

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 08-4342-VBF(Ex)**
CV 08-5330-VBF(Ex)/CV 08-7481-VBF(Ex)

Dated: **October 13, 2009**

Title: Rochelle Ingalls -v- Hallmark Retail, Inc., et al.
Nikki Fuzell -v- Hallmark Retail, Inc., et al.
Beverly Weaver -v- Hallmark Retail, Inc., et al.

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, UNITED STATES DISTRICT JUDGE

Rita Sanchez
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

None Present

PROCEEDINGS (IN CHAMBERS): **TENTATIVE RULING RE MOTION FOR FINAL APPROVAL OF SETTLEMENT [DOC. # 74]; MOTION FOR ATTORNEYS' FEES, LITIGATION COSTS, AND INCENTIVE AWARDS [DOC. # 75]**

I. Tentative Ruling

Based on the Motion papers, the Court would tentatively GRANT both the Motion for Final Approval of Class Action Settlement (doc. # 74) and the Motion for an Award of Attorneys' Fees, Litigation Costs, and Incentive Awards (doc. # 75),

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finding that the settlement is fair, reasonable, and adequate, and that the requested fees and costs are reasonable. Fed. R. Civ. P. 23(e), (h).

Prior to the October 16, 2009 Final Approval hearing, the parties are ordered to file a proposed judgment of dismissal that sets forth: (i) the class of persons who will be bound by the judgment; (ii) the factors that favor approval of the settlement; (iii) the adequacy of notice; (iv) that the requirements for class certification are met with respect to the settlement class; and (v) the release of claims that is part of the settlement. See Fed. R. Civ. P. 23(c)(3) & (e).

II. Background

Three class actions—*Ingalls v. Hallmark Marketing Corp.*, CV 08-4342 VBF; *Fuzell v. Hallmark Marketing Corp.*, CV 08-5330 VBF; and *Weaver v. Hallmark Marketing Corp.*, CV 08-7481 VBF—have been consolidated before the Court. The lawsuits variously allege that Defendant failed to pay wages, failed to provide meal/rest periods; failed to pay overtime; failed to pay minimum wage; failed to provide accurate wage statements; violated California’s unfair competition law; failed to reimburse expenses; and violated the Fair Labor Standards Act.

On May 18, 2009, the Court granted the parties’ Joint Motion for Preliminary Approval of Class Action Settlement (docs. # 71, 73), and conditionally certified a settlement class of “all current and former non-exempt, hourly employees employed by Hallmark Marketing Corporation in the State of California at any time between July 1, 2004 and May 18, 2009.” The parties now seek final approval of the proposed class action settlement and release, and an award of attorneys’ fees and other costs.

III. Motion for Final Approval of Class Action Settlement

Rule 23(e) of the Federal Rules of Civil Procedure states that a court may approve a class action settlement that binds class members “only after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). The

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decision whether to approve or reject a class action settlement is committed to the sound discretion of the trial court, but “the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited 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.” *Officers for Justice v. Civ. Serv. Comm’n of City & County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

A. The Settlement Is Fair, Reasonable, and Adequate

Assessing whether a class action settlement is fundamentally fair, adequate, and reasonable requires the district court to balance a number of factors, including: (i) the strength of the plaintiffs’ case; (ii) the risk, expense, complexity, and likely duration of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered in settlement; (v) the extent of discovery completed and the stage of the proceedings; (vi) the experience and views of counsel; (vii) the presence of a governmental participant; and (viii) the reaction of class members to the proposed settlement. *Id.* The pertinent factors support approval of the proposed settlement.

1. Strength of Plaintiffs’ Case. Plaintiffs recognize that Defendant has denied their claims and disputed that a class could be certified—Defendant has argued that individual issues as to hours worked and the calculation of administrative and travel time predominate over common issues. Mot. for Final Approval 10:21-24, 12:7-11. Defendant also maintained that it had policies in place requiring the proper payment of wages and reimbursable expenses. *Id.* 13:2-5. Plaintiffs further recognize the potential difficulties in ascertaining damages in an “off the clock” case such as this, in which there is no conclusive method for calculating damages. *Id.* 12:15, 16 n.1.
2. Risks of Further Litigation. Although Plaintiffs and class counsel believe this

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case is suitable for class certification, they recognize the risks presented by a motion for class certification, particularly in light of Defendant's position that individual issues predominate. *Id.* 10:21-24, 12:7-11. Both sides recognize the risks inherent in trial and the potential for appealable issues, and the added delay and costs that would result from additional litigation. *Id.* 15:18-16:6.

