

Habelito v. Guthy-Renker, LLC

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: February 1, 2017
Department: 308
Case No.: BC499558

FILED
Superior Court of California
County of Los Angeles

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SHERRI A. CABRERA, EXECUTIVE OFFICER/CLERK
BY [Signature] Deputy
BENIGNO DEL BARRIO

RULING:

- (1) The settlement appears to be in the range of reasonableness of a settlement that could ultimately be granted final approval by the Court;
- (2) Grant conditional class certification;
- (3) Appoint Wucetich & Korovilas, LLP as Class Counsel;
- (4) Appoint Jennifer Habelito as Class Representative;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below.

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

As a "fiduciary" of the absent class members, the trial court's duty is to have before it sufficient information to determine if the settlement is fair, adequate, and reasonable. (7-*Eleven Owners for Fair Franchising v. The Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, 1802 ("*Dunk*").)

California Rules of Court, rule 3.769 governs settlements of class actions. Any party to a settlement agreement may submit a written notice for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. California Rules of Court, rule 3.769(c).

In determining whether to approve a class settlement, the court's responsibility is to "prevent fraud, collusion or unfairness to the class" through settlement and dismissal of the class action because the rights of the class members, and even named plaintiffs, "may not have been given due regard by the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.)

FAIRNESS OF THE SETTLEMENT AGREEMENT

In an effort to aid the Court in the determination of the fairness of the settlement, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245 ("*Wershba*"), discusses factors that the Court should consider when testing the reasonableness of the settlement.

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* at 245, citing *Dunk* at 1802.) The test is not the maximum amount

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plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba* at 250.)

In making this determination, the Court considers all relevant factors including “the strength of [the] 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.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (“*Kullar*”), citing *Dunk* at 1801.)

“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”))

TERMS OF SETTLEMENT AGREEMENT

The class is defined as members of the Certified Class. (¶1.5)

The Certified Class means, “all California citizens who, between January 22, 2009 and July 8, 2014, purchased Proactiv products from Guthy-Renker and, as a result of their purchase, were automatically enrolled in Guthy-Renker’s automatic delivery and automatic renewal billing policy and charged for additional products and shipments beyond their initial purchase. As of April 2016, Guthy-Renker’s records indicate, and Guthy-Renker has confirmed, that the Class consists of approximately 761,005 individuals. The terms ‘Class’ or ‘Certified Class’ shall not include any persons who validly and timely submit a Request for Exclusion according to the terms of this Agreement, nor any officers, directors, employees, or agents of Guthy-Renker, the Court, or the Parties’ counsel.” (¶1.4)

For purposes of settlement only, the parties stipulate to class certification. (¶2.1)

Injunctive Relief and Change in Practices

“The parties agree to entry by the Court of a Stipulated Injunction . . . which shall contain the following provisions:

(a) Guthy-Renker shall not:

- (1) Fail to present its automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer.
- (2) Charge the consumer’s credit or debit card or the consumer’s account with a third party for an automatic renewal or continuous service without first obtaining the consumer’s affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms.

- (3) Fail to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, Guthy-Renker shall also disclose in the acknowledgement how to cancel and allow the consumer to cancel before the consumer pays for goods or services.
- (b) Guthy-Renker shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgement specified in paragraph (3) of subdivision (a).
- (c) In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer, Guthy-Renker shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.
- (d) The requirements of these provisions shall apply only prior to the completion of the initial order for the automatic renewal or continuous service except as follows: (1) The requirements in paragraph (3) of subdivision (a) may be fulfilled after completion of the initial order. (2) The requirements in subdivision (c) shall be fulfilled prior to implementation of the material change.
- (e) 'Automatic Renewal Terms' or 'Automatic Renewal Offer Terms' shall have the meanings set forth in Cal. Bus. & Prof. Code §17601.
- (f) For purposes of Section 2.2(a)(1), 'clear and conspicuous' or 'clearly and conspicuously' means in a larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language. . . .
- (g) In furtherance of the above provisions, Guthy-Renker's practices shall include, but not be limited to, the following: (1) The 'terms and conditions' page of any of Guthy-Renker's website(s) which sell products under continuous or automatic renewal terms shall set forth in full the terms of its automatic renewal billing and cancellation policies. . . . (2) Guthy-Renker shall maintain on such website(s) a check-box requiring customers to expressly agree to Guthy-Renker's terms and conditions, which shall be hyperlinked, and the line item language immediately next to the check-box shall specifically reference the automatic renewal billing and cancellation policy . . ." (¶12.2)

