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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 GERALD DUCHENE, et al.,

4 Plaintiffs,

5 v.

06 Civ. 4576 (PAC)

6 MICHAEL L. CETTA, INC.

6 d/b/a Sparks Steak House,

7 Defendant.

Fairness Hearing

8 -----x

9 New York, N.Y.
10 September 10, 2009
10 11:00 a.m.

11 Before:

12 HON. PAUL A. CROTTY

District Judge

14 APPEARANCES

16 BERKE-WEISS & PECHMAN LLP
17 Attorneys for Plaintiffs

17 BY: LAURIE BERKE-WEISS
18 LOUIS PECHMAN
18 JESSICA TISCHLER

20 FORD & HARRISON LLP
20 Attorneys for Defendant

21 BY: PHILIP K. DAVIDOFF
21 JEFFREY A. GOLDSTEIN
22 WILLIAM A. CARMELL

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1 (Case called)

2 THE CLERK: For the plaintiffs, please state your
3 appearances for the record.

4 MR. PECHMAN: For plaintiffs, Louis Pechman with the
5 firm of Berke-Weiss & Beckman. With me today is Jessica
6 Tischler, my associate, and Laurie Berke-Weiss, my partner.

7 MR. DAVIDOFF: Philip Davidoff from the firm of Ford &
8 Harrison. With me is my partner William Carmell.

9 THE COURT: Good morning. Mr. Pechman, how would you
10 like to proceed?

11 MR. PECHMAN: Judge, we have filed our papers for
12 final approval and we stand before you seeking a ruling today
13 for final approval of the parties' settlement, attorney's fees,
14 and service payments to Mr. Duchene and Mr. Wakim.

15 THE COURT: Why don't you summarize just for the
16 record very briefly, if you will, why in your opinion this
17 settlement is fair, reasonable, and adequate and ought to be
18 approved by me. And then a little bit about the legal fees.
19 Then if there are any objections, I'll hear the objections.

20 MR. PECHMAN: Your Honor, this case started out
21 because it was the belief of Mr. Duchene, who is in the
22 courtroom -- I just wanted to identify him -- and other waiters
23 at Sparks that individuals were participating in the tip pool
24 at Sparks who did not provide waiter service. Of course, the
25 position of a waiter is traditionally to serve customers. Tips

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1 are left by customers for the waiters, and there is a long
2 series of laws, both state and federal, which provide that tips
3 should be shared by the people who do table service.

4 With respect to the lawsuit, the lawsuit proceeded
5 along the lines of a federal collective action by which the
6 damages were apportioned by tip credit, and also under the New
7 York State Labor Law, which provides a disgorgement remedy.

8 In this case the principal people who were complained
9 about as far as participating in the tip pool were kitchen
10 waiters, those people in the kitchen who had a food service
11 function, who were making salads, who were making dressings,
12 who were doing traditional food service and expediting
13 functions, including two of the objectors, Jeton Karahoda and
14 Mohamed Elbeyali.

15 THE COURT: I notice in your complaint at paragraph 30
16 right from the start --

17 MR. PECHMAN: Correct, from day one.

18 THE COURT: -- from day one you identified certain
19 employees as participating in the tip pool who should not have
20 been in the tip pool.

21 MR. PECHMAN: Absolutely, your Honor.

22 THE COURT: Because they did not have a function of
23 serving people but were more engaged in the production of the
24 food.

25 MR. PECHMAN: Correct. For those food service

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1 persons, including the two objectors Mr. Karahoda and Mr.
2 Elbeyali, it is our position that their principal function was
3 food service. They weren't out on the floor, they weren't
4 serving a runner function, which is a specific function at
5 Sparks, and they weren't serving as a front waiter, taking
6 orders, punching orders into the computer.

7 So according to federal law, according to state law,
8 according to Norman Bromberg, who was our expert witness in
9 this case, there cannot be any serious question that these
10 people should not have been participating in the tip pool.

11 THE COURT: I noticed that in Mr. Bromberg's initial
12 affidavit he assesses the reasonableness of the settlement and
13 he takes a look at the various functions and says which should
14 and should not be subject to compensation. He engages in the
15 same analysis in the supplemental affidavit which was -- he
16 can't be here because of his illness. His affidavit is not
17 dated. Oh, it's the 4th of certainly, very recent, yes.

18 MR. PECHMAN: Your Honor, to fast forward in terms of
19 how we estimated damages in the case, we actually took the tips
20 that were taken from Mr. Karahoda and Mr. Elbeyali, and that's
21 how plaintiffs and defense counsel came up with a number that
22 would form the basis of the disgorgement pool.

