UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SA CV 18-1298 PA (MRWx)	Date	December 10, 2018
Title	Luis Duque, et al. v. Bank of America, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion for Preliminary Approval of Amended Class and Collective Action Settlement filed by plaintiffs Luis Duque and Daniel Thibodeau ("Plaintiffs") (Docket No. 26). Defendant Bank of America, N.A. ("BANA") does not oppose the Motion for Preliminary Approval. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for December 10, 2018, is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

Plaintiffs seek preliminary approval of their settlement of wage-and-hour claims on behalf of both a putative California class and a Fair Labor Standards Act ("FLSA") collective of all persons who were classified as exempt by BANA and worked as Client Advocates, Senior Client Advocates, Operations Consultants, Senior Operations Consultants, and/or other job titles performing the same or similar customer complaint processing duties in BANA's Regulatory Complaints and Social Media Servicing Group. The California wage-and-hour class defines a class period from January 5, 2014, to December 31, 2015, when BANA reclassified the effected workers to non-exempt status, and the FLSA collective covers a period from January 5, 2015, to December 31, 2015, because the FLSA has a shorter statute of limitations than do the California claims.

The Settlement Agreement includes a settlement amount of $1,950,000, from which 25%, or $487,500 would be awarded to Plaintiffs' counsel, up to $20,000 to reimburse litigation costs, named plaintiffs would receive $5,000 service awards, three additional plaintiffs who have already opted-in would receive $2,500 enhancement payments, and the claims administrator's fees would be capped at $20,000.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SA CV 18-1298 PA (MRWx)	Date	December 10, 2018
Title	Luis Duque, et al. v. Bank of America, et al.		

The Court previously denied Plaintiff's Motion for Preliminary Approval without prejudice because the parties' original settlement agreement included a procedure through which class members who did not timely exclude themselves from the Settlement Class would receive settlement payments by mail. The back of the check would have stated that by depositing the check, the payee opted-into the FLSA collective action, and agreed to release all relevant wage and hour claims at issue in this suit. The Court denied preliminary approval because the "back of the check" opt-in process proposed by the parties did not, in the Court's view, satisfy § 216(b) of the FLSA and effectively and impermissibly transformed the FLSA's opt-in requirement into a Rule 23 opt-out class.

The parties then agreed to an Amended Class and Collective Action Settlement ("Amended Settlement Agreement") that resolves the Court's concerns regarding § 216(b)'s opt-in requirement. Specifically, the Amended Settlement Agreement provides that members of the FLSA collective will have 90 days from the initial mailing of the Notice of Settlement to submit a Consent to Join Fair Labor Standards Act Settlement and Release of Claims form ("FLSA consent-to-join") to the claims administrator. Members of the FLSA collective who do not send in FLSA consents-to-join within 45 days after the initial mailing of the Notice of Settlement will receive reminder post cards. Members of the FLSA collective who do not submit valid and timely FLSA consents-to-join will not receive payment of FLSA-related settlement benefits and will not have released their FLSA claims.

II. Analysis

The parties request that the Court preliminarily approve the Amended Settlement Agreement under Federal Rules of Civil Procedure 23(a) and 23(b)(3). A plaintiff seeking a Rule 23(b)(3) class certification must first satisfy the prerequisites of Rule 23(a). Once subsection (a) is satisfied, the purported class must then fulfill the requirements of Rule 23(b)(3).

A. Rule 23(a) Requirements

Rule 23(a) establishes four prerequisites for class action litigation: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

1. Numerosity

The numerosity prerequisite is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). To establish that joinder of all members is "impracticable," the plaintiff need not show that it would be "impossible" to join every class

member. Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996). There is no specific number requirement, as the court may examine the specific facts of each case. Ballard v. Equifax Check Servs., Inc., 186 F.R.D. 589, 594 (E.D. Cal. 1999).

