SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/28/17	DEPT. 17
HONORABLE Richard E. Rico JUDGE	A. ORTIZ DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
24 C. ELLIS, C.A. Deputy Sheriff	NONE Reporter

8:30 am	BC464785 KIMBERLY MURPHY VS CVS CAREMARK CORPORATION ET AL NON-COMPLEX (07-12-11)	Plaintiff Counsel NO APPEAANCES Defendant Counsel

NATURE OF PROCEEDINGS:

RANDY RENICK
HADSELL STORMER RENICK, LLP
128 NORTH FAIR OAKS AVENUE
PASADENA, CA. 91103

CORNELLA DEL
HADSELL STORMER RENICK, LLP
128 NORTH FAIR OAKS AVENUE
PASADENA, CA. 91103

ROBERT D. NEWMAN
3701 WILSHIRE BLVD. SUITE 208
LOS ANGELES, CA. 90010

JENNIFER B. ZARGAROF
SIDLEY AUSTIN, LLP
555 WEST FIFTH STREET
SUITE 4000
LOS ANGELES, CA. 90013

MINUTES ENTERED
02/28/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/28/17	DEPT. 17
HONORABLE Richard E. Rico JUDGE	A. ORTIZ DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
24 C. ELLIS, C.A. Deputy Sheriff	NONE Reporter

8:30 am	BC464785 KIMBERLY MURPHY VS CVS CAREMARK CORPORATION ET AL NON-COMPLEX (07-12-11)	Plaintiff Counsel NO APPEAANCES Defendant Counsel

NATURE OF PROCEEDINGS:

DOUGLAS R. HART
SIDLEY AUSTIN,LLP
555 WEST FIFTH STREET
SUITE 4000
LOS ANGELES, CA. 90013

MINUTES ENTERED
02/28/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/28/17	DEPT. 17
HONORABLE Richard E. Rico JUDGE	A. ORTIZ DEPUTY CLERK
HONORABLE JUDGE PRO TEM	ELECTRONIC RECORDING MONITOR
24 C. ELLIS, C.A. Deputy Sheriff	NONE Reporter

8:30 am	BC464785 KIMBERLY MURPHY VS CVS CAREMARK CORPORATION ET AL NON-COMPLEX (07-12-11)	Plaintiff Counsel NO APPEAANCES Defendant Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court, having previously taken the matter under submission on 2/14/14, issues its ruling consisting of 10 pages, filed this date and incorporated herein by reference to the Court file.

Summary of the court's Ruling:

Plainiff's motion for final approval of class action settlement is GRANTED.

The court will sign the and judgment prepared by the Plaintiff.

A true copy of this minute order and the Court's ruling are mailed to counsel through U.S. Mail.

The court reads and considers order granting final approval of class action settlement and awarding attorney's fees and costs.

The court signs and files order.

The court reads and considers judgment.

The court signs and files order.

MINUTES ENTERED
02/28/17
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/28/17			DEPT. 17
HONORABLE Richard E. Rico	JUDGE	A. ORTIZ	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
24 C. ELLIS, C.A.	Deputy Sheriff	NONE	Reporter

8:30 am	BC464785 KIMBERLY MURPHY VS CVS CAREMARK CORPORATION ET AL NON-COMPLEX (07-12-11)	Plaintiff Counsel Defendant Counsel	NO APPEAANCES

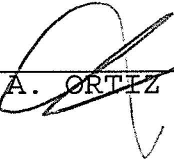
NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order and copy of the court's ruling.
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 3/2/17

Sherri R. Carter, Executive Officer/Clerk

By: 
A. ORTIZ

MINUTES ENTERED
02/28/17
COUNTY CLERK

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

MAR 28 2017

Sherri R. Carter, Executive Officer/Clerk
By Anthony Ortiz, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

KIMBERLY MURPHY, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

CVS CAREMARK CORP., et al.,

Defendants.