3. Maintaining Class Action Status. Plaintiffs faced uncertainty as to whether class action status could be maintained throughout trial. The class was certified in this case for settlement purposes only. As set forth above, Defendant maintained that it would oppose a motion for class certification on the ground that individual issues predominate. Defendant had already successfully opposed Plaintiff Ingalls' motion for conditional certification of the FLSA claims. *Id.* 2:26-27.

4. Settlement Amount. The settlement amount of \$5,625,000 is non-reversionary—the amount paid will not be reduced to the benefit of Defendant based on the number of claims made. After deducting the requested expenses and fees, \$3,458,750 would remain for distribution to the authorized claimants. *Id.* 4:26. Over 80% of this fund has been claimed—the settlement formula tailors each class member's compensation to the number of hours they worked, with class members employed as Territory Assistants receiving proportionally more compensation, based on a higher wage rate, than other class members. *Id.* 4:28, 5:9-10, 5:13-18.

Before deductions for expenses and fees, the average class member would receive approximately \$4,409, which represents a recovery of 2-3 hours of unpaid time per week per class member. *Id.* 5:11, 16:12-13. Plaintiffs estimate, based on the class representative's claims, that class members experienced approximately 5 hours per week of unpaid time. *Id.* 16 n.1. Thus, the settlement provides for a recovery of 40-60% of the estimated damages. *Id.* 16:15.

5. Stage of Proceedings. The parties engaged in discovery and negotiations prior to entering into the proposed settlement. Plaintiffs interviewed their clients and

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surveyed class members to determine the number of unpaid hours worked, reviewed Defendant's responses to Plaintiffs' interrogatories and document production requests, deposed Defendant's management-level employees, and consulted with a forensic expert regarding damages models. *Id.* 12:2-7, 12:24-13:11; Markham Decl. ¶ 12. The parties prepared lengthy mediation briefs and participated in a full-day mediation involving arms length negotiations before Mark Rudy, Esq., on January 22, 2009. Mot. 13:19-20. After several more days of negotiation, the parties agreed to the settlement amount of \$5,625,000 proposed by Mr. Rudy. *Id.* 13:28.

6. Experience and Views of Counsel. Class counsel are experienced in wage and hour and similar class actions, have participated in all aspects of the settlement negotiations, and have concluded that the settlement is fair, adequate, and reasonable. *Id.* 14:23-15:5.

7. Government Participant. This factor is not relevant to this case.

8. Reaction of Class Members. Class members have reacted favorably to the notice of settlement. Class notice was sent to the 3,846 class members, and no class member objected to the settlement. *Id.* 9:23-25. Class members filed 2,087 claims, a 53% claims rate, for over 80% of the funds available for distribution. *Id.* 10:6-8. Nine exclusion forms have been returned. Markham Decl. ¶ 5.

B. Notice Was Reasonable

The notice process approved by the Court during the preliminary approval stage was followed and is reasonable. Fed. R. Civ. P. 23(e); Mot. 1:13-20; Paul Decl. ¶¶ 1-15, Ex.A.

C. Class Certification Requirements for the Settlement Class Are Met

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As the Court found in preliminarily approving the proposed settlement, the settlement class meets the requirements for class certification. *See* Fed. R. Civ. P. 23(a) & (b); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-22 (1997).

IV. Motion for an Award of Attorneys' Fees, Litigation Costs, and Incentive Awards

Rule 23(h) states that "the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Rule 23(h) further states that in awarding attorney fees and costs, the court "may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a)." Fed. R. Civ. P. 23(h)(3). As described below, the Proposed Order Granting Class Counsel's Motion for Attorneys' Fees, Litigation Costs, and Incentive Awards (doc. # 75-7) satisfies the requirements of Rules 23(h) and 52(a).