Here, the parties estimate that the settlement classes consist of approximately 321 individuals, with 150 in the California Class and 171 in the FLSA collective. Given the number of class members involved, the Court finds that the numerosity requirement is met.

2. Commonality

The commonality requirement is met if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is construed "permissively." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). All questions of fact and law need not be common; rather, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id. "'What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (quoting Richard Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Here, Plaintiffs contend that this action presents common questions concerning whether the administrative exemption under state or federal law applies to BANA's classification of the class and collective members and BANA's willfulness in making that classification. Given that these legal issues are shared by the putative class and collective members and are based on a common core of salient facts, the Court concludes that the commonality requirement is met.

3. Typicality

Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Representative claims are "typical" if they are "reasonably co-extensive with those of absent class members"; they "need not be substantially identical." Hanlon, 150 F.3d at 1020. However, class representatives "must be able to pursue [their] claims under the same legal or remedial theories as the unrepresented class members." In re Paxil Litigation, 212 F.R.D. 539, 549 (C.D. Cal. 2003).

In the present case, both Plaintiffs and the putative class and collective members have suffered from the same allegedly wrongful conduct by BANA because Plaintiffs were subjected to each of the employment practices alleged in the Complaint. The Complaint alleges that Plaintiffs and the putative class and collective members were all injured by common employment practices that were uniformly applied to each of BANA's non-exempt employees. Accordingly, the Court finds that the typicality requirement is met.

4. Adequacy of Representation

Rule 23(a) also requires that the representative parties be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representation is adequate if the plaintiffs: (1) "do not have conflicts of interest with the proposed class" and (2) are "represented by qualified and competent counsel." Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1185 (9th Cir. 2007). At the heart of this requirement is the "concern over settlement allocation decisions." Hanlon, 150 F.3d at 1020.

Here, Plaintiffs and their counsel appear to be qualified and competent. Plaintiffs' counsel has had extensive class action litigation experience, including experience as lead counsel in a number of wage and hour class actions similar to the current action. Also, no conflicts of interest appear to exist between Plaintiffs and the class and collective or unique defenses that apply only to Plaintiffs or would otherwise suggest that they are inadequate representatives. The Court therefore concludes that Plaintiffs have satisfied the prerequisites of Rule 23(a).

B. Rule 23(b)(3) Requirements

Rule 23(b)(3) requires the Court to find that: (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance of Common Questions

The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Hanlon, 150 F.3d at 1022. This analysis requires more than proof of common issues of law or fact. Id. Rather, the common questions must "present a significant aspect of the case [that] they can be resolved for all members of the class in a single adjudication." Id.

"When the claim is that an employer's policy and practices violated labor law, the key question for class certification is whether there is a consistent employer practice that could be a basis for consistent liability." Kamar v. Radio Shack Corp., 254 F.R.D. 387, 399 (C.D. Cal. 2008). Class certification is usually appropriate where "liability turns on an employer's uniform policy that is uniformly implemented, since in that situation predominance is easily established." Id. Common claims predominate where a company-wide policy governs how employees spend their time and/or how they are paid. See, e.g., Wright v. Linkus Enterprises, Inc., 259 F.R.D. 468, 473 (E.D. Cal. 2009) (finding predominance, despite minor factual difference between individual class members, where the case involved "alleged policies that required class members to work without compensation, meal and rest periods, and/or reimbursement for expenses"); In re Wells Fargo Home Mortg. Overtime Pay Litig., 527 F. Supp. 2d 1053, 1065-68 (N.D. Cal. 2007) (finding predominance where, as a general matter, the defendant's policy and practice regarding compensation and exemption was uniform for all putative class members).

Here, the alleged claims stem from BANA's consistent employment practices that were uniformly applied to each of BANA's Client Advocates, Senior Client Advocates, Operations Consultants, Senior Operations Consultants, and/or other job titles performing the same or similar customer complaint processing duties in BANA's Regulatory Complaints and Social Media Servicing Group. During the applicable class periods, all of the putative class and collective members were subject to the same policies. Accordingly, the predominance requirement is met.