Case No. BC 464 785

RULING

Kimberly Murphy's ("Plaintiff's") motion for Final Approval of the Settlement came on for hearing on February 14, 2017. Appearing on behalf of Plaintiff were Randy Renick, esq., Cornelia Dai, esq., and Robert Newman, esq. and appearing on behalf of Defendants were Douglas Hart, esq. and Jennifer Zargarof, esq. After reviewing the papers filed and hearing oral argument, the court took the matter under submission and now rules as follows:

SETTLEMENT CLASS DEFINITION

All nonexempt employees who worked in CVS stores in California from July 5, 2007 through Preliminary Approval of the Settlement who has been, are or will be subjected to security inspections and/or labeling of their personal property, which the parties agree, for purposes of this settlement, includes all nonexempt employees in CVS stores in California. (Newman Decl., Exhibit 1; Settlement ¶ 2.)

TERMS OF SETTLEMENT AGREEMENT

The essential terms of the settlement are as follows:

- Defendants will pay $12,750,000.00: This includes payment to class members, additional compensation to Named Plaintiffs as class representatives, administration costs and notice, employees' share of payroll taxes, interest, attorneys' fees and reimbursement of litigation costs and expenses to Class Counsel. It does not include employer's share of payroll taxes. (*Id.* ¶ 44, 46-47.)
- Payment of $50,000 to the LWDA. (*Id.* ¶ 47.)
- The settlement is allocated 15% to Waiting Time Penalties and 85% to Wage-Per Shift. (*Id.* ¶ 95.) Waiting Time allocation is to be divided on a per capita basis. The Wage allocation is divided based upon the number of shifts worked during the class period and adjusted for the rate of pay. (*Id.* ¶ 95.) The rate or pay will be the average rate during the class period for all Pharmacists and for all Non-Pharmacist. (*Id.* ¶ 94.)
- Plaintiff counsel may apply for fees up to 30% of the total settlement and for reimbursement of reasonable costs up to $200,000. (*Id.* ¶ 77.)
- The cost of administration cannot exceed $250,000. (*Id.* ¶ 70.)
- Class Members had 45 days to file written objections with the Court, 45 days to request exclusion from the settlement, and 60 days to submit a claim. (*Id.* ¶ 65, 66, 19, 88(b).)
- All Class Members who do not opt out by timely filing a request for exclusion release and claims they may have had against Defendants for violations alleged in the Actions, including without limitation, claims for: failure to pay regular and overtime wages, failure to provide accurate wage statement and violation of Cal. Bus. & Prof. Code §§ 17200 et seq., and any additional claims for penalties, damages or wages predicated on the same. (*Id.* ¶ ¶ 102.)

ANALYSIS OF SETTLEMENT AGREEMENT

A. Standards for Final Fairness Determination

In evaluating the fairness of the settlement, the court should not "reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, 'the [trial] judge does not try out or attempt to decide the merits of the controversy,' [citation] and the appellate court 'need not and should not reach any dispositive conclusions on the admittedly unsettled legal issue.'" (Citation omitted.)" (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146.)

Importantly, though, in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, the COA held that the trial court erred in granting final approval of a settlement where "the trial court lacked sufficient information to make an informed evaluation of the fairness of the settlement." (*Id.* at 790.) The *Clark* court reiterated at length the principles applicable to a court's final approval of a class settlement as follows:

> The trial court must determine whether a class action settlement is fair and reasonable, and has broad discretion to do so. That discretion is to be exercised through the application of several well-recognized factors. The list, which "'is not exhaustive and should be tailored to each case,'" includes "'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.' (Citations omitted.) " ' "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ' " (Citation omitted.) While the court "'must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case,' " it " 'must eschew any rubber stamp approval in favor of an independent evaluation.'"

1 (Ibid.)

2 In *Dunk* [*v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794], the court observed that
3 "a presumption of fairness exists where: (1) the settlement is reached through
4 arm's-length bargaining; (2) investigation and discovery are sufficient to allow
5 counsel and the court to act intelligently; (3) counsel is experienced in similar
6 litigation; and (4) the percentage of objectors is small." (Citation omitted.) But
7 *Kullar* [*v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116] makes clear that
8 this is only an initial presumption. The point is cogently made in *Kullar*, where
9 the trial court's approval of a class action settlement was vacated because the
10 court *"[was] not provided with basic information about the nature and magnitude*
11 *of the claims in question and the basis for concluding that the consideration being*
12 *paid for the release of those claims represents a reasonable compromise.*"
13 (Citation omitted.)(Emphasis added.)