23 Likewise, with respect to, and I apologize if I'm
24 going to mess up his name, Fatlum Spahija, who was commonly
25 referred to by everyone as --

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1 THE COURT: Lucky.

2 MR. PECHMAN: Referred to by everyone at Sparks as
3 Lucky. It's undisputed from everyone in the class that Lucky's
4 position was that of pastry chef, he had his own area. He did
5 his job well, but his job was making pastries, dessert designs.

6 THE COURT: In paragraph 30 subpart (c) of your
7 complaint, you specifically refer to the dessert station chef.

8 MR. PECHMAN: Correct. Again, your Honor, fast
9 forwarding it to how we resolved this case, the disgorgement
10 was based on a full disgorgement for Lucky for the years 2004
11 to 2008, where there is no dispute that he was in the dessert
12 room. And, P.S., he was receiving extra money from the house,
13 I believe it was \$250 per week, for performing this dessert
14 function. He was not on the floor, it was a food service role,
15 and according to state and federal law, there can be no serious
16 question that he shouldn't have been in the tip pool.

17 I will say anecdotally, your Honor, that in no way is
18 our complaint to infer any fault on the part of these three
19 individuals. Members of the class are friends with the
20 individuals who are being complained about as being in the tip
21 pool. There is nothing in our complaint, nothing in the way we
22 have litigated this case, which is intended to minimize the
23 role that they played at Sparks, the important role in
24 expediting appetizers, in making cakes.

25 But according to the law, according to state law,

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1 according to federal law, they never should have been in the
2 tip pool. These are positions that the law is clear it should
3 have been paid by the house. Since it wasn't paid by the
4 house, what we have done is for the Rule 23 settlement we have
5 taken the money that these individuals, as well as individuals
6 such as Nick Velik, who was operating as banquet manager, and
7 Eugene Bonateau, who was operating as wine steward, and in
8 addition the kitchen manager, who was a series of individuals
9 over the years, we have taken all that money and we have put
10 that in a pool.

11 I have to say Jessica Tischler along with Mr. Davidoff
12 spent many hours putting together putting together a formula by
13 which we have the disgorgement pool based upon what we believe
14 was unlawfully taken out of the pool, split up by year, by
15 individual, by hours. Everything was mathematical, no
16 favorites. Every hour at Sparks for a given year was assigned
17 a particular monetary value, and that's how the disgorgement
18 pool was split up.

19 For these people who opted into the FSLA action
20 pursuant to this Court's order --

21 THE COURT: How many applicants were there,
22 eventually?

23 MR. PECHMAN: I believe there were about 60. 63.

24 THE COURT: The class is a hundred?

25 MR. PECHMAN: The class is approximately 200. Of

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1 those 63, those people who were within the statute of
2 limitations period and who opted in, we also obtained for them
3 the value of the tip credit. That was taken away.

4 In addition to that, for damages purposes, defendants
5 have agreed to pay the value of liquidated damages as well,
6 which is a 100 percent full remedy under the FSLA.

7 Our belief is that this is a good settlement. There
8 could always be more if we went to trial and if this played out
9 for a couple of years.

10 THE COURT: It could always be less.

11 MR. PECHMAN: It could certainly be less. I think in
12 terms of the actual raw damages, where we relied heavily on Mr.
13 Bromberg and his expert opinion on this, we believe that the
14 plaintiffs in the class are getting a hundred cents on the
15 dollar.

16 THE COURT: What about your legal fees?

17 MR. PECHMAN: Our legal fees, your Honor, as per the
18 retainer agreements that we have with opt-in plaintiffs, as per
19 the court order on the collective action notice, and as per the
20 court notice on the Rule 23 class notice, we are requesting a
21 third of the recovery in attorney's fees.

22 THE COURT: I know that's in all the documents that
23 you recite. But how does that one-third compare with the hours
24 that you have actually worked?

25 MR. PECHMAN: If you were to say in terms of a

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1 multiplier, at this point it's a little bit above a 2
2 multiplier. We would envision by the time that the hours and
3 this process is completed, it will be slightly less than 2 as a
4 multiplier, which I believe is very reasonable given what other
5 judges in this district have held. And frankly, given the work
6 that we have done on the case and the settlement that we have
7 achieved, I think that's appropriate.

