WARE v. SOHO HOUSE
Case No.: BC496246
Hearing Date: 1/8/15
Department 310

MOTION FOR FINAL APPROVAL AND ATTORNEYS' FEES

~~TENTATIVE RULING~~ Final Order

1) Grant motion for final approval

2) Grant attorneys' fees in the amount of $911,715.35, but defer an award of costs, pending a further breakdown of the costs requested.

3) Grant request for LWDA payment of $15,000

4) Grant the incentive payment request in the amount of $10,000 to Plaintiff Ware

5) Defer an award on administration costs, pending Ms. Butler's further Declaration and exhibit justifying these costs

DISCUSSION

I. Background. Plaintiff Andrea Ware brought this putative wage-and-hour action against her former employer, Defendant Soho House West Hollywood, LLC and Cecconi's West Hollywood. Plaintiff was employed as a Front Desk Agent/Reception employee, beginning in September 2010. [Complaint, ¶15.] Plaintiff alleges that she was a non-exempt hourly employee during the class period. She alleges that Defendants committed violations of California wage and hour law, and has alleged claims for failure to pay straight and overtime compensation in violation of Labor Code §§223, 510, 1194, and 1199; failure to provide meal periods in violation of Labor Code §§226.7 and 512; failure to provide rest breaks in violation of Labor Code §226.7; failure to provide itemized wage statements in violation of Labor Code §226; failure to pay all wages owed in violation of Labor Code §§204 and 224; failure to keep accurate payroll records in violation of Labor Code §§226 and 1198 and Wage Order No. 5; failure to pay waiting time penalties in violation of Labor Code §203; failure to provide expense reimbursements in violation of Labor Code §2802; failure to pay personal days in violation of Labor Code §226.7; unlawful business practices in violation of Business & Professions Code §§17200, et seq.; and a violation of the Private Attorneys General Act ("PAGA"") in violation of Labor Code §2699, et seq.

The Court granted preliminary approval on July 9, 2014. Following the notice and claims process, Plaintiffs have moved for an order granting final approval, attorneys' fees, costs, payment to the LWDA, incentive payments, and administration costs as set forth above.

II. Events since preliminary approval

A. Notice process

Plaintiffs have submitted the Declaration of Mary Butler, a case manager with Simpluris, Inc. (the claims administrator). Ms. Butler notes that Simpluris received the Court-approved notice, the motion for fees, and the settlement hearing and claim form ("Notice Packets") from counsel on July 18, 2014. [Butler Decl., ¶4.] Butler says Simpluris received the mailing list with the classmembers' names, Social Security numbers, last known addresses, email addresses, last known phone number, and total hours worked during the class period. [Butler Decl., ¶5.] As a result of these efforts, notice was sent to these new addresses. Ultimately, 61 packets were undeliverable because Simpluris could not find a correct address [Butler Decl., ¶12.]

In California, the notice must have "a reasonable chance of reaching a *substantial* percentage of the class members." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251 (emphasis added). Importantly, however, the plaintiff need not demonstrate that each member of the class has received notice. As long as the notice had a "reasonable chance" of reaching a substantial percentage of class members, it should be found effective. Here, notice was successful. Simpluris indicates that 61 packets were ultimately undeliverable out of a total of approximately 1248 classmembers. This represents 4.8% of the class (meaning that 95.2% of the class received notice). The notice satisfies the *Wershba* standard above.

III. *Dunk* Factors. Any party to a settlement agreement may submit a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶14:138.21 (2014).

It is the duty of the Court, before finally approving the settlement, to conduct an inquiry into the fairness of the proposed settlement. California Practice Guide, Civil Procedure Before Trial, The Rutter Group, ¶14:139.12 (2014). The trial court has broad discretion in determining whether the settlement is fair. In exercising that discretion, it normally considers the following factors: strength of the plaintiff's case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status through trial; amount offered in settlement; extent of discovery completed and stage of the proceedings; experience and views of counsel; presence of a governmental participant; and reaction of the class members to the proposed class settlement. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723. This list is not exclusive and the Court is free to balance and weigh the factors depending on the circumstances of the case. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245.

The proponent bears the burden of proof to show the settlement is fair, adequate, and reasonable. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1165-1166; *Wershba, supra,* 91 Cal.App.4th at 245. There is a presumption that a proposed fairness is fair and reasonable when it is the result of arm's-

length negotiations. 2 Herbert Newburg & Albert Conte, Newburg on Class Actions §11.41 at 11-88 (3d ed. 1992); *Manual for Complex Litigation* (Third) §30.42.

