



Sozzi v. Provide Commerce, Inc.

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: March 28, 2017

Department: 308

Case Number: BC513925

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 Stevens, LC, Flaherty Hennessey, LLP, and Milstein, Adelman, Jackson, Fairchild & Wade, LLP as Class Counsel;
- (4) Appoint Brett Long as Class Representative;
- (5) Approve the notice; and
- (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 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

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

The class is defined as, "those natural persons (excluding wholesalers and other business purchasers) identified by reference to ProFlowers' records that: (a) provide a California billing address; and (b) ordered and paid for a floral arrangement from ProFlowers during the Class Period." (§I)

Class Period means July 1, 2009 through April 30, 2016. (§I, pg. 2)

The class size is approximately 2 million. (Declaration of Paul Stevens, ¶¶24-25.)

Plaintiff alleges that ProFlowers failed to adequately disclose that its floral arrangements are delivered unassembled in a box. ProFlowers contends that its flowers are delivered assembled in a box, and that its disclosures were adequate. To resolve the costs of protracted litigation, ProFlowers has agreed to enhance and has enhanced its disclosure that its floral arrangements are shipped in a box. To do so, ProFlowers has agreed to the following injunctive and monetary relief:

1) On the "Product" page, where customers view individual floral arrangements, the product description now includes "Ships in custom ProFlowers packaging and gift box" under

the image of the floral arrangements and provides a link to the "FAQ" page, which provides even further details about the manner of shipment and specifically notes that "[i]f requested at checkout, a vase and other accessories will be delivered in the box as well."

2) The "Calendar" page, where customers select delivery dates for each floral arrangement, states conspicuously at the top of the page "Ships in custom ProFlowers packaging and gift box."

3) In addition, all class members that do not opt out will also receive a \$10 gift code to be used towards a purchase at ProFlowers.com. (§III ¶¶B.1, B.2)

Attorneys' Fees, Costs, and Service Awards:

- Up to \$525,000 for attorney fees and costs (§X ¶A);
- Up to \$5,000 for a service award (§III ¶B.3);
- Estimated \$55,000 for claims administration costs (§X ¶B)

Class members will be provided 60 days notice from the date of class notice to opt-out or object to the settlement. (Declaration of Sarah Hennessy, ¶43)

The claims administrator is Heffler Claims Group. (Declaration of Scott Fenwick, ¶¶1-4)

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. The proposed settlement was reached after formal mediation and two further months of negotiation under the supervision and recommendations of the Honorable Carl J. West, Ret. (Declaration of Sarah Hennessy, ¶33)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. Prior to filing suit and thereafter, Class Counsel investigated and researched facts and circumstances underlying the issues raised in this action and the law applicable thereto. Class Counsel reviewed hundreds of Defendant's website pages related to the claim and conducted a significant amount of consumer research relating to the claims. Class Counsel served pre-class certification discovery shortly after filing the Complaint. (Id. at ¶48)

3. Is counsel experienced in similar litigation? Yes. (Id. at ¶¶49-62)

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.)

Because Plaintiff filed suit in 2013, and the longest applicable statute of limitations is four years, Defendant pulled data beginning calendar year 2009 and through the last full calendar year 2015.

During that time, Defendant reported approximately 2 million unique California purchasers ordered flowers with a vase through ProFlowers.com. The average order value was \$60. It is Defendant's position that the data overstates the relevant number of purchases and that a significant portion of these purchases fall outside the scope of Plaintiff's class definition. Defendant argues that many purchases were not for "personal use," as required by the class definition, including purchases by corporate accounts and Defendant's wholesale partners. Furthermore, the data included purchases by customers who, prior to their purchase, previously received a Defendant bouquet and therefore necessarily understood the delivery method. It is Defendant's position that excluding these orders, along with the initial orders of repeat purchasers (whose subsequent purchases demonstrate that they did not view the need to unpack the shipment as material) would decrease the number of relevant orders to less than 1.1 million during the relevant time period.