Settlement Fund and Class Relief

"Guthy-Renker shall disburse to Class Members the following relief, including making available to Class Members up to \$15,220,100 in cash on a claims-made basis, together with the non-monetary relief described below:

- a. **Claims for Cash; Minimum \$20, Maximum \$75.** All Class Members shall be entitled to submit a claim to the Claims Administrator for cash relief. Guthy-Renker agrees to make a minimum cash payment of \$20 to each Class Member who submits a timely and valid Claim Form to the Claims Administrator. Depending on the number of valid claims

- submitted, Class Members may receive on a pro rata basis up to a maximum cash payment of \$75 as set forth herein.
- b. **Alternative Option to Claim Product Worth \$75 Minimum.** All Class Members shall be entitled to alternatively submit a claim for a minimum of \$75 worth of Eligible Product (defined below) pursuant to the terms of Section 2.3(c) below, plus free shipping, by so electing on the Claim Form. Any Class Member who submits a claim to receive Eligible Product shall not be entitled to receive cash.
 - c. **Automatic Distribution of \$75 Worth of Product to Class Members Who Do Not Submit a Claim and who are Current Subscribers for Whom Guthy-Renker Possesses Current Contact and Address Information.** For any Class Member who does not submit a claim for either the cash or product option, and who is a Current Subscriber, Guthy-Renker shall automatically distribute to each such Class Member, without a claim process, a minimum \$75 worth of product, plus free shipping. [additional terms]
 - d. **Automatic Distribution of Merchandise Certificates for Minimum \$75 Worth of Product to Class Members Who Do Not Claim Cash or Product.** For Class Members who do not submit a claim for either the cash or product option, and who are not Current Subscribers, Guthy-Renker shall automatically distribute to each such Class Member, without a claims process, a Merchandise Certificate entitling the Class Member to redeem the Merchandise Certificate for a minimum \$75 worth of product, to be fulfilled from Eligible Product pursuant to the terms of Section 2.3(c) above. [additional terms]
 - e. **Minimum \$2,500,000 Cash Payment to Class Members or Cy Pres.** Guthy-Renker agrees and guarantees it will distribute at least two million five hundred thousand dollars (\$2,500,000) cash to Class Members and/or a cy pres recipient jointly selected by Plaintiff and Guthy-Renker, subject to Court approval, by establishing a Qualified Settlement Fund consisting of an initial minimum of \$2,500,000 cash. [additional terms]" (§2.3)
 - **Based on information provided in response to the Court's Checklist, the Court approves Consumer Federation of California and Public Counsel as cy pres recipients, subject to later allocation.**

The parties agree that Plaintiff's counsel may apply for an award of attorney's fees and costs of up to \$5,150,000. (§2.4)

The parties agreed to a \$10,000 incentive award. (§2.5)

Guthy-Renker to bear all reasonable costs of claims administration. (§2.6)

The claims administrator is KCC Class Action Services, LLC. (Wucetich Declaration, §20.)

The time to object or opt out is 60 days. (§§ 3.3, 3.4)

In response to the Court's checklist regarding the time for class members to submit claims, the Supplemental Brief states that the same 60 day period for class members to opt-out or

object applies to the submission of claims. (Supplemental Memorandum ISO Motion for Preliminary Approval, pg. 2)

All class members who do not opt out will release certain claims, discussed in detail below.

