UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 15-4701-MWF (AGRx) **Date: August 6, 2019**
Title: Jose Jacobo, et al. v. Ross Stores, Inc., et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT [146]; MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS, ADMINISTRATIVE COSTS, AND CLASS REPRESENTATIVES' ENHANCEMENT PAYMENTS [141]

Before the Court are two motions by Plaintiffs. First, there is the Motion for Final Approval of Class Action Settlement (the "Settlement Motion"), filed on July 1, 2019. (Docket No. 146). Second, there is the Motion for Attorneys' Fees, Litigation Costs, Administrative Costs, and Class Representatives' Enhancement Payments (the "Fee Motion"), filed on July 1, 2019. (Docket No. 141). No opposition to either Motion was filed, and only two class members have requested to be excluded from the settlement.

The Court has read and considered the papers in connection with the two Motions and held a hearing on July 29, 2019.

For the reasons discussed below, the Motions are ruled upon as follows:

- The Settlement Motion is **GRANTED**. The settlement agreement is fair, reasonable, and adequate to serve the interests of the class members; and

- The Fee Motion is **GRANTED**. The requested attorneys' fees and costs are fair compensation for counsel's efforts and reimbursement for their expenses, and the incentive award requested is reasonable.

I. BACKGROUND

A. Factual and Procedural Background

The Court previously discussed the following factual and procedural background to this action in an Order preliminarily approving the settlement. (*See generally* "Preliminary Approval Order" (Docket No. 138)).

Plaintiffs commenced this class action on June 20, 2015. (Complaint (Docket No. 1)). Along with this Motion, the parties stipulated to permit Plaintiffs to file the Third Amended Complaint ("TAC") to amend the SAC from a California-only class to a nationwide class for purposes of certification of a settlement class and approval of a class action settlement. (Docket No. 136). The TAC asserts four claims for relief: two claims under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, for unfair business practices and fraudulent business practices; one claim for violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, *et seq.*; and one claim for negligent misrepresentation. (*Id.* ¶¶ 205-37).

Based on the allegations in the TAC:

Plaintiffs are patrons of Ross's department stores that offer good bargains on a wide-variety of items. (TAC ¶ 7). Each of those items is displayed with two prices: a sale price and a "Compare At" price. (*Id.* ¶ 15). Although Plaintiffs allege that reasonable consumers interpret the "Compare At" price to represent the amount charged for an identical product at other stores, Ross defines the term as referring to the "selling price of the same ***or*** similar product." (*Id.* ¶ 49 (emphasis added)). That unintuitive dual definition, Plaintiffs allege, misleads the buyers of Ross's merchandise. (*Id.* ¶¶ 65-66).

Between October 2016 and November 2017, the parties engaged in settlement negotiations and two mediation sessions, one with Bruce A. Friedman of JAMS and the other through the Ninth Circuit's mediation program with circuit mediator Kyungah Suk. (*See* Preliminary Approval Order at 3). On November 10, 2017, the parties reached a tentative settlement. (*See id.*).

On July 1, 2019, Plaintiffs filed the present Motion, seeking final approval of the parties' settlement and certification of a settlement class pursuant to Rule 23(b)(3).

B. The Settlement

The settlement agreement (the "Settlement" or "Agreement") is attached to the Declaration of Douglas Caiafa ("Caiafa Decl. I") as Exhibit A. (Docket No. 146-2). The Agreement establishes a non-reversionary fund of $4.854 million (the "Global Settlement Amount") for payment of attorneys' fees ($1,213,500, or 25% of the Global Settlement Amount); notice and administration expenses (up to $600,000), litigation expenses (up to $50,000), and incentive awards to the named Plaintiffs ($5,000 each, or $10,000 total), with the remainder reserved for payment of settlement class members' claims with merchandise certificates on a pro rata basis. (Preliminary Approval Order at 4).

The settlement class consists of "all persons in the United States who purchased (and who did not receive a refund or credit for all their purchases) from Ross any item with a price tag that included a comparison price that was higher than the sales price during the Settlement Class Period. Excluded from the Settlement Class are Ross's past and present officers, directors, employees, agents or affiliates, and any judge who presides over the Litigation." (Agreement ¶ 1.24)

Notice was provided to settlement class members in the manner approved by the Court in the Preliminary Approval Order. (*See* Preliminary Approval Order at 16-17).

