court rejected appellate jurisdiction in the absence of a notice of appeal filed within the prescribed time period. We acknowledge that the Eighth Circuit declined to deem a notice of appeal the functional equivalent of a section 1292(b) petition under circumstances similar to those in this case. *See Estate of Storm v. Northwest Iowa Hospital Corp.*, 548 F.3d 686 (8th Cir. 2008). We note that the issue tendered for interlocutory review concerned whether to certify a state law question to a state court. *See id*. at 687. By contrast, the pending case concerns the interplay of a federal statute and a federal rule.

within this Circuit demonstrate. *Compare, e.g., Sanchez v. Burgers & Cupcakes LLC,* No. 16-CV-3862 (VEC), 2017 WL 2171870, at *3 (S.D.N.Y. Mar. 16, 2017) (Rule 68 settlement of FLSA case not valid absent court or Department of Labor approval), *with, e.g., Anwar v. Stephens*, No. 15-CV-4493 (JS) (GRB), 2017 WL 455416, at *1 (E.D.N.Y. Feb. 2, 2017) (Rule 68 settlement of FLSA case not subject to court approval). Furthermore, "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Conclusion

Leave to file the petition for section 1292(b) review is granted, and the petition is granted.