2. Superiority

The superiority inquiry requires determination of "whether objectives of the particular class action procedure will be achieved in the particular case." Hanlon, 150 F.3d at 1023. Notably, the class-action method is considered to be superior if "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (citation omitted).

Here, the large number of putative class and collective members and the commonality of the issues presented render the class action procedure a superior method to address the putative class members' claims. If each class member filed an individual action, the potential recovery for each individual might be considerably less, given the attorneys' fees and costs that would be incurred by each individual member. See Hanlon, 150 F.3d at 1023 ("Even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs."). Accordingly, a class action constitutes a superior method of adjudication, and Plaintiffs have satisfied the requirements of Rule 23(b)(3).

C. Fairness of the Proposed Class Settlement

Rule 23(e) requires a district court to determine whether a proposed class action settlement is "fundamentally fair, adequate, and reasonable." Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003). To make this determination, the court must consider a number of factors, including: (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. See id. Also, the settlement may not be the product of collusion among the negotiating parties. In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000).

At the preliminary approval stage, some of these factors cannot be fully assessed. Accordingly, a full fairness analysis is unnecessary. See Alberto v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008); Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 237 F.R.D. 26, 34 (E.D.N.Y. May 2006). Rather, the court need only review the parties' proposed settlement to determine whether it is within the permissible "range of possible judicial approval" and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate. Wright v. Linkus Enters., 259 F.R.D. 468, 472 (E.D. Cal. 2009). "[T]he 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." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998). The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992).

1. Strength of Plaintiffs' Case

Plaintiffs believe the proposed Amended Settlement Agreement is fair and reasonable. In the absence of settlement, Plaintiffs faced the risk of unfavorable rulings on the application of the administrative exemptions to their claims and difficulty in establishing BANA's willfulness. The parties conducted informal discovery prior to their negotiation of the Amended Settlement Agreement. Given the additional briefing and discovery that would be required were this action not to settle at this stage, the likelihood and expense of continued litigation favors approval of the proposed Amended Settlement Agreement.

2. Amount Offered in the Amended Settlement Agreement

Plaintiffs' counsel believes that the terms of the proposed settlement agreement are an exceptional result for the class and collective members. Specifically, Plaintiffs' counsel estimates that under the best case scenario, total estimated value of the claims would be under $5.1 million. The settlement amount of $1.95 million is therefore a good result for the class and collective members in light of the difficulties and expenses of litigating and maintaining this matter as a class action. Claims and administrative expenses are capped at $20,000, while the two named Plaintiffs will receive enhancement awards of $5,000 each, and FLSA opt-in plaintiffs Gamble, Fuentes, and Abad will receive enhancement payments of $2,500 each. The proposed Amended Settlement Agreement also provides that attorneys' fees will not exceed the Ninth Circuit's 25% benchmark for reasonableness. See Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). In return for these awards, the putative class members and collective members who opt-in agree to release BANA from any and all claims, whether known or unknown, arising from the allegations set forth in the Complaint, and arising during the class period. Finally, the cy pres beneficiary, Legal Aid at Work, has a strong nexus to the subject matter and claims. The Court therefore concludes that the total settlement amount and proposed distribution of funds appears to be reasonable and therefore favors approval of the proposed Amended Settlement Agreement.

3. Extent of Discovery Completed and Stage of the Proceedings

The parties indicate that they have exchanged comprehensive informal discovery in this case. BANA provided to Plaintiffs information and documents relating to the number and wages of employees subject to the challenged wage and hour policies and the total number of employees in the class and collective. It appears that the parties have spent a significant amount of time considering the issues and facts in this case and are in a position to determine whether settlement is a viable alternative to further litigation.