Plaintiff paid a total of \$145.51 for the flowers and service that are the subject of this action, which includes the taxes and the delivery charge. The question is the value of what Plaintiff received versus the price premium. It was Defendant's position that Plaintiff likely received more than the entire price premium that could be attributed to the flowers arriving in a box and the amount attributed to cutting the stems and placing the bouquet in a vase is *de minimus*.

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.

The total benefits reached by this proposed settlements includes the value of Defendant's agreement to remedy the practice which gave rise to the class action lawsuit. Furthermore, the settlement also offers a \$10 benefit to approximately 2 million customers to be used on a future purchase. This amounts to \$20 million and is significant due to the number of repeat

ProFlowers customers and represents more than 16% of the average cost of the Products. (Memorandum of Points and Authorities at pg. 15)

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.

6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations. Class Counsel is of the opinion that the settlement is fair, reasonable, and adequate. (Hennessy Decl., ¶138)

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 the Effective Date, Plaintiff and all Class Members who do not opt out of the Settlement and their heirs, executors, estates, predecessors, successors, assigns, agents and representatives, shall be deemed to have jointly and severally released and forever discharged ProFlowers and ProFlowers Affiliates, together with their respective agents, attorneys, employees, officers, directors, employees, affiliates, subsidiaries, parent companies, insurers, all persons natural or corporate in privity with any one or more of them including any agents, representatives, and contractors (collectively, "Released Parties"), from any and all Released Claims. Plaintiff and all Class Members shall be fully and forever barred from instituting or prosecuting in any court or tribunal, either directly or indirectly, individually or representatively, any and all Released Claims against the Released Parties. (§VII ¶A)

Released Claims means and includes any and all claims, demands, rights, damages, obligations, suits, and causes of action of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including both known and unknown claims, of the Plaintiff and all Class Members arising from or related to Plaintiff's allegations in the Complaint. (§I, pg. 3)

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.)

B. Analysis

1. Numerosity. There are approximately 2 million class members. (Stevens Decl., ¶¶24-25.) Numerosity is sufficiently established.

2. Ascertainability. The proposed settlement class is ascertainable through Defendant’s records. (§V ¶C)

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.) This matter involves common misrepresentations and omissions in the form of alleged misleading internet website product pages and alleged non-disclosure of the manner and method in which the ProFlowers.com product would delivered to which every consumer was exposed and which did not materially change over the course of the class period. (Memorandum of Points and Authorities at pg. 18.) Plaintiff has admitted that he would not have purchased the ProFlowers product for his mother if he had known the flowers would be delivered unassembled and in a box instead of a finished delivered bouquet as depicted in the advertising. (Stevens Decl., ¶20)

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations.

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

The proposed notice is attached to the Notice of Lodgment as Exhibit C. The information provided in the proposed notice includes a summary of the litigation, the nature and terms of the settlement, the proposed deductions from the gross settlement amount, the 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 30 days of entry of the Preliminary Approval Order, Defendant will, through the claims administrator, provide class notice to the putative class members. (§IV ¶B.) The notice will be provided via email to the email address used by the putative class member when he/she made the purchase at issue. (Ibid.) The claims administrator will also create a website to which will contain the Notice. (§V.) 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

The settlement administration costs are estimated to be \$55,000. This amount appears reasonable. However, prior to the time of the final fairness hearing, 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 common fund cases, 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 has 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 \$525,000 for fees and costs will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.

Class Counsel have an agreement to split the attorney’s fees based on each attorney’s lodestar time in the case, with consideration for the time each of the attorneys accrued while they were employed at MA and their attendant compensation structures, as follows: Stevens, LC (30%), Flaherty Hennessey, LLP (40%), and Milstein, Adelman, Jackson, Fairchild & Wade, LLP (30%). (Stevens Decl., ¶34, fn. 1)

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

SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is set by the Court:

- Preliminary Approval Hearing – April 12, 2017
- Deadline for Serving Notices to Class Members – April 27, 2017 (30 days after preliminary approval)
- Deadline for Objecting or Opting Out – June 26, 2017 (60 days after notice)
- Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees (and respond to any objections) – July 14, 2017
- Final Fairness Hearing and Final Approval – August 14, 2017 at 10 a.m.