8 THE COURT: Mr. Davidoff, do you want to say anything?

9 MR. DAVIDOFF: Just briefly, your Honor. I think Mr.
10 Pechman summarized it well. The only comment I would have is
11 that we do not necessarily agree and we do not admit that these
12 individuals are necessarily unlawfully in the tip pool. But
13 for purposes of the settlement, we have taken that into account
14 and we think it is a fair settlement.

15 THE COURT: You faced a risk, a litigation risk.

16 MR. DAVIDOFF: Absolutely.

17 THE COURT: Which you resolved by settling the matter
18 now.

19 MR. DAVIDOFF: Absolutely, your Honor.

20 THE COURT: It's an arm's length settlement?

21 MR. DAVIDOFF: Absolutely, your Honor.

22 THE COURT: I received letters from Mr. Bonateau, Mr.
23 Ivce, Mr. Spahija, Mr. Karahoda, Mr. Elbeyali, and Mr. Fahija
24 in the nature of objections. Are any of those individuals here
25 and do they want to elaborate? There are three in the back.

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1 Why don't you come up and please take the stand.

2 MR. PECHMAN: Your Honor, I would like to make sure
3 that the Court has received the withdrawal of objections from
4 Mr. Ivce, Mr. Bonateau, and Mr. Spahija.

5 THE COURT: Hand them up.

6 Thank you. Sir, come on up.

7 FATLUM SPAHIJA,

7

8 called as a witness by the Court,

8

9 having been duly sworn, testified as follows:

10 THE COURT: Please sit down. Why don't you tell us in
11 your own words what your objections are to settlement. Then if
12 Mr. Pechman or Mr. Davidoff want to ask you a few questions,
13 they can do that. All right?

14 THE WITNESS: Sure. Your Honor, if I'm allowed to
15 say, I wasn't driven by greed to be here today. I've just been
16 driven with the injustice done. I would like before I proceed
17 to donate 50 percent of my awarded money to the families of
18 fallen soldiers. Because of them we are here today.

19 As soldiers in the field, we got assignments every
20 single day to who is going to work where, what station are you
21 going to work. Because of the fact that I'm part of the
22 awarded money, that means I started working as a waiter at
23 Sparks. I was hired as a waiter at Sparks and I work as a
24 waiter at Sparks. The only crime that I did is listen to what
25 the superiors told me to do. So I'm here more to support

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1 Jadinga Diavich which is the only one from the old -- I mean
2 from all the Sparks waiters that didn't get any money from the
3 settlement.
4 THE COURT: Is that all you want to say?
5 THE WITNESS: Yes, sir.
6 THE COURT: Mr. Pechman, do you have any questions?
7 MR. PECHMAN: If I could have this marked as employees
8 Exhibit 1?
9 THE COURT: Yes.
10 THE WITNESS: I'm sorry. I have to add something.
11 THE COURT: Yes.
12 THE WITNESS: I am not denying anything, that I did
13 not work in the station. I did work from 2004 to 2008. I have
14 no problem with that.
15 BY MR. PECHMAN:
16 Q. Just so we are clear --
17 THE COURT: Yes, what does that mean?
18 A. I did what they told me to do.
19 Q. In other words, you were the pastry chef between 2004 and
20 2008?
21 A. I was the pastry chef, yes. I was the dessert guy.
22 Q. You didn't go out on the floor?
23 A. No.
24 MR. PECHMAN: OK.
25 THE COURT: Mr. Davidoff, any questions?
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1 MR. DAVIDOFF: No, your Honor.

2 THE COURT: How do I pronounce your name again, sir,

3 Spahija?

4 THE WITNESS: Yes.

5 THE COURT: What exactly is the nature of your
6 objection to this? I'm going to find that as a dessert chef or
7 the person in charge of desserts, you were not entitled to be
8 tipped. That's a legal determination.

9 THE WITNESS: Correct.

10 THE COURT: You can accept that or not accept it, but
11 that's my determination. What, then, is your objection?

12 THE WITNESS: My objection is if we were told to do,
13 we were told to do this job, what's our position, what is
14 supposed to be our position?

15 THE COURT: Your job was to take care of desserts,
16 right?

17 THE WITNESS: I started as a waiter, yes, and then
18 there was a new station open. That's it.

19 THE COURT: Anything else? Mr. Davidoff, any
20 questions?

21 MR. DAVIDOFF: No, your Honor.

22 THE COURT: Thank you, Mr. Spahija.

23 (Witness excused)

24 THE COURT: There are two other gentlemen in the back
25 who raised their hands.

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1 MOHAMED ELBEYALI,

1

2 called as a witness by the Court,

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3 having been duly sworn, testified as follows:

4 THE COURT: Mr. Elbeyali, sit down and make yourself
5 comfortable. I have a letter that is dated August 18 to me,
6 and it attaches various letters that you wrote to Mr. Pechman
7 July 8, August 10, and June 2nd.