Class counsel request approval of the following fees and costs:

1. Attorneys' fees. Class counsel seek \$1,875,000 as attorneys' fees, or approximately 33% of the common fund. This request comports with fee awards in comparable class actions. *See* Mot. for an Award 10:19-11:26.

In the Ninth Circuit, 25% is considered a benchmark rate, but factors such as achieving an "excellent result" for the class and the risk Class Counsel faced in bringing the case may support a higher percentage. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). Here, Class Counsel argue that the high level of responsiveness to the notice by the class, as measured by the high claims and distribution rates, support a 33% fee award. *See also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297 (N.D. Cal. 1995) (noting that class counsel fee awards of 30-50 percent are more typical where the common fund is less than \$10 million).

The reasonableness of a percentage award may be tested by applying the

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lodestar method. *See id.* at 298. Class counsel calculate their combined lodestar at \$1,174,155.50.¹ Mot. 4:3-18. A court may enhance the lodestar with a multiplier based on a variety of factors, including the risk counsel faced in bringing the litigation, to arrive at a reasonable fee under the circumstances: multipliers in the 3-4 range are common for lengthy and complex class action litigation. *Van Vranken*, 901 F. Supp. at 298. Here, a multiplier of only 1.55 yields a total of \$1,819,940.00, which validates the percentage requested. *See* Mot. for an Award 4:18-22.

2. Attorneys' costs. The attorneys' costs of \$54,528.85 for actual expenses incurred appear reasonable and are below the estimated attorneys' costs of \$75,000.00. *See id.* 16:10-11.

3. Incentive awards. Plaintiffs seek six \$10,000 incentive awards, or \$60,000 in total incentive awards: one award for each of the three named plaintiffs, and one award for each of three collective action certification declarants. *Id.* 17:3-19:24. These awards fall within the range of incentive awards in comparable class actions, and are supported by the assistance provided by the award recipients. *See id.* 18:24-19:19; *Van Vranken*, 901 F. Supp. at 299-300 (approving \$50,000 participation award).

Other expenses. The settlement also provides for payment of the following expenses out of the settlement fund, but these expenses are not the subject of the Motion for an Award:

4. Claims administrator expenses. The final administration expenses of \$70,556.18 appear reasonable and are below the estimated expenses of \$100,000.00.

¹Application of the lodestar method requires multiplying the reasonable hours expended by a reasonable hourly rate. *Van Vranken*, 901 F. Supp. at 298. Here, Class Counsel's lodestar figure is the product of their actual hours worked times an average blended hourly rate of \$525.00 per hour per firm. *See* Mot. 4:3-12. As set forth in the Motion, Class Counsel efficiently divided the work among the various firms involved in the three consolidated actions. *See id.* 2:10-26.

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See Mot. for an Award 16:15-21.

5. PAGA payment. The settlement provides for \$56,250, or 1% of the gross settlement amount, as a payment to the California Labor Workforce Development Agency (“the PAGA payment”), which appears reasonable. See Cal. Lab. Code § 2699.

V. Proposed Judgment

The parties did not submit a proposed judgment as to the class action settlement. Class counsel did submit a proposed order with respect to their Motion for an Award of Attorney’s Fees (doc. 75-7), but that proposed order only addresses attorneys’ fees, attorneys’ costs, and the incentive awards.

Proposed Order Granting Attorneys’ Fees, Litigation Costs, and Incentive Awards (doc. # 75-7). The Court would sign the proposed order. The proposed order adequately sets forth the facts and legal conclusions the Court must make to award attorneys’ fees and costs and the incentive awards under Rule 23(h)(3) and 52(a). The Proposed Order states that the class members were adequately notified of Class Counsel’s request for fees and costs and of the incentive awards, and that such fees and costs are reasonable under the circumstances of this case.

Proposed Judgment. No proposed judgment of dismissal has been filed. Within three (3) court days, before the October 16, 2009 Final Approval hearing, the parties are ordered to file a proposed judgment that identifies the class members who are bound thereby, in accordance with Rule 23(c)(3). The proposed judgment should also identify the factors that favor approval of the settlement, the adequacy of notice, that the requirements for class certification are met, and the release of claims that is part of the settlement. See Fed. R. Civ. P. 23(c)(3) & (e).

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