4. Experience and Views of Counsel

The Court finds that Plaintiffs' counsel has had sufficient experience with class action litigation to appropriately assess the legal and factual issues in this matter and determine whether the proposed Amended Settlement Agreement serves the interests of the class and collective members. Given that Plaintiffs' counsel believes the proposed Amended Settlement Agreement is both fair and adequate, this also weighs in favor of preliminary approval.

5. Collusion between the Parties

To determine whether there has been any collusion between the parties, courts must evaluate whether "fees and relief provisions clearly suggest the possibility that class interests gave way to self interests," thereby raising the possibility that the settlement agreement is the result of overt misconduct by the negotiators or improper incentives for certain class members at the expense of others. Staton, 327 F.3d at 961.

Here, there is no evidence of overt misconduct. The proposed Amended Settlement Agreement is the product of extensive negotiations between the parties, including a mediation session conducted with the assistance of a neutral settlement officer.

For all of these reasons, the Court concludes that the proposed Amended Settlement Agreement submitted by the parties is within the "range of possible judicial approval." Wright, 259 F.R.D. at 472.

D. Notice to the Class

Under Federal Rule of Civil Procedure 23(e), this Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Such notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." Rodriguez v. West Publ'g Corp., 563 F.3d 948, 962 (9th Cir. 2009).

Here, the proposed notice plan submitted by the parties is reasonably calculated to reach the members of the class and collective. The parties have selected a neutral claims administrator who will handle all communications to and from the class members. The parties have agreed that no later than 15 days after the Court's entry of this order, BANA will provide the claims administrator with a database containing the employment periods, names, social security numbers, and last known addresses of all the class and collective members. Within 10 days of receiving the class list, the claims administrator will determine the preliminary net pro rata distribution that each class member is eligible to receive, and shall provide counsel for Plaintiffs and BANA with a list of all such amounts. Within 7 days after receiving the claims administrator's report, counsel will jointly review the claims administrator's calculations to determine if they are consistent with the Amended Settlement Agreement. The claims administrator will send a Notice of Proposed Class Settlement and Final Fairness and Approval Hearing to class and collective members via first class mail within 5 days of receiving approval from counsel. The claims administrator will make efforts to determine a correct address for any

mail that is returned as undeliverable and will send a reminder postcard to eligible class and collective members after 45 days for those class and collective members who have not responded by that date. Class and collective members will have 90 days from the date that the notices are mailed to postmark their claim forms, written objections, requests for exclusion, and consents to join the FLSA collective.

The proposed notice describes the essential terms of the proposed Amended Settlement Agreement, defines the class and collective, sets forth the procedures for opting out of the class, opting in to the FLSA collective, filing objections to the proposed Amended Settlement Agreement, and provides information on the date, time, and location of the fairness hearing. The Court finds that these notice methods are reasonably calculated to afford the class members an opportunity to present their objections. As such, the parties are ordered to issue settlement notices to the class pursuant to the proposed notice plan and substantially in the form submitted for the Court's approval as Exhibits 1 and 2 to the Amended Settlement Agreement. (Docket No. 26).[1/]

Conclusion

The parties' Motion for Preliminary Approval of Amended Class and Collective Action Settlement is granted. The fairness hearing for final approval of the proposed Amended Settlement Agreement is set for May 13, 2019, at 1:30 p.m. in this Court. A Motion for Final Approval of the Amended Settlement Agreement, as well as any Motion for Attorneys' Fees and Costs, shall be filed in accordance with Local Rule 6-1. The Court vacates the Scheduling Conference calendared for December 10, 2018.

IT IS SO ORDERED.

[1/] The Court notes, however, that the proposed Notices of Class and Collective Action incorrectly list an address for the Roybal Federal Building and United States Courthouse as the Court's mailing address for those class members who mail a Notice of Intention to Appear directly to the Court. The correct address is: First Street United States Courthouse, 350 West 1st Street, Suite 4311, Los Angeles, CA 90012-4565.