14 In *Kullar*, the court pointed out that "neither *Dunk* ... nor any other case suggests
15 that the court may determine the adequacy of a class action settlement without
16 independently satisfying itself that the consideration being received for the release
17 of the class members' claims is reasonable in light of the strengths and
18 weaknesses of the claims and the risks of the particular litigation." (Citation
19 omitted.) *Kullar* continues: "The court undoubtedly should give considerable
20 weight to the competency and integrity of counsel and the involvement of a
21 neutral mediator in assuring itself that a settlement agreement represents an arm's-
22 length transaction entered without self-dealing or other potential misconduct.
23 While an agreement reached under these circumstances presumably will be fair to
24 all concerned, particularly when few of the affected class members express
25 objections, *in the final analysis it is the court that bears the responsibility to*
26 *ensure that the recovery represents a reasonable compromise, given the*
27 *magnitude and apparent merit of the claims being released, discounted by the*
28 *risks and expenses of attempting to establish and collect on those claims by*

pursuing the litigation. 'The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.'" (Citation omitted.) (Italics in original.)

Kullar further explains that, while there is usually an initial presumption of fairness when a proposed class action settlement was negotiated at arm's length by counsel for the class, "'to protect the interests of absent class members, the court 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.'" (Citation omitted.) To make that determination, "'the factual record before the ... court must be sufficiently developed,' " and the initial presumption to which *Dunk* refers "'must then withstand the test of the plaintiffs' likelihood of success.' " (Ibid.) Again, " ' "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." ' " (Ibid.) In *Kullar*, because the trial court was not presented with data permitting it to review class counsel's evaluation of the sufficiency of the settlement, the order approving the settlement was vacated. (Citation omitted.) As we shall see, the same result is required here.

n8 *Kullar* points out that, while *Dunk* asserts there is a presumption of fairness where the four factors it identifies are established, in fact *Dunk* is fully consistent with "this recognition of the court's responsibility"; there was a "voluminous record" before the *Dunk* trial court, which "was made aware of the maximum damages that each class member had sustained and the value of the coupons that each class member would receive under the settlement, as well as of the particular issues that the plaintiffs needed to overcome in order to prevail in the litigation." (Citation omitted.)

n9 "Whatever information may have been exchanged during the mediation, there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to

see. The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement. Assuming that there is a 'presumption' such as *Dunk* asserts, its invocation is not justified by the present record." (Citation omitted.) *(Clark*, 175 Cal.App.4th at 799-800.) In finding that the trial court abused its discretion in approving the settlement before it, the *Clark* court emphasized that "an informed evaluation of a proposed settlement cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. (Citation omitted.)" (*Id.* at 801.) The court also emphasized that "it is the trial court's duty, whether or not there are objectors, to employ those [*Dunk* presumption of fairness] factors to evaluate independently the fairness of a proposed settlement." (*Id.*) The court must have before it data in order to make an independent assessment. (*Id.*)

B. Clark / Kullar Factors To Consider In Evaluating the Fairness, Adequacy and Reasonableness of the Settlement Agreement

Strengths and Weaknesses of Plaintiffs' case

Plaintiff explains that while they believe in the strength of their case, they are mindful of risks and delays in proceeding to trial, as evidenced by recent district court decisions granting summary judgment for the employer in a class action lawsuit alleging claims under state law for off-the-clock bags. Plaintiff notes that no appellate court has determined whether security inspections and labeling should be considered "work" within the meaning of the IWC order.

Plaintiff was looking at trial only of her individual claims. Her claims had both their strengths (e.g., she had no choice about taking her smocks home to clean) and their weaknesses (e.g., other employees at her store would testify that they chose not to undergo bag checks and labeling while off the clock). In addition, CVS could be expected to argue vigorously that the de

minimis case applied in this case. Moreover, adjudication of the PAGA claims was uncertain and there are clear complications in trying the action. (Motion pp. 6-7.)

a. Risk, Expense, Complexity and Likely Duration of Further Litigation

Defendants successfully argued that Plaintiff's claims were not appropriate for class resolution on the grounds that individual issues predominated. While Plaintiffs disagree, Plaintiffs could not be certain of a reversal on appeal. Of course, any appeal would likely cause a delay of one or two more years. (Motion pp. 7-8.)

b. Amount offered in settlement.

