

DEPARTMENT 310 - LAW AND MOTION RULINGS

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Superior Court of California  
County of Los Angeles

MAY 02 2017

Case Number: BC494909 Hearing Date: May 02, 2017 Dept: 310

Willis v. Thrifty Payless, Inc.

Sherril R. Carter, Executive Officer/Clerk  
By [Signature] Deputy

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR FEES, COSTS, AND INCENTIVE PAYMENT

Final Order

Grant final approval, finding that the settlement is fair, reasonable, and adequate. Award \$300,000 for fees and \$15,662.87 for costs to class counsel, ~~reduce~~ service award to the class representative to ~~5,000~~ \$35,000 for administrative costs to the claims administrator, and \$3,750 to the LWDA.

DISCUSSION

I. Background

This is a wage and hour class action. Plaintiffs Oscar Willis, Jr. and Renee Ortiz sue Defendant Thrifty Payless, Inc. for a variety of claims. The pleading alleges two basic types of claims: failure to reimburse employees for business-related expenses incurred when employees traveled from one store to another or to make bank runs using their personal vehicles; and a sub-class (for whom Ortiz is representative) of non-exempt managers, for whom Defendant failed to provide meal periods, etc.

The First Amended Complaint sets forth the following causes of action: (1) Failure to Reimburse for Expenses; (2) Failure to Provide Mandated Timely Off-Duty Meal Periods; (3) Failure to Pay Compensation Due Upon Separation of Employment; (4) Failure to Issue Accurate Itemized Wage Statements; (5) Unfair Business Practices; (6) for PAGA penalties.

Class Counsel has also filed a declaration supporting the request for dismissal of Plaintiff Willis, as his claims were subsumed in another settlement: *Fenley v. Rite Aid Corporation*. (Settlement Agreement, ¶1, FN 1; Declaration of Michael Malk re: Dismissal.)

Following mediation, Plaintiff Renee Ortiz and Defendant entered into a Class Action Settlement Agreement and Release Settlement Agreement. The Court granted preliminary approval of settlement on October 12, 2016. Now before the Court is Plaintiff's motion for final approval of the settlement agreement.

In light of the Joint Stipulation Clarifying Release Language in Class Action Agreement, entered into between Defendant and Plaintiff Renee Ortiz, Proposed Intervenor Matthew Ogura has withdrawn his Motion to Intervene filed in this Court on April 3, 2017.

II. Notices and Claims Process

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.

Simpluris, Inc. ("Simpluris") is the claims administrator for this settlement. (Declaration of Stephen Gomez, ¶1.) On December 13, 2016, Simpluris mailed the class notice to 3,278 class members who were identified as being current employees. (Id. at ¶8.) On December 13, 2016, Simpluris mailed the class notice and claim form to 4,114 class members who were identified as former employees. (Id. at ¶9.) For undeliverable class notices, Simpluris utilized Accurint to locate more current addresses. (Id. at ¶10.) Ultimately 107 notice packets were undeliverable. (Ibid.)

The last day for class members to submit a request for exclusion, a claim form, or object to the settlement was February 11, 2017. (Id. at ¶¶13, 16)

As of March 20, 2017, there are 4,074 Participating Class members, which represents 73.17% of the Net Settlement Amount before redistribution. The Participating Class Members consist of 3,276 Current Employees who did not request exclusion and 798 Former Employees who submitted claim forms. (Id. at ¶12.)

As of March 20, 2017, Simpluris received no objections. (Id. at ¶18)

As of March 20, 2017, CPT received 6 requests for exclusion. (Id. at ¶17). Of these, two were from Current Employees and four were from Former Employees

Based on the above, the Court finds that the notice procedure satisfies due process.

### III. *Dunk* Factors

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 (2012). 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.

#### Strength of the plaintiff's case

Class Counsel calculates the total maximum value of the claims to be \$2,251,554.98. (Malk Declaration ISO Preliminary Approval, ¶52.) This consists of the following: \$256,546 (Sub-IRS Rate claims) + \$433,934 (mileage for bank deposits) + \$1,181,541.98 (mileage for inter-store transfers) + \$379,533 (key holder meal break claims).

#### The risk of maintaining class action status through trial.

There is always a risk of decertification. [Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.").]

#### The 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.

Defendant has agreed to a non-reversionary \$900,000 settlement. This constitutes approximately 40% of the potential value of the claims and is thus within the ball park of reasonableness. If deductions are taken in the requested amounts, there would be a net of \$527,250. The average settlement payment is estimated to be \$129.41 ( $\$527,250 / 4,074 = \$129.41$ ).

#### The extent of discovery completed and the stage of the proceedings

Prior to the first mediation session, Class Counsel reviewed data produced by Defendant including Plaintiff's personnel file, information about the number of Rite Aid locations in California, data relating to the number of stores performing their own bank deposits and the average driving distances to the bank, extensive expert analysis of the inter-store transfer data, the number of class members and weeks worked, reimbursement policies and rates, and information relating to mileage reimbursement requests. (Declaration of Michael Malk ISO Final Approval, ¶45)

#### Experience and views of counsel

Class Counsel has sufficient class action experience (Id. at ¶¶4-41.) and is of the opinion that the proposed settlement is fair to the class (Id. at ¶61).