ANALYSIS OF SETTLEMENT AGREEMENT

A. Does a Presumption of Fairness Exist?

1. Was the Settlement reached through arm's-length bargaining? Yes. Settlement was reached only after numerous settlement discussions, including four formal mediation sessions with the Hon. Peter D. Lichtman, (Ret.). (Wucetich Declaration, ¶2.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. Class Counsel conducted a thorough investigation, engaged in formal and informal discovery, deposed witnesses, and issued subpoenas. (Id. at ¶7.) The evidence sought pertained to class certification, liability, and damages. (Ibid.) Defendant responded to all discovery requests and produced voluminous documents related to its renewal billing policies and the impact of those policies on consumers. (Id. at ¶8.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel and his firm have experience with consumer class action litigation. (Id. at ¶¶10-14.)

4. What percentage of class has objected? This cannot be determined until the fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 14:139.18 ("Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing.")

B. Is the settlement fair, adequate and reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar* at 130.) If Plaintiff prevailed at trial, Class Counsel estimates that class members could have obtained \$60-\$100 each, or more. (Motion at 6:22-23.) Defendant strongly disputed Plaintiff's damage theory and argued against strict liability. (Id. at 7:3-5.) This case was heavily litigated for nearly four years. (Wucetich Declaration, ¶9.) Class Counsel is not aware of any appellate case law interpreting B&P Code §17600, which is a relatively new statute. (Ibid.) These factors had to be weighed against the strength of the case when negotiating the settlement.

2. Risk, expense, complexity and likely duration of further litigation. Further litigation carried the possibility of non-certification and unfavorable rulings on the merits on the above legal issues.

3. Risk of maintaining class action status through trial. It would have been Plaintiff's burden to maintain the class action through trial.

4. Amount offered in settlement. With this settlement, Defendant will provide a \$2,500,000 cash settlement, as well as injunctive relief which, while difficult to place a dollar value on, may be worth tens of thousands of dollars. (Motion at 9:18.)

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Plaintiff has completed sufficient discovery in order to make an informed decision.

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6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions, including consumer class action litigation. Class counsel endorses the settlement as fair, reasonable, and adequate. (Wucetich Declaration, ¶9.)

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object or opt-out. This factor becomes relevant during the fairness hearing.

SCOPE OF RELEASE

Upon entry of Final Approval and Judgment, Class Members (and their heirs, etc.) who have not opted out will release Defendant (and related entities) from, "any and all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of or relating to any of the acts, omissions or other conduct alleged in the Action, including, but not limited to, (1) any and all violations of Cal. Bus. & Prof. Code §17200 *et seq.*; (2) any and all violations of California's the Consumer Legal Remedies Act, Cal. Civil Code §1750 *et seq.*; (3) any and all violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §17200 *et seq.*; (4) fraud; (5) negligence; and (6) breach of contract and the alleged related claims, specifically with respect to Guthy-Renker's automatic renewal billing for its Proactiv line of skin care products and allegations that Guthy-Renker has been unlawfully imposing unauthorized renewal charges for products that consumers never ordered." (¶4.4)

Plaintiff's release includes a CC §1542 waiver. (¶¶ 4.3, 4.5)

The releases appear to be proper. First, the release by the participating class members is narrow in scope since it is limited to the facts of this case. Second, the broader release by the class representative is acceptable as she was represented by counsel when agreeing to such terms.

CONDITIONAL CLASS CERTIFICATION

A. Standards

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified. (*Amchem Products, Inc. v. Winsor* (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (*Dunk* at 1807, fn. 19.) Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859.) Finally, the Court is under no "ironclad requirement" to conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (*Wershba* at 240.)

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B. Analysis

1. Numerosity. There are approximately 761,005 class members. (Settlement Agreement, page 2, ¶G.) Thus, numerosity has been sufficiently established.

2. Ascertainability. The class is defined as, "all California citizens who, between January 22, 2009 and July 8, 2014, purchased Proactiv products from Guthy-Renker and, as a result of their purchase, were automatically enrolled in Guthy-Renker's automatic delivery and automatic renewal billing policy and charged for additional products and shipments beyond their initial purchase. As of April 2016, Guthy-Renker's records indicate, and Guthy-Renker has confirmed, that the Class consists of approximately 761,005 individuals. The terms 'Class' or 'Certified Class' shall not include any persons who validly and timely submit a Request for Exclusion according to the terms of this Agreement, nor any officers, directors, employees, or agents of Guthy-Renker, the Court, or the Parties' counsel." (Settlement Agreement, ¶1.4) This class definition "is precise, objective and presently ascertainable." (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.)

