ORDER ON SUBMITTED MATTERS

FILED
January 22, 2021
Clerk of The Court
Superior Court of CA
County of Santa Clara
17CV312251
By: rwalker

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

LATANYA SIMMONS, et al.,

Plaintiffs,

vs.

APPLE INC., et al.,

Defendants.

Case No.: 17CV312251

ORDER CONCERNING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND JUDGMENT AND OF ATTORNEY FEES

This is a putative consumer class action challenging Defendant Apple, Inc.'s actions in connection with marketing, advertising, and selling allegedly defective Powerbeats 2 and Powerbeats 3 headphones. The parties reached a settlement, which the Court (Judge Walsh) preliminarily approved in an order filed on August 7, 2020. The factual and procedural background of the action and the Court's analysis of the settlement and settlement class are set forth in that order.

Before the Court are Plaintiffs' motions for final approval of the settlement and for approval of their attorney fees, costs, and service awards. Apple does not oppose Plaintiffs' motions, but one objection was submitted to class counsel and the settlement administrator. After considering that objection, the Court posted a tentative ruling on the Court's website on January 20, 2021. No party contacted the Court by 4 pm on January 20 to contest the ruling, as

required under the Court's local rules and the complex division's guidelines. At the January 21 hearing, however, one objector (Steven Helfand) was present to object to the settlement and Plaintiffs' claimed fees. Even though he had not given proper notice to the Court that he planned to object at the January 21 hearing, the Court permitted him to state his position at the hearing, and then permitted Plaintiffs' and Apple's counsel to respond to Mr. Helfand's objections.[1]

The Court then took the matters under submission. The Court now issues its final order. As explained below, the Court GRANTS Plaintiffs' motion for final approval of the settlement and Plaintiffs' motion for approval for their attorney fees, costs, and service awards.

I. LEGAL STANDARDS FOR CLASS ACTION SETTLEMENT APPROVAL

Generally, "questions whether a [class action] 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 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> 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, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and

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[1] Mr. Helfand stated at the January 21 hearing that he believed tentative rulings for final approval motions were improper and unlawful. The Court disagrees.

weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial 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.*, citation and 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, supra*, 91 Cal.App.4th at p. 245, citation omitted.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar*, *supra,* 168 Cal.App.4th at p. 130.)

II. TERMS AND ADMINISTRATION OF SETTLEMENT

The settlement states Defendant will pay a non-reversionary total of $9,750,000. (Settlement Agreement, § 1.23.) This amount includes attorney fees, costs, settlement administration costs estimated between $516,000 and $552,600, and service awards of $1,000 for each class representative. Checks not cashed for 90 days from the date of issuance will become void and will be distributed to a *cy pres* recipient, Consumer Federation of America. (*Id.* at §§ 3.3.4 and 3.3.6.) At preliminary approval, class counsel indicated that they would seek one third of the settlement fund, or $3,250,000, in attorney fees and costs. The settlement provides that Apple may respond to counsel's request as it deems appropriate, and Apple does not oppose it.

Class members must submit claims for payment. (Settlement Agreement, § 5.1.) Payments to class members will be made using a points system. (*Id.* at § 3.2.) Authorized

claimants with no proof of purchase and for whom there is no record of a warranty repair or replacement will receive one point. (*Id.* at § 3.2.1(a).) Authorized claimants with a valid proof of purchase or a warranty repair or replacement will receive two points. (*Id.* at § 3.2.1(b).) A "point multiplier" will be calculated by dividing the net settlement amount by the total points claimed and then the settlement share of each authorized claimant will be calculated by applying the multiplier to the claimant's points. (*Id.* at §§ 3.2.2-3.2.3.) The maximum amount an authorized claimant may receive is $189 multiplied by the number of valid proofs of purchase submitted. (*Id.* at § 3.2.3.) At preliminary approval, class counsel estimated the point multiplier would be approximately $38, meaning class members with no proof of purchase or record of repair or replacement would receive approximately $38 and class members with a proof of purchase or record would receive approximately $76. In fact, as described in the Devery Declaration filed on January 14, 2021, the point value will be at least $56.96, which is more favorable to the class.