8 THE WITNESS: And another letter, your Honor. There
9 is a letter of July 8th.

10 THE COURT: August 18 is your letter to me.

11 THE WITNESS: Yes.

12 THE COURT: You have a letter of June 2nd.

13 THE WITNESS: Right.

14 THE COURT: July 8 you say?

15 THE WITNESS: Yes, sir.

16 THE COURT: I have that letter as well. This is the
17 letter to Mr. Pechman?

18 THE WITNESS: It's three letters.

19 THE COURT: Three letters: June 2, July 8, and August
20 10?

21 THE WITNESS: Correct.

22 THE COURT: Mr. Elbeyali, why don't you tell us
23 exactly what the nature of your objection is.

24 THE WITNESS: Mr. Pechman has taken me off the entire
25 settlement because I was working in the cold/hot appetizers.

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1 He stated in paragraph 30, which I mentioned on my last letter,
2 saying that we had no connection with customers and we were not
3 serving customers. That's not true, your Honor. I stated that
4 at Christmastime, when it's busy, that was partly correct, even
5 though still when it was necessary to go out and serve
6 customers, I had to do that. I calculated it was about 20
7 percent of the time that probably I had connection with the
8 customers at the lowest level.

9 THE COURT: Connections at the lowest level? What do
10 you mean?

11 THE WITNESS: When I was taking care of the cold/hot
12 appetizers, when it gets busy, then I didn't get a chance to
13 serve. So my main job was to prepare and to get the tables
14 ready for others to take it out.

15 THE COURT: That was work you did in the kitchen?

16 THE WITNESS: Yes, sir.

17 THE COURT: You got the appetizers and salads ready
18 for others to bring out to the customers?

19 THE WITNESS: Yes. But that was not for the entire
20 year. Most of the year I was serving customers. I took tables
21 out. I got in connection with clients. So I don't see why he
22 took me off the list.

23 THE COURT: Anything else?

24 THE WITNESS: Yes, sir. As my colleague mentioned, we
25 go there and we are told probably daily or weekly where we are

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1 going to be positioned, and then the rotation was taken apart.
2 For example, when Andy was in charge of the kitchen, I was
3 taking guridons out. He had come up with an idea that he is
4 going to calculate how many each waiter would carry out so the
5 people who don't work hard would be figured out and that would
6 encourage everybody to contribute as much as they can.

7 We have another waiter who draws things, draws things,
8 and he drew me where I'm on roller skates, where like my hair
9 is flying, because most of the time I was scoring the highest
10 score. That was to prove that I worked in the dining room.

11 Third, there were so many waiters who did appetizers
12 for shorter times and they were treated evenly with other
13 waiters. I don't see why they didn't get treated as I did get
14 treated, taken off the list, or at least part of the time.

15 At Christmastime we had parties that we had to prepare
16 their cold and hot appetizers, cold appetizers mainly,
17 downstairs. We spent more than two hours every day preparing
18 the appetizers, and they were totally on the list and they got
19 treated evenly with others. Therefore, I consider myself a tip
20 employee and I should be taking an equal share with everybody
21 else.

22 Finally, Mr. Pechman had divided the tips including
23 the lunchtime. This lunchtime we didn't have anybody that was
24 assigned to any sections. Everybody was working. So I don't
25 see why the people who worked lunch would get a bigger share

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1 than the people who worked only dinner.

2 THE COURT: Mr. Pechman?

3 BY MR. PECHMAN:

4 Q. Mr. Elbeyali, I just have a few questions for you. In your
5 complaint to the Court dated August 18th you say you were
6 assigned to work on the hot/cold appetizers. Could you
7 describe for the Court what that job of working with the hot
8 and cold appetizers entailed.

9 A. Sure. When I'm assigned to work with cold and hot
10 appetizers, that does not mean totally that I'm taken off the
11 list to serve customers. I still have --

12 Q. If I could just --

13 THE COURT: Don't interrupt. Let him finish. You're
14 interrupting him.

15 MR. PECHMAN: But I asked, your Honor, what his job
16 was about hot and cold appetizers, and he's talking about
17 something else.