#### Reaction of the class members to the proposed class settlement

The class reacted positively in that no class member objected and 6 opted out. (Gomez Decl., ¶¶17-18.) The 4,074 participating class members represent 73.17% of the 7,392 settlement class members. (Gomez Decl., ¶¶6, 12.)

#### Conclusion on *Dunk* factors

On balance, this is a fair settlement that satisfies the *Dunk* factors, such that final approval is warranted.

#### IV. Attorney's Fees, Costs, and Incentive Payments

##### Attorneys' Fees

Class counsel requests attorney fees of \$300,000.

In general, the Court employs the lodestar method in awarding fees, as opposed to a "percentage of the common fund" method. This amount would reflect the actual work performed, plus a multiplier (if applicable) to recognize counsel's efforts. In true common fund cases, the Court may utilize the percentage method, as cross-checked by the lodestar. (*Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5<sup>th</sup> 480, 503.)

Here, fees are sought pursuant to the percentage method. (Motion for Class Counsel Fees and Costs at pgs. 1-3)

The \$300,000 fee request constitutes 33-1/3% of the potential recovery of \$900,000, which is within the average range. The determination of what constitutes an appropriate percentage "is somewhat elastic and depends largely on the facts of a given case, but certain factors are commonly considered. Specifically, the court may address the percentage likely to have been negotiated between private parties in a similar case, percentages applied in other class actions, the quality of class counsel, and the size of the award." [*In re Ikon Office Solutions, Inc., Securities Litigation* (E.D. Pa. 2000) 194 F.R.D. 166, 193.]

These factors favor the \$300,000 award. As for the first factor, private contingency fee agreements are routinely 30% to 40% of the recovery. [*Id.* at 194.] As for the second factor, although the median percentage of attorney fees in class actions is 25%, "most fees appear to fall in the range of nineteen to forty-five percent." [*Id.*] As for the third factor, Class Counsel has experience in class actions, including wage and hour related actions. Most importantly, Class Counsel achieved good results for the class as evidenced by the class members' reaction to the settlement. As for the fourth factor, Class Counsel negotiated a settlement agreement in which Settlement Agreement provides for a financial benefit in which approximately \$527,250 is distributed to 4,074 class members, with an average payout of approximately \$129.41.

The lodestar cross-check supports the fee request as well.

Class Counsel has presented evidence from which the lodestar may be calculated. Attorney Michael Malk spent 95.8 hours on this matter with a billing rate of \$625 per hour. Attorney Barry Goldstein spent 17.3 hours on this matter with a billing rate of \$865 per hour. Attorney Jala Amsellem spent 69.7 hours on this matter with a billing rate of \$650 per hour. Paralegal Linda Sieger spent 82.5 hours on this matter with a billing rate of \$200 per hour. (Malk Decl. at ¶178.) In total, Class Counsel will have spent 265.3 hours on this matter.

The hourly rate for class counsel and the hours spent appear to be reasonable. Accordingly, the total lodestar calculation is \$136,644.50. (*Ibid.*). Class Counsel's fee request of \$300,000 represents application of a lodestar multiplier of approximately 2.2. It appears that Class Counsel utilized skill in litigating this case, and by all accounts, have good reputations in the legal community; at the very least, there is no evidence before the Court to indicate that the attorneys have negative reputations in the legal community. It also appears that Class Counsel spent appreciable time on the case, which time could have been spent on other meritorious fee-generating cases.

For the foregoing reasons, the fee request of \$300,000 is granted. The Court notes that the notice advised class members of the maximum fee request of \$300,000 and not a single class member objected to it.

Costs

Class Counsel requests costs in the amount of \$15,662.87. Class Counsel's actual costs, as of April 3, 2017, amount to \$15,662.87. (Id. at ¶80 and Exhibit A thereto.) Class counsel's fee request is lower than the settlement agreement cap of \$20,000. Class Counsel's actual costs consist of mediation fees (\$10,000), travel fees (over \$1,600), court fees and attorney services (over \$500), and copies, scan and postage. All of the items of cost appear to be reasonable in amount and necessary to the litigation.

Because the \$20,000 maximum cost request was disclosed to class members and deemed unobjectionable, the Court awards costs in the requested amount of \$15,662.87.

#### Cost of Administration

Claims administrator CPT requests administration costs of \$35,000 (Gomez Decl., ¶18.) The Settlement Agreement estimated claims administration costs at \$35,000. (¶19.b.) Based upon the reasonableness of the costs and the fact that a cap was provided in the Settlement Agreement, the court awards costs in the amount of \$35,000.

#### Incentive Payments

Finally, Class Counsel seeks an incentive payments of \$14,000 to the class representative.

The Court considers the following factors, among others, in determining whether to pay an incentive or enhancement award to a class representative:

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 2012) (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).

Renee Ortiz is the class representative in this matter. Ms. Ortiz was employed by Defendant from July 1989 through November 24, 2011. (Declaration of Renee Ortiz, ¶13.) She participated in interviews and phone conferences with Class Counsel, searched for and produced relevant documents, reviewed pleadings and documents and communicated about the case with class members. (Id. at ¶16.) She also attended two all-day mediations. (Ibid.)

The Court grants a ~~\$5,000~~<sup>\$14,000</sup> incentive award to Ms. Ortiz for the following reasons:

- Her time and efforts in prosecuting this action on behalf of the class
- The benefits achieved for the class
- The employment risks she undertook