On October 9, 2018, the settlement administrator, CPT Group, Inc. (the "Settlement Administrator") mailed all required notices under the Class Action

Fairness Act ("CAFA"), a total of 52 CAFA notifications, to the Attorney Generals in all 50 states, the District of Columbia, and the U.S. Attorney General. (Declaration of Ani S. Sarich ("Sarich Decl.") ¶ 4 (Docket No. 146-3)). Between January 7, 2019 and January 20, 2019, the Settlement Administrator sent the Summary Notice to 3,973,733 potential Settlement Class Members for whom a valid email address was available. (*Id*. ¶ 15). The Summary Notice informed Class Members of "the deadline for submitting Claim Forms, their right to opt out of the Settlement or to object to the Settlement, the process by which such opt-outs or objections must be made, and the date set by the Court for a hearing on final approval of the Settlement." (Agreement ¶ 4.1.1). Of the 3,973,733 emails sent, 2,695,200 (67.83%) were successfully delivered. (Sarich Dec. ¶ 15). On January 4, 2019, the Settlement Administrator commenced an 8-week online and mobile media banner ad campaign consisting of Facebook, Instagram, Twitter, and banner display ads. (*Id*. ¶ 13). The total number of impressions for these banner advertisements is 18,242,732. (*Id*.). The Settlement Administrator also published a Publication Notice in People Magazine, which was made available to consumers for purchase on a nationwide basis, pursuant to the Settlement Agreement. (*Id*. ¶ 14).

II. DISCUSSION

Plaintiffs seeks final approval of the Agreement and a $5,000 incentive award for each class representative. (Settlement Mot. at 2-14). Plaintiffs' counsel seek fees in the amount of $1,213,500, or 25% of the Global Settlement Amount, and reimbursement of expenses incurred in the amount of $19,750. (Fee Mot. at 1).

A. Final Approval of Class Action

Before approving a class action settlement, Rule 23 of the Federal Rules of Civil Procedure requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). "To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status

throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted) (applying the factors announced in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quoting *Hanlon*, 150 F.3d at 1026). "The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair." *Linney v. Cellular Alaska P'ship*, Nos. C–96–3008 DLJ, C–97–0203 DLJ, C–97–0425 DLJ, C–97–0457 DLJ, 1997 WL 450064, *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234, 1234 (9th Cir. 1998).

"In addition, the settlement may not be the product of collusion among the negotiating parties." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000).

Here, the Court is satisfied that the Agreement is not the product of collusion between the parties. The parties attended a mediation session in October 2016 with Bruce A. Friedman of JAMS. (*See* Preliminary Approval Order at 3). The parties ultimately reached their settlement after another mediation session in November 2017 with Kyungah Suk, a mediator with the Ninth Circuit's mediation program. (*Id.*). Moreover, Class Counsel have extensive experience litigating consumer class actions. (*See id.* at 7). Plaintiffs' counsel have litigated and are litigating numerous consumer class actions in state and federal courts in California. (*Id.*). Finally, the action was

vigorously litigated on both sides, with each of the parties conducting substantial discovery over the course of this action. (*Id.*). The arms-length nature of the negotiation resulting in the Agreement and the recommendation of experienced class action counsel support final approval. *See Linney*, 1997 WL 450064, at *5.

Moreover, consideration of the *Hanlon* factors dictates final approval of the proposed settlement:

1. Strength of Plaintiffs' case and risk, expense, complexity, and likely duration of further litigation

When assessing the strength of a plaintiff's case, the Court does not reach "any ultimate conclusions regarding the contested issues of fact and law that underlie the merits of this litigation." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1388 (D. Ariz. 1989).

Plaintiffs acknowledge that, despite the strength of their case, "[t]he record . . . demonstrates the significant risks that Plaintiffs would face if this case were not settled." (Settlement Mot. at 8). Furthermore, continued litigation may pose the risk that (1) Plaintiffs could not prove a "legally and factually supportable measure of damages or restitution"; (2) Plaintiffs would not be able to obtain and then maintain a certified class through trial; and (3) the additional time and expense that would be required to complete the appeals' process and obtain a judgment in this case would be substantial. (*Id.* at 9-10).

Moreover, significant party and judicial resources would be expended in further deposition and expert discovery, motion practice, trial, and potentially appeals following trial. Accordingly, this factor weighs in favor of final approval of the Agreement.

