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United States District Court, S.D. New York.

Alana Karpoff SCHWARTZ, Individually and on behalf of a class, Plaintiffs,
v.
INTIMACY IN NEW YORK, LLC; Intimacy, Management Company, LLC, Defendants.

13 CV 5735 (PGG)
|
Signed September 1, 2015
|
Filed 09/16/2015

Attorneys and Law Firms

SPENCER FANE, BY: BRYANT LAMER, JOSHUA C. DICKINSON, Attorneys for Plaintiffs.

COZEN O'CONNOR, BY: VINCENT P. POZZUTO, PASTORE & DAILEY, MICHELE MARTIN, Attorneys for Defendants.

Before: HON. PAUL G. GARDEPHE, District Judge

Opinion

***1** (In open court; case called)

THE COURT: This matter is on my calendar for purposes of considering plaintiffs' motion for final approval of a class action settlement. The background is as follows:

On April 17th of this year, I issued an order preliminarily approving a class action settlement and providing for notice to the putative class (Dkt. No. 77). The class is defined as all persons who used a Visa, MasterCard, Discover or American Express credit card at any of the retail locations of the settling defendants—those being Intimacy in New York LLC, Intimacy Management Company LLC, and their affiliates. It includes customers who received an electronically printed receipt at the point of sale or transaction that displayed the expiration date of that person's credit card during the period beginning January 1, 2012 to the date the class is certified for settlement purposes, and who do not validly and timely elect exclusion from the class.

The April 17, 2015 order (which I will refer today as the "order") provided for a fairness hearing to be conducted on August 28, 2015, at 10:00 a.m. I later adjourned the hearing to today, September 1, 2015, at 10:00 a.m.

The order also provided that:

(1) Direct notice of the proposed settlement be mailed and, if available, also emailed to all class members for whom defendants have such contact information;

(2) A summary notice of the proposed settlement be published in a newspaper of general publication at least two times in each of the impacted markets, and to be run on two consecutive Saturdays; and

(3) That a website be created that includes information about the action and the settlement, including a copy of the settlement agreement, a downloadable claim form, and the name address and telephone number of the claims administrator.

The order also provided that potential class members for whom defendants do not maintain contact information may submit claims during the 60-day period following the second provision of notice. The order required such potential class members to submit a claim—which, as I indicated, is available on the website—stating that he or she purchased an item at one or more of the settling defendants' retail locations using a credit and/or debit card during the class period. The order provided that the determination of whether a submission constitutes a valid claim is at the sole discretion of the claims administrator.

The order also provided that any potential class member who wishes the be excluded from the settlement must mail a clear, written request for exclusion to the claims administrator by July 6, 2015. To date, 19 of the 79,389 class members have submitted exclusion requests. See Keough Decl. (Dkt. No. 77) at paragraphs 6 and 21.

The order also provided that any class member who has not requested exclusion from the settlement may appear at the fairness hearing to object to the settlement or the award of attorneys' fees and costs. The order required any class member wishing to raise such an objection to submit a written objection to class counsel and the Court no later than 30 days before the fairness hearing. The order also

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required that, if the objecting class member intended to appear at the hearing, the objection must include:

***2** (1) A statement that the objecting class member intends to appear at the fairness hearing;

(2) The specific objections that the objecting class member wishes to be heard upon at the hearing; and

(3) The name, address and telephone number of any attorney who will speak or appear on the objecting class member's behalf. To date, one class member has objected to the proposed settlement. (Dkt. No. 86) That class member did not indicate that she intended to appear at the fairness hearing. The class member who objected is Jessica Fealk, and she submitted an objection on May 14, 2015, the gist of which is that she lives more than a four-hour car ride away from the nearest Intimacy store and thus it would not be practicable for her to use the gift card that is the vehicle for the award to the class members here. (Docket No. 86)

Is there any class member present in the courtroom today who wishes to object to the proposed settlement or to class counsel's application for an award of attorneys' fees and expenses?