The total settlement is $12,750,000, which includes payment to Settlement Class members, the Named Plaintiffs' enhancement awards, LWDA payment, attorneys' fees and costs, the employees' share of payroll taxes, and administrative costs.

Plaintiffs' counsel will apply for up to 30% ($3,825,000) in attorney's fees, and for the reimbursement of no more than $200,000 in costs. The Parties have agreed to an enhancement award for each of the three Named Plaintiffs of $5,000, for a total of $15,000. Payment to the LWDA for their share of PAGA penalties will be $50,000. The Parties expect that the administrative costs will be less than $250,000. This means that the class members will share in the sum of at least $8,000,000. Counsel estimates that the average payment per class member could be $200. The range for typical incentive awards is 0.01% to 1.67% of the total settlement amount.[1] The proposed enhancement awards fall below this range.

Plaintiff counsel Robert Newman provides projections as to the values of different claims in this lawsuit. (Newman Decl. ¶¶ 44-52.) While Plaintiffs could theoretically recover hundreds of millions of dollars, this is far from guaranteed. Plaintiffs would have to obtain a reversal on the decertification order and then prove the merits of their case as to security inspections and

---

[1] **For Illustrative Purposes Only:** *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal. 2007) 2007 WL 3492841 ($3,000 and $4,000 awarded from $240,000 settlement); *Trew v. Vovlo Cars of North America, LLC* (E.D. Cal. 2007) 2007 WL 2239210 ($5,000, $2,500 and $1,000 awarded from a rough estimate of a common fund of $24 Million).

labeling as "work," prove that class members are entitled to all the time associated with bag checks and labeling, overcome the de minimis defense, and present a workable survey of class members on damages.

c. Extent of discovery completed.

This action settled after years of litigation, following both formal and informal litigation. (Newman Decl. ¶¶ 5-23, 26-30, 44.) The parties negotiated in good faith to reach the settlement. (*Id.* at ¶¶ 31-34.) The parties ultimately settled on the second full day of mediation. (*Id.* at ¶ 33.)

d. Experience and Views of Counsel.

Plaintiff counsel believes the terms of the settlement are fair and reasonable. (*Id.* at ¶ 53.) A review of counsel's declaration shows substantial litigation experience in wage-and-hour and class actions. (*Id.* at ¶ 35-43.)

e. Responses and Objections to Notice of Class Settlement. (Johnson Decl.)

Number in settlement class:	64,587
Number of undeliverable notices:	4,197
Number of objections:	1[2]
Number of opt-outs:	54
Number of timely, valid claims:	n/a

The administration of the claims is being operated by CAC Services, Group, LLC. (Johnson Decl. ¶ 1.) Beginning on 11/22/16, CAC designed, published, and maintained a website dedicated to the settlement and available to Class Members. The website includes are pertinent information. (*Id.* ¶ 5.) Class Members were also mailed a Notice Packet. (*Id.* ¶ 7, Exhibit 1.) As of the date of the declaration, 20,963 Class Members have timely filed Claim Forms. representing approximately $4,337,453.35 in Member Payments. This amount is approximately

---

[2] Class members and objectors Elario Sandoval and Robert Siporen filed objections on 2/6/17. Objections were withdrawn on 2/13/17.

50% of the Settlement Funds available to Class Members. A reminder postcard was also mailed on 12/23/16. (*Id.* ¶¶ 10-12, Exhibit 2.)

The sole objector is Cheyrl Berghorst. Berghorst objects to the allocation for PAGA civil penalties on the grounds that the parties have not provided "sufficient information for the court to determine" the adequacy of the amount. (Objection pp. 2-3.) As outlined above, the parties have provided sufficient information

f. Conclusion

The settlement is fair, adequate and reasonable.

C. Attorneys' Fees and Costs

Although this is a reasonable contingency fee, the court is still obliged to ensure that the attorneys' fee award in anchored in the time actually spent by class counsel. Whether an attorney fee is fair, the primary factor for determination is whether the fee bears a reasonable relationship to the value of the attorney's work. *Robbins v. Alibrandi* (2005) 127 Cal. App. 4th 438, 451. In fee-shifting cases, the primary method is the lodestar method; and in common fund cases, the primary method is the percentage of the fee method. *Apple Computer, Inc. v. Superior Court (Cagney)* (2005) 126 Cal. App. 4th 1253, 1270; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal. App. 4th 819, 833. Courts have adopted a practice of cross-checking the lodestar against the value of the class recovery because the award is then anchored in the time spent by counsel. *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 45, fn. 12.