Class members who do not opt out of the settlement will release "any actions, causes of action (in law, equity, or administratively), suits, debts, liens, or claims, known or unknown, suspected or unsuspected, fixed or contingent, which they may have or cla[i]]m to have, that directly or indirectly arise out of, relate to, or derive in any way from Powerbeats 2 earphones."[2]

The notice process has now been completed. There was only one objection to the settlement, discussed below, and there were 38 requests for exclusion from the class. Email notice was sent to 483,116 class members with valid email addresses, with 4,470 emails returned as undeliverable. A postcard notice was mailed to 11,246 class members for whom only postal addresses were available, as well as 2,178 class members whose email notices were returned but for whom the administrator had valid postal addresses. 2,406 postcard notices were returned as undeliverable and 1,687 were re-mailed to updated addresses. The administrator also conducted a digital notice campaign resulting in 37,625,575 digital banner ad impressions; ran a social media digital campaign resulting in 1,161,335 impressions; caused publication notice to be

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[2] The settlement class and release are limited to individuals who purchased and claims relating to Powerbeats 2 headphones, in light of discovery showing that Powerbeats 3 headphones had different design features. (Zavareei Decl., ¶ 12.)

printed in *People Magazine* and *USA Today*; and hosted a settlement website that has received has received 211,617 visitors and a toll-free telephone line that has received 303 calls.

The administrator received 554 claims by mail and 87,590 claims through an online portal. Following an initial review, it determined that 5,053 online claims required additional scrutiny and 7,039 claims appeared to be duplicates, for a total of 12,092 claims requiring enhanced review. As explained in the Devery Declaration, the administrator ultimately determined that 12,201 claim forms were fraudulent or duplicative.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims. It finds no reason to deviate from this finding now, especially considering that the payments to class members will be even higher than estimated at preliminary approval and that the percentage of objectors was quite small. The Court thus finds that the settlement is fair and reasonable for purposes of final approval.

The Court has read and considered the objection submitted by Steven Helfand, and considered the arguments he made at the January 21 hearing, although the Court notes that both parties challenge his standing to object. Mr. Helfand's arguments, which are largely unsupported by any reasoning or authority, do not persuade the Court that the settlement should not be approved. The thousands of claims that were submitted disprove Mr. Helfand's argument that the claims process was "convoluted" and that the settlement will only "pay the attorney fees, settlement administration costs and the incentive awards." Mr. Helfand fails to explain his assertions that notice to the class was "misleading and deceptive" and inadequate due to COVID-19.

Mr. Helfand cites *Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937 (*Molski*) for the proposition that "[t]he release is totally over-broad," but in that case

> the class members received nothing; the named plaintiff and class counsel received compensation for his injury and their time; and the defendant escaped paying any punitive or almost any compensatory damages. [Citation.] This outcome is particularly problematic because only a minimal amount of discovery

occurred in this case, and the primary components of the agreement were reached prior to filing of the class action.

(*Molski, supra*, 318 F.3d 937, 954, overruled on another ground by *Dukes v. Wal-Mart Stores, Inc.* (9th Cir. 2010) 603 F.3d 571, 617.) "The District Court abused its discretion by failing to afford notice and the right to opt-out because substantial monetary damages were released …." (*Id.* at p. 956.)

Here, by contrast, class members are receiving significant compensation—either a substantial portion or the entire cost of the products they purchased—and Plaintiffs' investigation of their claims was thorough. Mr. Helfand cites no evidence that class members have personal injury claims that are being released. There was substantial notice given to potential claimants, and there was a right to opt out of the settlement in this case, which 38 individuals exercised.