1. Strength of the plaintiff's case/magnitude of claims

This case was of medium strength. The complaint alleges common causes of action for wage-and-hour violations. Plaintiffs may have been successful in litigating at least some of the claims. However, Defendants denied liability, and the settlement was the product of arms-length negotiations between the parties. In sum, the "strength of Plaintiff's case" factor weighs in favor of final approval.

2. The risk, expense, complexity and likely duration of further litigation

Had this case not settled, it likely would have continued indefinitely. There would have been class proceedings. There was no guarantee that the class would have been certified. Moreover, from a substantive standpoint, there was always the possibility that Plaintiff and the class would not have prevailed on the claims. This factor weighs in favor of final approval.

3. The risk of maintaining class action status through trial

There was no class certified in this case. If, however, had a class been certified, Defendant likely would have tried to decertify it. This factor weighs in favor of final approval.

4. Amount offered in settlement

As part of the Court's analysis of this factor, the Court should take into consideration the admonition in *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133. In *Kullar*, objectors to a class settlement argued the trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The Court of Appeal agreed with the objectors that the trial court bore the ultimate responsibility to ensure the reasonableness of the settlement terms. Although many factors had to be considered in making that determination, and a trial court was not required to decide the ultimate merits of class members' claims before approving a proposed settlement, an informed evaluation could not be made without an understanding of the amount in controversy and the realistic range of outcomes of the litigation. The *Kullar* noted that the Court has a responsibility to independently evaluate the settlement.

With these standards in mind, counsel had previously represented in its joint filing (in response to the Court's prior query at the time of preliminary approval) that the settlement was calculated as follows:

$2,800,000.00	total settlement value

-$933,333.33	fees/costs
- $20,000.00	class representative enhancement
- $25,000.00	claims administration
- $15,000.00	LWDA payment for PAGA penalties

Equals $1,806.666.67. Divided by 1,185 employees, this equals 1,524.61 per employee, on average.

Following the claims process, however, the actual amount claimed by classmembers who returned valid claim forms is $1,358,139.30, based on 637 claimants (representing 79.66% of the settlement amount). Thus, the actual net settlement value, on average, per classmember comes to $2,132.09 ($1,358,139.30 divided by 637 claimants).

Per *Kullar,* the Court must "receive and consider enough information about the *nature and magnitude* of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." Following the claims process, the overall value of the settlement, based on the number of valid claims, comes to $2,351,472.63 (representing the $2,800,000 gross figure, less the difference between the $1,806,666.67 total net figure and the $1,358,139.30 actual net figure). In conjunction with preliminary approval, counsel had provided a comprehensive estimate of the total outlier amount of potential recovery (complete with a breakdown of the outlier recovery, for each of the claims). For Soho House, this total amount was $3,274,084. For Cecconi, this total amount was $1,946,149. [See May 27, 2014 Joint Filing at pp. 2-4.] When these figures are combined, the total outlier value of this case was $5,220,233.

The $2,351.472.63 actual sum seems to be within the ballpark of reasonableness under *Kullar*, when viewed against the $5,220,233 outlier figure provided by counsel. Accordingly, this factor is satisfied.

5. Extent of discovery completed and stage of the proceedings

The *Ware* case was filed on November 26, 2012, and has been pending for over two years. Counsel represents that the parties conducted significant investigation of the facts, law, and the recoverable damages during the approximate two years the case has been active. [Favorote Decl., ¶9.] This included extensive review of relevant policies and procedures, extensive document review, the deposition of Defendants' PMQ over the course of 5 days, defending Plaintiff's deposition over the course of 4 days, and dozens of interviews with classmembers. [*Id.*] This case was advanced enough for the parties to reach a settlement of the matter, and there was sufficient discovery taken. This factor weighs in favor of final approval in this case.

6. Experience and views of counsel

Counsel Favarote has set forth a sample of cases where Gleason & Favarote, LLP has been counsel of record in wage and/or class/representative actions at ¶26 of his Declaration. Counsel Becerra has also set forth his experience at ¶¶3-4 of his Declaration. It is evident that both counsel have substantial experience in class and wage & hour litigation. Both counsel state that the settlement is fair to the class. As such, this factor weighs in favor of final approval.

7. Reaction of the class members to the proposed class settlement

Ms. Butler notes there has been only one (1) request for exclusion, and zero objections. This is an overwhelmingly positive response to the settlement, and this factor weighs in favor of final approval.