2. Amount offered in the Agreement

The Court concludes the $4.854 million offered in the Agreement is fair and reasonable. The Court looks at "the complete package taken as a whole, rather than the individual component parts" in making this determination. *Officers for Justice*, 688 F.2d at 628. After deducting administration costs, attorneys' fees and expenses, and the proposed incentive award, the class members will collectively receive $2,980,000 of these available funds. (*See* Settlement Mot. at 1). Over 280,000 valid claims have were received, yielding a claim rate of 3.14%, which means each of those class members will receive approximately $10.45 in merchandise certificates. (*Id.* at 4; Caiafa Decl. I ¶ 33). The Court determines that this claim rate is reasonable. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (approving settlement with 3.4% claim rate)

When considered in light of the potential pitfalls of an adverse ruling against Plaintiffs as their standing to assert this class action claim, a recovery of $10.45 per consumer appears fair and reasonable. If this litigation were to continue, Plaintiffs may not prevail on all claims and overcome all defenses and the aggregate recoverable damages may be significantly less than $2,980,000. Moreover, continued litigation would result in considerable additional expenses. Accordingly, this factor also weighs in favor of final settlement approval.

3. Extent of discovery completed and stage of the proceedings

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney*, 151 F.3d at 1239. The parties conducted substantial discovery over the course of this action and filed and opposed numerous dispositive and class related motions. (Settlement Mot. at

11). The Court concludes that the parties had ample information with which to make informed settlement decisions.

Accordingly, this factor weighs in favor of final settlement approval.

4. Experience and views of counsel

Plaintiffs' counsel have extensive experience litigating consumer class actions. (Settlement Mot. at 11). Counsel are of the opinion that "in consideration of the risk, expense, complexity, and likely duration of further litigation, the amount of the Settlement, and the positive reaction of Class Members" the Settlement is "fair, adequate, and reasonable." (Caiafa Decl. I ¶ 37). Accordingly, this factor weighs in favor of final settlement approval.

5. Reaction of the class members to the Agreement

The Settlement Administrator received no filed objections to and only two requests for exclusion from the Agreement. (Settlement Mot. at 12).

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomm'cns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004); *see also Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent).

While Plaintiffs indicate that three boxes of documents were delivered to the Court, and one letter delivered to CPT, none of the documents were filed with the Court as outlined by the Settlement Agreement. (Settlement Mot. at 13; Agreement ¶ 7.2 ("To be considered valid, an objection must . . . be filed with the Court on or before the deadline in Section 7.1.")). In any event, with respect to the letter delivered to CPT, the objections are not convincing. The letter objects to the Agreement on the grounds that (1) "[i]t is impossible to determine the amount of the settlement remaining

for distribution to the Class after deductions for fees and costs are taken out"; (2) the attorneys' fees are too high; and (3) "Ross will benefit by the settlement because Class Members will be required to go to Ross stores to redeem their Merchandise Certificates." (Settlement Mot. at 13-14). As Plaintiffs correctly highlight, after deductions for fees and costs, there will be $2,980,500 remaining for distribution to claimants; a 25% fee is presumptively reasonable in the Ninth Circuit (*see infra*); and class members can redeem their certificates for cash. (*Id.* at 14).

Accordingly, this factor also weighs in favor of final settlement approval.

B. Attorneys' Fees

In the Ninth Circuit, there are two primary methods to calculate attorney's fees: the lodestar method and the percentage-of-recovery method. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949 (citation omitted). "The lodestar method requires 'multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.'" *Id.* (citation omitted).

"Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%." *Id.* (citation omitted). However, the "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). "The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases." *Martin v. Ameripride Services, Inc.*, No. 08-cv-440-MMA, 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)). The choice of "the

benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

Plaintiffs' counsel request fees in the amount of $1,213,500, or 25% of the $4,854,000 settlement fund. (Fee Mot. at 1). The Court sees no reason to depart from the Ninth Circuit's 25% benchmark. This fee amount is reasonable and fair.