Class members are identifiable based on a review of Defendant's records. (Settlement Agreement, ¶3.2)

3. Community of interest. "The community of interest requirement involves three factors: '(1) predominant common 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.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) As for the first factor, the class members share common questions of law and fact regarding the legality of Defendant's automatic renewal and automatic billing practices. Further, the class members' claims arise from Defendants' automatic renewal and billing policies. Lastly, the named Plaintiff can adequately represent the class because her interest in this action is the same as all class members.

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions, including consumer litigation.

5. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

Since the elements of class certification have been met, the class may be conditionally certified at this time.

NOTICE TO CLASS

A. Standard

California Rules of Court, rule 3.769(e) provides: "If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." Additionally, rule 3.769(f) 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. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement."

B. Form of Notice

Notice will be provided by e-mail, postcard, and internet publication. (¶3.2) The proposed long form notice is attached to the Settlement Agreement as Exhibit A. The information provided in the proposed notice includes a summary of the litigation, the nature and terms of the settlement, the various procedures for participating in, opting out of, or objecting to the settlement, and the time, date, and location of the final approval hearing. The Court finds the notice acceptable.

C. Method of Notice

Within 14 calendar days of preliminary approval, the claims administrator will provide the class members with written notice via e-mail to all class members. (¶3.2(a)) No later than 14 days prior to the expiration of the period for timely objections and/or requests for exclusion, the claims administrator will provide the class with second e-mail, reminding them of the pending deadline. (Ibid.)

No later than 14 days after providing e-mail notice, the claims administrator will provide via U.S. mail of the short-form notice to class members for whom the e-mail notice was returned as undeliverable or bounced back. (¶3.2(a)(1))

Starting no later than 14 days after preliminary approval, the claims administrator will set up an internet based website at which it will post the class notice and settlement documents. (¶3.2(b))

The proposed means of providing notice appears to provide the best possible means for giving actual notice to the putative class members.

D. Cost of Notice

Defendant will bear all reasonable costs of claims administration, and this amount will be paid separately from the other amounts of cash relief. (¶2.6) Prior to the time of final approval, the Claims Administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

ATTORNEY FEES AND COSTS

California Rules of Court, rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the Court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) In a common fund case, the Court may utilize the percentage method, cross-checked by the lodestar. (*Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503.) Despite any agreement by the parties to the contrary, "the court had an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th 123, 128.)

The question of whether class counsel is entitled to \$5,150,000 for fees and costs will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees. The Court will utilize the lodestar method to determine attorney fees and cross-check it against

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the percentage-of-recovery method. (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) Plaintiff's counsel is advised that he must provide the Court with billing information so that it can properly apply the lodestar method and indicate what modifier they are seeking as to each counsel. Counsel must also give a brief summary, in chart form, of these billing records by indicating how much time was spent on discovery, motion preparation, research, etc. by each attorney or paralegal who worked on this matter.

The parties should also indicate if there is a fee-splitting agreement among counsel and, if so, whether such was disclosed. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219; California Rules of Professional Conduct, §2-200; California Rules of Court, rule 3.769.) As noted in Haning, et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2011) ¶ 1:79.1: "An agreement between attorneys to split fees in a class action must be 'set forth in full' in any application to the court to approve dismissal or settlement of the action (CRC 3.769). Failure to do so bars a party to the agreement from bringing a later action against another party to enforce the fee split."

Counsel should also be prepared to justify any costs sought by detailing how such costs were incurred.

PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is proposed by the Court:

Preliminary Approval Hearing – February 1, 2017

Deadline for Serving Notices to Class Members – February 15, 2017

Deadline for Postmark of Opt-Outs and Objections – April 16, 2017

Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees – May 1, 2016.

Final Fairness Hearing and Final Approval – May 16, 2017 at 9:00 a.m.