Conclusion on *Dunk* Factors

On balance, the settlement satisfies the *Dunk* factors. The Court should grant the motion for final approval.

IV. Motion for Attorneys' Fees and Costs. Class counsel seeks a combined fee and cost award amounting to 1/3 of the $2.8 million gross settlement (which would amount to $933,333.33). However, the actual cost figure referenced by Mr. Favarote is $21,617.98 in costs, which would mean the actual *fee* request is $911,715.35.

When determining the amount of a fee award, the court should calculate it using the community's prevailing hourly rate for comparable legal services, even when the litigant did not pay the attorney the prevailing rate. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096. The burden is on the successful party to prove the appropriate market rate to be used in calculating the lodestar. Pearl, California Fee Awards (2006 Supp.), §12.33. Among the ways to demonstrate market rates are expert testimony (i.e., testimony from persons with specialized knowledge of billing rates) (*Children's Hosp. & Med. v. Bonta* (2002) 97 Cal.App.4th 740, 783); counsel's own billing rates, which carries a presumption of reasonableness (*Gusman v. & Unisys Corp.* (7th Cir. 1993) 986 F.2d 1146, 1150); rates awarded to the claiming attorneys in previous actions (*Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 904); rates awarded attorneys of comparable experience in other cases in the same market (*Children's Hosp. & Med. Ctr. v. Bonta, supra,* 97 Cal.App.4th at 783); surveys of billing rates; and opposing counsel's billing rates. Richard M. Pearl, California Fee Awards (2006), §12.33.

"[T]he ' 'reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors . . . the level of skill necessary, time limitations [imposed by the client or other limitations], the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' '[Citation.]" *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1139. "A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate." *Id.* at 1138-1139. "[I]n assessing a reasonable hourly rate, the trial court is allowed to consider the attorney's skill as reflected in the quality of the work, as well as the attorney's reputation and status." *MBNA American Bank, N.A. v. Gorman* (2006) 147

Cal.App.4th Supp. 1, 13. Once the party claiming fees presents evidence supporting the claimed rate, the burden shifts to the party opposing fees to present equally specific countervailing evidence. Pearl, California Fee Awards (2006 Supp.), §12.34 (referencing, *inter alia*, *Gates v. Deukmejian* (9th Cir. 1992) 987 F.2d 1392, 1405).

The lodestar calculations and hours for the attorneys who worked on the case are as follows:

Attorney	HOURS	RATE/HR.	TOTALS
Torey Favarote	921.10	$575	$529,632.50
Joseph Becerra	1023	$550	$562,650.00
Jing Tong, Michelle Moy, and Janet Yavrouian	27 combined	$370.09 (blended rate)	$992.50
TOTAL ATTORNEYS' FEES	1971.1 combined lodestar hours		$1,102,275 combined lodestar figure

When applying the factors discussed above in calculating the lodestar, the lodestar amount is in the ballpark, when using the amount going to the class as a cross-check. First, "amount to be obtained in the litigation" factor is somewhat high in justifying the $1,102,275 lodestar amount. The lodestar represents 46.86% of the actual $2,351,472.63 "total" settlement figure (i.e., factoring the amount actually going to the class, plus the fees, costs, and incentive payment). The hourly rates of counsel is in the range of what is charged in the Los Angeles legal market for mid-sized firms, and appear to be reasonable. Further, both Mr. Favarote and Mr. Becerra have significant experience in litigating wage and hour cases, as outlined in their declarations.

It is apparent that counsel utilized significant skill in prosecuting this case and achieving the settlement. Class counsel conducted substantial discovery, and conducted a thorough investigation of the claims in the litigation, as outlined in the Favarote Declaration. Ultimately, the case was able to settle (following the unsuccessful mediation before Mark Rudy). By all accounts, counsel have good reputations in the legal community. Moreover, the attorney hours of billed time between the two firms could have been spent on other cases, had class counsel chosen to prosecute them. This amount (1971.1 hours between the two firms) seems about right for a case which is just over two years old. On balance, and for these reasons, the lodestar figure of $1,102,275 is reasonable.