Moreover, Mr. Helfand's argument that counsel will receive payment before the effective date of the settlement is incorrect.[3] And he provides no evidence that the cy pres beneficiary is somehow beholden to Plaintiffs' counsel. He also claimed at the January 21 hearing that the cy pres beneficiary would be paid before the class, which is not true. Finally, his remaining substantive arguments pertain to the asserted weakness of Plaintiffs' case, which would seem to weigh in favor of settling the case as Plaintiffs did.

In sum, Mr. Helfand's written and oral objections do not change the Court's conclusion that the settlement warrants approval.

III. ATTORNEY FEES, COSTS, AND INCENTIVE AWARD

Plaintiffs seek a combined fee and cost award of $ 3,217,500, or one-third of the gross settlement. This is somewhat higher than the twenty- to twenty-five percent typically requested in a consumer class action with a large class size, but represents the standard percentage awarded in other types of class actions. Plaintiffs also provide a lodestar figure of either $1,964,637.40 or

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[3] While the settlement technically provides that counsel must be paid within 20 calendar days of the settlement administrator's receipt of the full gross settlement amount from Apple, Apple is not required to pay this amount until "[o]n or before ten (10) business days after" the effective date, and it is unlikely that it will do so before the effective date.

$1,966,850.60,[4] based on 2,856.45 hours spent on the case through October 30, 2020 by counsel with billing rates of $378–914 per hour and staff billed at $200–250 per hour. Plaintiffs' request results in a reasonable multiplier of around 1.59, after subtracting the $88,248 in unreimbursed costs that will also be paid from the fee award.

Overall, counsel's lodestar is reasonable, and the Court finds the multiplier is appropriate given the contingent nature of the fee award, the high uncertainty of recovery here, and the substantial time and costs invested by counsel in the case. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [in order to reflect the fair market value of attorney services, lodestar may be adjusted with a multiplier based on factors including the extent to which the nature of the litigation precluded other employment by the attorneys and the contingent nature of the fee award].) Viewed in light of this cross-check, the Court approves the one-third percentage fee requested. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

The administrator estimates that administrative costs will total up to $550,000, "although this number could decrease." This is within the range estimated at preliminary approval, and an award of administrative costs up to this amount is approved.

Finally, Plaintiffs request service awards of $1,000 each. To support their requests, they submit declarations describing their efforts on the case. The Court finds that the class representatives are entitled to enhancement awards and the amount requested is reasonable.

Mr. Helfand does not adequately justify his assertions that "[t]he attorneys fees are inflated" and "[n]o multiplier is justified." As a percentage of the total recovery, Plaintiffs' counsel's fees are not out of line, in the Court's view. The Court does not agree with Mr. Helfand that the billing rates for counsel or staff are outrageous and concocted for attorney fee purposes.

In short, the Court APPROVES the motion for attorney fees, costs, and service awards.

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[4] The former lodestar figure is stated in Plaintiffs' memorandum of points and authorities supporting their attorney fee motion, while the latter figure is stated in the supporting Zavareei Declaration.

IV. ORDER AND JUDGMENT

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motions for final approval and for approval of their attorney fees, expenses, and services awards are GRANTED. The following class is certified for settlement purposes:

> All persons residing in the United States who purchased new Powerbeats 2 earphones for primarily personal, family, or household purposes, and not for resale, before the date the Court entered the Preliminary Approval Order [(August 7, 2020)].

Excluded from the class are employees, officers, and directors of Apple, members of the immediate families of the officers and directors of Apple, and their legal representatives, heirs, successors, or assigns, and any entity in which they have a controlling interest. Also excluded from the class are the Court, and the Court's staff, as well as their heirs, successors, or assigns. Finally, the 38 individuals who submitted timely requests for exclusion are excluded from the class.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **October 7, 2021 at 2:30 P.M.** in Department 1. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

IT IS SO ORDERED.

Date: January 22, 2021

The Honorable Sunil R. Kulkarni
Judge of the Superior Court