Motion for Preliminary Approval of Class Settlement (Judge Thomas E. Kuhnle)

Case Name: *Robinson, et al. v. Energy Remodeling, Inc., et al.*

Case No.: 2015-1-CV-287674

Plaintiffs Brian Robinson and Jason Fairchild ("Plaintiffs") bring this putative class action arising from various alleged violations of the Labor Code by defendants Energy Remodeling, Inc., David Barnes, Lior Etri, Ofir Attal, Ilan Benisty, and Rami Bildorf (collectively, "Defendants"). The Complaint, filed on November 3, 2015, sets forth the following causes of action: [1] Violation of California Labor Code Section 226; [2] Violation of California Labor Code Section 2802; [3] Unlawful, Unfair and Fraudulent Business Practices Pursuant to Business & Professions Code Section 17200, et seq.; and [4] Private Attorneys General Act of 2004: Labor Code Section 2698.

The parties have reached a settlement. Plaintiffs filed a motion for preliminary approval of the settlement that was originally set on February 17, 2017. The hearing on the motion was continued by the Court so Plaintiffs could file supplemental papers regarding whether the requirements for provisional certification are met. The papers have been filed and the Court now rules on the motion.

1. **Legal Standard**

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the

trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794.)

In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624.)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc., supra,* 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act

intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

1. **Discussion**

1. **The Proposed Settlement**

The terms of the settlement are as follows. Defendants will pay a maximum settlement amount of $250,000. (Declaration of Robin G. Workman in Support of Plaintiffs' Application for Order: (a) Granting Preliminary Approval of Class Settlement and Provisionally Certifying the Settlement Class; (b) Approving the Form and Manner of Notice to Provide to the Proposed Settlement Class and Directing That a Neutral Third Party Give Such Notice to the Proposed Settlement Class; (c) Approving Simpluris, Inc., a Neutral Third Party, as Claims Administrator; (d) Setting a Hearing for Final Approval of the Proposed Settlement and Award of Attorneys' Fees and Costs to Class Counsel and Enhancements to Class Representatives; (e) Appointing Workman Law Firm, PC as Class Counsel; and, (f) Appointing Named Plaintiffs Brian Robinson and Jason Fairchild as Class Representatives ("Workman Decl."), Exhibit E ("Settlement Stipulation"), p. 2:22-25.) The settlement is non-reversionary. (*Id*. at p. 7:7-9.)

The settlement fund includes allocations of $62,500 for attorneys' fees; up to $20,000 for actual litigation expenses; service awards of $5,000 to each named plaintiff; payment of $1,000 to the State of California for resolution of PAGA claims; and administration costs of up to $10,000. (Settlement Stipulation, pp. 18:8-20:6.) There are approximately 190 putative class members and Plaintiffs assert each class member will receive approximately $1,000 from the remaining net settlement amount. No claim forms will need to be submitted for class members to receive their payments.

(*Id*. at p. 14:20-26.) Uncashed checks will be tendered to the Department of Industrial Relations Unpaid Wages Fund, so that all settlement class members will have an opportunity to claim their payments after the expiration of their checks. (*Id*. at p. 18:1-7.)

Plaintiffs contend the settlement is within the range of reasonableness. The settlement was reached through arms'-length mediation on November 8, 2016. (Workman Decl., ¶ 11.) The case has not reached the certification stage yet; therefore, settlement at this stage of the litigation eliminates the risk that the case will not be certified, as well as the risk and expense of continuing the case to trial.

Plaintiffs assert that the potential total recovery for all claims is $760,130. (Workman Decl., ¶ 10.) The Court acknowledges that settlements are generally reached at a lower percentage of the total potential recovery and that settlement at an earlier stage prevents the accumulation of further litigation expenses and the risk of losing at trial. Accordingly, based on the information provided by Plaintiff, the Court finds the settlement is fair.

As stated above, Plaintiffs will seek class representative incentive payments of $5,000 for each class representative.

The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack

thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiffs have provided declarations from the class representatives regarding the amount of time they each spent on the case. Jason Fairchild states that he spent time answering questions, looking for documents, helping to find witnesses, and assisting in preparation for mediation. (Declaration of Plaintiff Jason Fairchild in Support of Plaintiffs' Application, ¶¶ 5-6.) Fairchild asserts he spent approximately 20 hours in connection with the case. (*Id*. at ¶ 6.) Brian Robinson states that he spent time on similar tasks, totaling approximately 20-25 hours. (Declaration of Plaintiff Brian Robinson in Support of Plaintiffs' Application, ¶¶ 5-7.) Under these circumstances, the Court finds that Plaintiffs have properly supported their requests for incentive awards and that the awards are justified.

The Court has an independent right and responsibility to review the requested attorneys' fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorneys' fees of up to 25% of the gross settlement fund (plus costs and expenses not to exceed $20,000). While 25% of the common fund for attorneys' fees is generally considered reasonable, Plaintiffs' counsel should submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees.

1. **Conditional Certification of Class**

Plaintiffs request that the putative class be certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

1. **Ascertainable Class**

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932.)

Plaintiffs request conditional certification of the following class: "[T]hose former and current sales managers and sales representatives who worked for Defendants from November 3, 2011 through the date of preliminary approval." Defendants have identified approximately 190 class members, 15 of which are sales managers, from their records.

The Court finds that the class is sufficiently numerous and that the parties have demonstrated class members can be determined through reference to Defendants' employment records. Therefore, the class is ascertainable.

2. **Community of Interest**

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Id*. at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

1. **Predominant Questions of Law and Fact**

Regarding the predominance of questions of law or fact:

The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

A class may be certified when common questions of law and fact predominate over individualized questions. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings

and the law applicable to the causes of action alleged.

(*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

Plaintiffs contend there are common questions of law and fact regarding whether Defendants failed to classify properly the sales representatives and failed to compensate them for all expenses incurred to do their jobs. Plaintiffs assert there is also a common question concerning whether Defendants were required to provide wage statements to the sales representatives. Accordingly, the requirement of common questions of law and fact is satisfied.

1. **Typicality**

Class representatives must have claims or defenses typical of the class.

The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Plaintiffs' claims arise out of the same course of conduct as the claims pursued on behalf of the class. Plaintiffs have sufficiently demonstrated typicality.

1. **Adequacy of Representation**

Regarding adequacy of representation, this factor "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Regarding the class representative's interest, the class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages is not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid*., internal citations and quotation marks omitted.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, Plaintiffs have hired experienced counsel. Plaintiffs have sufficiently demonstrated adequacy of representation.

3. **Substantial Benefits of Class Litigation**

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.*, *supra,* 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120-121, internal quotation marks omitted.)

As stated above, there are approximately 190 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually. It is clear that a class action provides substantial benefits both to the litigants and the Court in this case.

In sum, Plaintiffs have demonstrated that the proposed class should be conditionally certified.

1. **Class Notice**

Rule 3.769(f) of the California Rules of Court states: "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." For this reason, the Court must consider Plaintiffs' proposed notice procedure, and the content of the actual notice.

Here, the notice generally complies with the requirements for class notice. (See Workman Decl., Exhibit F.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion. In connection with the original moving papers for this motion, the Court stated that the notice must be changed to state that class members that want to object can appear and speak at the final approval hearing without providing any notice. This change has been made and the notice is approved. (See Declaration of Robin G. Workman in Support of Plaintiffs' Supplemental Application, Exhibit E.)

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Accordingly, the motion for preliminary approval of the class action settlement is GRANTED. The final approval hearing is set for June 2, 2017, at 9:00 a.m. in Department 5.

The Court will prepare the order.