18 A. I'm about to answer. Like I said, even though I'm assigned
19 to cold or hot appetizers, that does not mean that I don't take
20 tables out; just that I would be in control of the station,
21 making sure that everything is done right. And then when it
22 was necessary, like I said, in a busy time, then I would stay
23 stationed in the station. But most of the time I had to take
24 guridads out and I had to work like any other waiter in the
25 kitchen.

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- 1 Q. Wasn't the kitchen staffing that there is a manager,
2 kitchen manager, two individuals doing cold appetizers, and one
3 individual doing hot appetizers? Isn't that the way the
4 kitchen was staffed?
- 5 A. Yes.
- 6 Q. Who was known as the hot appetizer guy?
- 7 A. Can I just answer the first question, please? Can I answer
8 the first question?
- 9 Q. You just did. You said yes.
- 10 A. Yes is not the only thing that I have to say. The kitchen
11 manager was assigned and they were not only one kitchen manager
12 in that period. However, the people who prepared the cold and
13 hot appetizers, they rotated. They were not the same people.
14 Mainly through the memories of the other waiters, that was a
15 recent thing that they told you that these are the ones who
16 were doing that all the time. That's not true. The truth is
17 that we were rotated. We have schedules that show that we were
18 rotated. We were not stationed the entire time.
- 19 Q. For a given shift or a given week, when somebody was
20 assigned to be the hot appetizer person, what did the hot
21 appetizer person do?
- 22 A. Again, I'm going to repeat myself. Mainly we would be
23 concerned with preparing the hot appetizers. But that doesn't
24 mean that he has to be totally inside and freeze and doesn't
25 move. Still have to do the waiter jobs. Has to do late lunch

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1 if he's working for lunch, has to do early and late for dinner,
2 has to stay when it's necessary to stay. Has to go to the
3 meeting when there's a meeting. Goes with the group. So I
4 don't see why you divide the group into categories.

5 Q. Weren't you known as the hot appetizer man?

6 A. No, that's not true. There were other hot appetizers
7 before me and after me.

8 THE COURT: While you were there, were you known as
9 the hot appetizer man?

10 THE WITNESS: No, your Honor, it's not true.

11 THE COURT: Nobody ever called you the hot appetizer
12 man?

13 THE WITNESS: They were closer. Alain, he was before
14 me. He was in the hot appetizers for a long period of time,
15 and his name is not mentioned even.

16 Q. Did you ever work as the hot appetizer man?

17 A. Yes, I did.

18 Q. For what period of time?

19 A. Like stated in my first letter to you, that is very hard to
20 determine, the length of time. My letter of June 2nd I stated
21 that it's very complicated to determine who worked where,
22 because we are on a daily basis or weekly basis. There is no
23 memory can hold this information for all these years.

24 Q. Was there a point in time, Mr. Elbeyali, that you had a
25 conversation with Rami Maher about not being in the dining

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- 1 room?
2 A. I'm sorry?
3 Q. Because you didn't want to be around alcohol?
4 A. That was a wish. But that doesn't mean I was granted the
5 wish because I wanted to.
6 Q. That was your wish to who?
7 A. Just for myself. I never requested that to anybody. And
8 then right now I'm working in the dining room. I did not
9 refuse.
10 Q. It was your wish that you didn't want to be in the dining
11 room because of your Muslim religion and dealing with alcohol,
12 but you're saying you never said that to anybody?
13 A. No, sir.
14 Q. You never told that to Rami Maher or to anyone else at
15 Sparks?
16 A. No, sir.
17 Q. You just kept that to yourself?
18 A. Yes, sir.
19 Q. You never told that to anyone?
20 A. No, sir.
21 Q. In your objections to the Court you attach a series of
22 correspondence that you had with me. On one of your
23 correspondence, the June 20th one, we don't have a second page,
24 but it does look very similar to an email that I would like to
25 show you and I'd like to have marked as Plaintiffs' Exhibit 1.

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- 1 A. I'm sorry. Which letter is that?
2 THE COURT: Do you have a question, Mr. Pechman?
3 MR. PECHMAN: Yes.
4 Q. If you refer to the second page of this email, do you see
5 where you say the salad men and the appetizer expeditors were
6 waiters? Did you work as an appetizer expeditor at Sparks?
7 A. What period?
8 Q. For any period.
9 A. Yes, I did.
10 Q. Just to get a sense for the Court, when you worked as an
11 appetizer expeditor, how many appetizers would you be working
12 on on a given night?
13 A. It's hard to know.
14 Q. Hundreds?
15 A. It's hard. Could be 60, could be 50, could be 100, could
16 be 150. It depends on the night.
17 Q. For example with respect to let's say a baked clam
18 appetizer, could you tell the Court what your responsibilities
19 were as an appetizer expeditor.
20 A. Put the lemon in for the baked clams, and then either give
21 it to a runner or, if there is no runners around, then I would
22 take it out myself.
23 Q. Tell us what you would do with respect to the lump crabmeat
24 and bay scallops. How would you expedite that?
25 A. Same thing.