Plaintiffs' counsel requests a fee award of 30% of the settlement fund. The settlement was achieved after a hard-fought litigation lasting nearly 5 years. (Newman Dec., ¶ 61; Aiman SmithDec., ¶ 19; Renick Dec., ¶ 19; Rubin Dec., ¶ 13; Voorhees Dec., ¶ 61.)

Plaintiff counsel's aggregate lodestar is $4,396,695.00, which means that the contingency request is less than the aggregate fees incurred. (Newman Dec., ¶¶ 61, 63($1,082,250); Aiman-Smith Dec., ¶ 17 ($702,487.50); Renick Dec., ¶¶17-18 ($174,937.50); Rubin Dec.,111¶ 11-12 ($55,889.50); Voorhees Dec., ¶ 60 ($2,381,130.50).) As discussed above, the parties engaged in extensive discovery, including document production and depositions, and worked with experts. The action was heavily litigated, including motions for summary adjudication and motions for

recertification and decertification. (Newman Dec., ¶¶2-30, 54-61; Aiman-Smith Dec., ¶113-13, 17; Renick Dec., ¶113-10, 18; Rubin Dec., ¶¶ 3, 12; Voorhees Dec., ¶¶ 3-11, 60.) Counsel anticipates an additional 20 hours in connection with the instant motion. (Renick Decl. ¶¶ 17.)

In light of the foregoing, the court finds that the amount requested is reasonable.

D. Incentive Award / Enhancement Fee to Named Plaintiff

> [A]n incentive award is appropriate "if it is necessary to induce an individual to participate in the suit," and have noted 'relevant factors' to consider in deciding whether such an award is warranted. (*Cook v. Niedert* (7th Cir.1998) 142 F.3d 1004, 1016 (Cook).) Those factors include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation."
>
> The trial court is not bound to, and should not, accept conclusory statements about "potential stigma" and "potential risk," in the absence of supporting evidence or reasoned argument explaining why, under the particular circumstances, an actual-not a negligible-risk existed, or why it might be difficult to get plaintiffs to come forward to prosecute a particular case. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804, 807.)

The three named Plaintiffs seek enhancements of $5,000 each. Plaintiffs spent substantial time and provided invaluable assistance to counsel and the class, which included communicating with class counsel on a regular basis, providing the factual background for the complaint and discovery documents, and reviewing many documents produced by defendant. (Muphy Decl. ¶¶ 3-12; Ortiz Decl. ¶¶ 3-20; Miller Decl. ¶¶ 3-20.) The amount appears to be reasonable.

Reimbursement of Costs.

In total, as set forth in the declarations of counsel submitted to this court, Class Counsel have incurred an aggregate of $205,514.09 in unreimbursed expenses in prosecuting this case, all of which were reasonable and necessary to bring this case to closure. The amount provided for

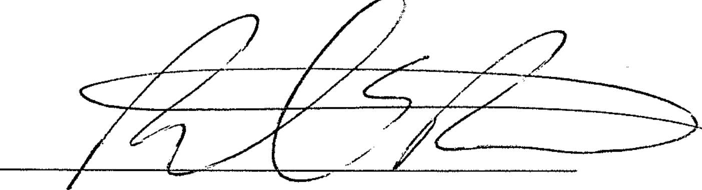
under the settlement is $250,000. (Newman Dec., ¶64 ($9,350.37); Voorhees Dec., 165, Ex. C ($190,777.74); Aiman-Smith Dec., 1120, Ex. B ($4,046.64); Renick Dec., ¶¶ 28-34 ($1,235.10); Rubin Dec.,11117 ($104.24.).) Plaintiffs' counsel seeks $200,000 in costs. The amount is properly requested.

Plaintiff's motion for final approval of class action settlement is GRANTED.

The court will sign the order and judgment prepared by the Plaintiff.

Clerk to give notice.

DATED: February 28, 2017



RICHARD E. RICO

Judge of the Superior Court