A lodestar crosscheck confirms the reasonableness of the 25% award. While counsel have not submitted an itemized billing summary, they have provided specific billing rates and hours for those working on the case. Mr. Morosoff has devoted 870 hours to this action and Mr. Caiafa has devoted 925 hours, for a total of 1,795 hours, which the Court views as reasonable given the length of the case, the issues involved, and the mediation and negotiations that occurred. (Declaration of Christopher J. Morosoff ("Morosoff Decl.") ¶ 33 (Docket No. 141-3); Declaration of Douglas Caiafa ("Caiafa Decl. II") ¶ 34 (Docket No. 141-2)). The billing rates of $650 per hour for Mr. Morosoff and $750 per hour for Mr. Caiafa are also reasonable for the range of experience of counsel working on the case, from five years to 20 years of practice. (Morosoff Decl.") ¶ 34; Caiafa Decl. II ¶ 35). Multiplying the hours by the rates documented results in a total lodestar of $1,259,250. (Caiafa Decl. II ¶ 36). The Court's $1,213,500 fee award represents an amount slightly lower than counsel's lodestar, which is well within the range of reasonability. *See Vizcaino*, 290 F.3d at 1051 n.6 (noting that the majority of fee awards are 1.5 to 3 times higher than lodestar).

Continued litigation carries the risk for the class of an inferior award or nothing. Obtaining and maintaining class action status, as well as ultimately obtaining a finding of liability, remains uncertain. Counsel exercised considerable skill in the investigation of the case, discovery, and settlement negotiations, and they did so against experienced, highly skilled opposing counsel and on an entirely contingent basis. (Fee Mot. at 12-14).

Accordingly, the Court concludes that counsel's request for attorneys' fees is reasonable.

C. Reimbursement of Litigation Expenses

Counsel next seek reimbursement of litigation expenses in the amount of $19,750, well below the $50,000 cap contemplated in the Settlement Agreement. (*Id.* at 17). However, the actual expenses for claims administration and notice by CPT have exceeded the cap of $600,000 due to an increase in the estimated class size and increases in postage and other costs. (*Id.*). Therefore, Plaintiffs' counsel request that any and all costs not awarded with respect to the $50,000 litigation expenses cap ($30,250) be paid to CPT. (*Id.*).

Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

Counsel provide a detailed breakdown of costs. (Morosoff Decl. ¶ 36). All of Counsel's costs are due to "filing fees, service of process, mediation expenses, deposition costs, travel [expenses], photocopy expenses, parking, postage, online research charges unique to this action and related expenses." (*Id.*). Attorneys routinely bill clients for such expenses, and it is therefore appropriate to allow counsel to recover these costs from the settlement fund.

Class members were also notified that counsel would seek reimbursement of litigation expenses of up to $50,000. (*See* Preliminary Approval Order at 8).

Accordingly, the Court concludes that counsel's request for litigation expenses is fair and reasonable. The Court likewise approves counsel's request to transfer costs not awarded up to the $50,000 litigation expenses cap to CPT.

D. Incentive Awards

Plaintiffs also seek an incentive award of $5,000 each for their participation in this action. (Fee Mot. at 18-20).

"[N]amed plaintiffs . . . are eligible for reasonable incentive payments" as part of a class action settlement. *Staton*, 327 F.3d at 977 (9th Cir. 2003). When evaluating the reasonableness of an incentive award, courts may consider factors such as "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Id.*

The Fee Motion contends that the incentive award is appropriate here because Plaintiffs were required to "review and provide documents, prepare for and attend their noticed depositions, prepare declarations in support of Plaintiffs' motions, participate in numerous conversations with counsel, be involved in discussions regarding settlement and generally be available to fully participate every step of the way." (Fee Mot. at 18-19).

The Court's independent search reveals that incentive awards of up to $5,000 have been found to be reasonable. *See, e.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266-67 (N.D. Cal. 2015) (approving a $5,000 incentive payment for releasing all claims against the defendant); *In re Toys R Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 472 (C.D. Cal. 2014) (concluding that "an incentive award of $5,000 for each of [the plaintiffs]" is just and reasonable).

In light of the significant time and effort Plaintiffs expended in this action and case law supporting up to $5,000 incentive awards, the Court finds the award of $5,000 appropriate.

III. CONCLUSION

For the reasons discussed above, the Settlement Motion and Fee Motion are **GRANTED**.

The Court awards counsel $1,213,500 in fees and $19,750 in litigation costs, to be paid from the Global Settlement Amount. The Court also awards Plaintiffs an incentive award of $5,000 each, totaling $10,000.

A separate judgment will issue.

IT IS SO ORDERED.