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1 Q. How did you expedite the cold salads with the hot
2 appetizers? What would you do?

3 A. The cold appetizers would be done by the cold appetizer
4 waiters, then they are --

5 THE COURT: Then what? Speak a little bit more
6 slowly.

7 A. I'm sorry. When the cold appetizers are done, they are
8 placed on the gueridon waiting for the hot appetizer to be
9 ready. Then all I have to do is just add it to the order, make
10 sure everything is there, and again either give to it a runner
11 or taking it out myself.

12 Q. You were responsible for making sure that the order of the
13 appetizers on the guridon that was going out to the customer
14 was correct, right?

15 A. That goes with every other waiter. If I'm not there, then
16 other waiters are doing the same exact thing.

17 Q. But when you were the expediter, that's what you did?

18 A. In part, yes. If I'm not there, somebody else would do the
19 same.

20 THE COURT: But your job when you were there was to do
21 it, correct?

22 THE WITNESS: Yes, sir.

23 Q. Did you decorate the plates with a napkin also?

24 A. Yes, I did.

25 Q. What did you do to decorate the plates?

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1 A. Before we start, the kitchen runners, including the cold
2 appetizers and hot appetizers, would prepare for the kitchen
3 needs for the night. Some of them would do the mushrooms, some
4 of them would do the napkins, some of them would prepare the
5 stations. That was the preparation part.

6 MR. PECHMAN: I have no further questions, Judge.

7 THE COURT: Mr. Davidoff?

8 BY MR. DAVIDOFF:

9 Q. Mr. Elbeyali, I have just one question for you. During the
10 time that you were doing hot appetizers and throughout your
11 tenure at Sparks, you did receive tips, didn't you?

12 A. Yes, sir.

13 Q. And you got your fair share of the nightly tips, is that
14 correct?

15 A. Yes, I did.

16 MR. DAVIDOFF: Thank you.

17 THE COURT: Anything else you want to add, Mr.

18 Elbeyali?

19 THE WITNESS: Can you give me a second, your Honor?

20 THE COURT: Yes.

21 THE WITNESS: Your Honor, Mr. Pechman did not explain.

22 When Mr. Pechman sent me a letter asking me to sign and join
23 the case, the letter stated if you are worked at Sparks from
24 the time 2004 -- between 2000 and 2008 as a waiter, to then
25 sign this agreement and send it back, which I did. Then I got

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1 a letter from Mr. Pechman saying that you worked as a waiter at
2 Sparks between the period of 2000 and 2008, therefore you are
3 awarded this amount of money.

4 To my understanding, working as a waiter is receiving
5 tips. I looked at the dictionary and I didn't see any other
6 meaning for the word "waiter." Waiters get tips. Therefore, I
7 considered myself waiter. I signed the petition as a waiter,
8 and I should receive the settlement as a waiter. I don't see
9 why Mr. Pechman is dividing the group into waiters and
10 nonwaiters.

11 It is true that some of the waiters did nonwaiter
12 jobs, but that was an order. We had to follow. Otherwise, we
13 had no jobs. So I don't see why I should be responsible for
14 decisions that I did not make and I'm not responsible for.

15 THE COURT: Mr. Pechman, do you have another question?

16 MR. PECHMAN: Just to follow up, your Honor, so it's
17 clear for the record.

18 BY MR. PECHMAN:

19 Q. You did sign on to the collective action, correct?

20 A. Yes.

21 Q. The letter that was sent to you telling you what your award
22 would be was for \$16,779.26, correct?

23 A. Yes.

24 Q. That's your award under the FSLA settlement, correct?

25 A. Yes. But I don't see why you consider me as a waiter in

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1 some incidents and a nonwaiter in other incidents.

2 MR. PECHMAN: We have had some cordial conversations
3 in the past, Mr. Elbeyali, but I don't think the judge wants us
4 to be in that position now.

5 THE COURT: I think I've figured this out. Could you
6 leave behind the exhibit that Mr. Pechman marked. You can take
7 all your other papers, Mr. Elbeyali. Thank you very much.