3. Negative Multiplier of approximately 0.8271 requested

Based on the $1,102,275 lodestar, a negative multiplier of approximately 0.8271 is being requested, resulting in an actual fee request of $911,715.35. Considering the factors in assessing the multiplier, this case was of medium-range difficulty to prosecute. There do not appear to have been any special novel or difficult legal questions involved, outside of the realm of the standard wage-and-hour case. Counsel used significant skill in arriving at the settlement, which is, on average, significant for each class member. The fact

counsel was able to avoid arbitration and negotiate a settlement also highlights the skill employed by counsel. While the amount of recovery itself is relevant to the attorney fee award, it cannot be the *sole* factor upon which the Court bases that award. *See Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 419-421. An award of attorney fees in class action litigation must be tied to counsel's actual efforts *to benefit the class*. *Mark v. Spencer* (2008) 166 Cal.App.4th 219, 229. Here, the amount of fees being sought is tied to counsel's actual work in the case and efforts to benefit the class. The class, is getting a significant settlement check, without the necessity of a claims process. As such, the negative multiplier of 0.8271 is appropriate, and the $911,715.35 is awarded, in full.

Costs

Class counsel seeks an additional $21,617.98 in combined litigation costs between Mr. Becerra's firm and Gleason & Favarote. However, there is nothing which sets forth a breakdown of the costs (even in general categories). While the costs may be reasonable, the Court defers an award of costs, pending a further declaration from Mr. Becerra and Mr. Favarote justifying the combined requested costs of $21,617.98

V. Incentive Payment. Class counsel seeks an incentive payment to the class representative, Andrea Ware, of $20,000. The court should consider the following factors, among others, in determining whether to pay an incentive or enhancement award to the class representative(s):

- Whether an incentive was necessary to induce the class representative to participate in the case;
- Actions, if any, taken by the class representative to protect the interests of the class;
- The degree to which the class benefited from those actions;
- The amount of time and effort the class representative expended in pursuing the litigation;
- The risk to the class representative in commencing suit, both financial and otherwise;
- The notoriety and personal difficulties encountered by the class representative;
- The duration of the litigation; and
- The personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. California Practice Guide, Civil Procedure Before Trial, ¶14:146.10 (The Rutter Group 2014) (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804; *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726; *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1394; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412).

Ms. Ware has submitted a Declaration outlining the tasks they performed as class representatives. Ms. Ware states that she provided "substantial work" for the case, which required that she miss time from work on her regular job and spend time away from her

family. [Ware Decl., ¶2.] Ms. Ware says she attended full-day depositions during which she was asked numerous questions over several hours (four days' worth). [Ware Decl., ¶2.] She also says she had to miss multiple days of work and pay for childcare to prepare for and attend each of the four depositions. [Ware Decl., ¶2.] She also had to find extended childcare for her son while performing her duties as class representative. [Ware Decl., ¶2.] She says that she had to pay many of the associated costs herself, and was not paid for the days she did not work. She also had to fly to Los Angels to attend the mediation on 8/26/13, and had to miss work for two days to attend the mediation and had to pay for child care to attend the mediation. [Ware Decl., ¶2.] Ms. Ware estimates that she also spent several hours reviewing and verifying discovery responses for this case, and searching for relevant documents. She estimates that she has spent at least an additional 75 hours since the beginning of the case looking for responsive documents, reviewing and revising all discovery requests and spending time talking to counsel regarding the status of the case, developments in the case, answering questions that counsel had re: SoHo House's operations, and providing any additional information needed from her by her counsel. [Ware Decl., ¶3.]

Ms. Ware also says she obtained information needed for the suit from her own investigation, and communicated with other class members. [Ware Decl., ¶5.] She claims to have participated in planning the strategy for, and success of, reaching a settlement, and assumes the risk of being black-listed with future employers for being the named representative in a class action against her former employer. [Ware Decl., ¶5.]

The efforts of Ms. Ware has resulted in a solid benefit to the class, where each classmember will be receiving, on average, about $2,132 per classmember. Undoubtedly, Ms. Ware took a considerable risk in suing, as well. These considerations, as well as the statements in her Declaration, support a significant multiplier. However, the Court will not award an exorbitant incentive payments to class representatives. The parties have all agreed on $20,000 figure; however, will approve not approve an incentive payment greater than $10,000.

VI. Costs of Administration. Simpluris requests administration costs in the amount of $24,713, "which includes all work to conclude Simpluris' duties and responsibilities pursuant to the settlement, issuance and mailing certified mail of settlement payment checks, to do the necessary tax reporting on such payments, answer class member questions, and the like." [Butler Decl., ¶19.] Other than this statement in Ms. Butler's Declaration, there is no supporting documentation justifying this amount. Given the relatively high administration cost request, Ms. Butler must provide a supplemental declaration, providing the Court with a breakdown justifying the $24,713 sought. The Court defers an award on administration costs, pending Ms. Butler's further Declaration and exhibit justifying these costs.