8 (Witness excused)

9 THE COURT: I guess the last objection is Mr.
10 Karahoda. Is he in? Come on up, Mr. Karahoda.

11 JETON KARAHODA,

11

12 called as a witness by the Court,

12

13 having been duly sworn, testified as follows:

14 THE COURT: I have your letter of August 4th in which
15 you object. Do you want to state for the record what your
16 objection is.

17 THE WITNESS: Yes. I'm the only waiter in Sparks that
18 never received any letter or received any money award from the
19 settlement.

20 THE COURT: What did you do at the restaurant? Why do
21 you think you're entitled to a settlement?

22 THE WITNESS: First of all, I was hired as a waiter.
23 For eleven years that I'm at Sparks I did every job, like
24 everybody else.

25 THE COURT: What are the jobs that you did?

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1 THE WITNESS: Everything, like everybody else.

2 THE COURT: I don't know what "everything" is. Why
3 don't you tell me specifically what you did.

4 THE WITNESS: The waiters: Stayed by the table, get
5 the orders, get the wine. Also I did work in the kitchen
6 mostly.

7 THE COURT: You say in your letter here, Mr. Karahoda,
8 and I don't mean to argue with you, you said, "I was hired as a
9 waiter and then put to work in the kitchen as a kitchen
10 waiter," and you dressed in the same attire as other waiters on
11 the floor and you are ready to jump and perform other
12 positions. But over a decade of work there were numerous times
13 that I had to abandon my position as staff to the kitchen."
14 That suggests to me that most of your work was done as staff in
15 the kitchen loading food carts.

16 THE WITNESS: Actually, I prepared salads. That was
17 my main work at Sparks, but, as required, I did other jobs,
18 too.

19 THE COURT: In weighing your jobs, if your primary job
20 was to get salads ready, how much of your time on a normal
21 shift would you spend?

22 THE WITNESS: Most of the time, 80 percent of the
23 time, 90 percent of the time.

24 THE COURT: Mr. Pechman, do you have questions?

25 BY MR. PECHMAN:

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1 Q. Just a few questions, Mr. Karahoda. Is it fair to say that
2 when you were making some of the salads, you would be wearing
3 rubber gloves? That's a yes?

4 A. Yes.

5 Q. For most of the time that you spent in the kitchen between
6 2000 and 2008, you wouldn't be wearing a tie, you would have
7 your shirt open like it is now?

8 A. Not correct.

9 Q. Did you ever wear an apron so that you don't get salad on
10 you and stuff?

11 A. Not correct.

12 Q. I know you worked hard in terms of the salads, but fair to
13 say that you were known as the salad man at Sparks?

14 A. Correct.

15 Q. When we met, you proudly noted to me that you were the
16 salad man because you did it better and faster than anybody
17 else at Sparks?

18 A. Correct.

19 Q. That's correct?

20 A. Correct.

21 MR. PECHMAN: No further questions.

22 THE COURT: Mr. Davidoff?

23 BY MR. DAVIDOFF:

24 Q. Mr. Karahoda, good afternoon. During your employment at
25 Sparks, the entire period, did you receive your share of the

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1 tip pool?

2 A. Correct.

3 MR. DAVIDOFF: Thank you.

4 MR. PECHMAN: Judge, I actually have one other
5 question.

6 THE COURT: All right, Mr. Pechman.

7 BY MR. PECHMAN:

8 Q. Mr. Karahoda, it's fair to say that Mr. Elbeyali worked
9 with you in the kitchen at Sparks?

10 A. Yes, most of the time.

11 Q. Is it fair to say that at Sparks, as you were known as the
12 salad man, Mr. Elbeyali was known as the hot appetizer man,
13 correct?

14 A. That's irrelevant.

15 Q. But it's true, isn't it?

16 A. Most of the time, yes.

17 MR. PECHMAN: No further questions.

18 THE COURT: Mr. Karahoda, thank you very much.

19 THE WITNESS: Can I say something else?

20 THE COURT: Yes, certainly.

21 THE WITNESS: In addition to this?

22 THE COURT: Yes.

23 THE WITNESS: As I understand it, I didn't sign the
24 original lawsuit. You ordered, your Honor, this case to turn
25 into a class action suit.

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1 THE COURT: Yes.

2 THE WITNESS: The tip pool was not considered as a
3 class action suit, only the hours. That's very relevant,
4 because everybody in Sparks was hired as a waiter. Assigned
5 different positions to work, but still hired as a waiter. The
6 hours should be divided fairly. That's my objection.

7 THE COURT: Thank you very much.

8 (Witness excused)

9 THE COURT: Is there anybody else who has an objection
10 to the lawsuit? I assume everybody here sitting in the back
11 has some connection with the restaurant. Does anybody want to
12 speak in favor of the resolution? OK.

13 MR. PECHMAN: Mr. Duchene.

14 THE COURT: Does Mr. Duchene want to speak?

15 MR. PECHMAN: If your Honor deems it relevant, we
16 would be happy to have him or others speak. But it's only as
17 your Honor finds it necessary.

18 THE COURT: I don't find it necessary. But if anybody
19 wants to speak, they are entitled to speak. You have to speak
20 now or forever hold your peace. It's not a wedding, but . . .

21 MR. PECHMAN: Then we won't take up the Court's time.

22 THE COURT: Anything else?

23 MR. PECHMAN: Unless your Honor feels that it's
24 necessary for us to provide evidence in response to Mr.
25 Karahoda and Mr. Elbeyali --

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1 THE COURT: I don't.

2 MR. PECHMAN: Thank you, your Honor.

3 THE COURT: Do you have an order?

4 MR. PECHMAN: Yes, your Honor.

5 THE COURT: Would you hand it up.

6 I've heard the matter and considered it. I believe
7 that the settlement is fair and reasonable and adequate, and I
8 think the attorney's fees are appropriate in the circumstances.

9 With regard to the objections, first of Mr. Ivce, Mr.
10 Bonitou, and Mr. Spahija, in order for the objections to be
11 perfected they had to appear here in court. They did not.
12 They withdrew them. Pursuant to Rule 23(e) I approve the
13 withdrawal of the objections.

14 I noted on reading the objections that they were all
15 individualized and they were not to the settlement in toto but
16 were really to the method of calculation of the settlement. So
17 they were not to the fairness, the adequacy, and the
18 reasonableness of the settlement, but they were individual
19 grievances. Therefore, I approve the withdrawal of those
20 objections.

21 With regard to the three objections that I heard this
22 morning from Mr. Karahoda, Mr. Elbeyali, and Mr. Spahija,
23 taking up Mr. Spahija first, there is no doubt that he served
24 as the dessert chef and should not have been in the tip pool.

25 Part of the confusion here is that everybody was hired

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1 as a waiter, and that title causes confusion. Under the Fair
2 Labor Standards Act and the New York Labor Law, however, you
3 have to engage in a functional analysis. It is those people
4 who served tables that are entitled to compensation and not
5 those people who worked in the back office producing the food.

6 I find that both Mr. Karahoda and Mr. Elbeyali have
7 been properly characterized as working more in production than
8 in service, and therefore not entitled to participate in the
9 tip pool.

10 So I'm going to overrule the objections of Mr.
11 Karahoda, Mr. Elbeyali, and Mr. Spahija. As a matter of fact,
12 based on the testimony here and the expert analysis of Mr.
13 Bromberg, I find that they were properly excluded from
14 participating in the tips and have no right to participate in
15 the settlement based on the job functions that they performed,
16 which should not have been tipped.

17 Therefore, I approve the settlement.

18 I have before me what I have previously studied and
19 considered, which is Exhibit M to Mr. Pechman's affidavit and
20 which was submitted some time ago. I'm going to strike the
21 word "proposed" from Exhibit M. I specifically approve the
22 award of \$25,000 to Mr. Duchene and \$10,000 to Mr. Joaquim, and
23 I'm going to sign the order dated this 10th day of September
24 2009. The order will be entered promptly on our ECF system.

25 Is there anything else to do, Mr. Pechman and Mr.

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1 Davidoff?

2 MR. PECHMAN: No. I just want to thank the Court, and
3 particularly Mr. Ovaless for the attention that we received
4 throughout this case. We thank the Court.

5 THE COURT: I thank the parties for engaging in a very
6 professional manner in disposing of this case. I think it was
7 the right thing to do. I believe the settlement in all its
8 respects is fair and reasonable and adequate. It addresses
9 mistakes that were made over time and corrects them, puts the
10 defendant on a better course to follow in the future, one that
11 will hopefully eliminate any further disputes.

12 I will say to the three objectors, because they are
13 not part of the settlement, they have whatever rights they
14 might have under statute and common law to proceed as they
15 wish, but they are not entitled to participate in the
16 settlement as I have already ruled.

17 Thank you very much.

18 (Adjourned)

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