Let me say that my understanding is that Ms. Fealk's objection has been resolved to her satisfaction, and I will address that in a moment.

Let me begin by saying that the proposed settlement I am going to describe was the product of extensive negotiations between the parties and was the subject of a mediation session conducted by an experienced mediator.

The proposed settlement will provide each class member with a $50 gift card that can be used at any retail location owned and operated by defendants in the United States. As provided in the order, the administrator is required to send a $50 gift card, by regular mail, to each class member who has submitted a valid claim, and is also required to send a $50 gift card to each class member who received direct notice and who did not validly opt out. Notice of the settlement was mailed or emailed directly to 72,594 class members. Accounting for returned or undelivered mail, the total number of class members who received direct notice is 70,089 people or more than 88 percent of the class. (Keough Decl. (Dkt. No. 79), paragraph 12) Under the proposed settlement, these class members need do nothing more than await their $50 gift card from defendants. Based on these figures alone—which do not account for claims by potential class members who did not receive direct notice—defendants will mail over $3,540,450 of relief to class members. Neither the cost of notice nor any attorneys' fees or expenses awarded to class counsel will reduce the funds made available to the class.

I will now turn to an analysis of the fairness of the proposed settlement.

Courts determine a settlement's fairness "by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001).

With respect to the negotiation process, "a court reviewing a proposed settlement must pay close attention ... To ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class' interests." D'Amato, 236 F.3d, 85.

***3** With respect to the settlement's substantive terms, "in this circuit, courts examine the fairness, adequacy and reasonableness of a class action settlement according to the Grinnell factors." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 117 (2d Cir. 2005). The Grinnell factors are:

(1) The complexity, expense, and likely duration of the litigation;

(2) The reaction of the class to the settlement;

(3) The stage of the proceedings and the amount of discovery completed;

(4) The risks of establishing liability;

(5) The risks of establishing damages;

(6) The risks of maintaining the class action through the trial;

(7) The ability of the defendants to withstand a greater judgment;

(8) The range of reasonableness of the settlement fund in light of the best possible recovery;

(9) The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Wal-Mart, 396 F.3d 117 (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)). I have considered all of the Grinnell factors here, and I believe that they favor approval of the proposed settlement.

With respect to procedural fairness, I find that there is ample evidence that the parties engaged in arm's-length negotiations in reaching the settlement.

As I noted, the proposed settlement was the result of a mediation session that was conducted before the Honorable John J. Hughes of JAMS, citing plaintiffs' brief (Dkt. No. 81) at 11.

During the mediation session, the parties engaged in discussions concerning the strengths and weaknesses of their claims and defenses, as well as the applicability of case law and the potential impact it might have on each party's position. Id.

Although the parties did not settle the case at the mediation, they continued to work with Judge Hughes —and with each other—for several weeks after the mediation until they finally reached a settlement. Id.

Once the parties agreed on the terms of the settlement, they exchanged multiple drafts of the settlement agreement until submission of the final settlement documents were made with this Court. Id.

With respect to substantive fairness, I have considered the complexity, expense, and likely duration of the litigation, as well as the litigation risk.

Plaintiffs allege here that defendants violated the Fair and Accurate Credit Transactions Act, which I will refer to as the "Act," 15 U.S.C. 1681c(g), by unlawfully displaying the expiration dates of plaintiffs' credit and/or debit cards on electronically printed receipts provided to plaintiffs when they made purchases in defendants' stores. Defendants asserted defenses to plaintiffs' allegations—namely, that their conduct was not willful, as required under the act. Were this litigation to proceed, the parties would address these complex questions, including whether there is a basis to demonstrate defendants' willfulness under the act, and how this Court should determine how willfulness is defined or treated under the act.

Defendants have vigorously opposed this case from the outset, having filed a motion to dismiss soon after the lawsuit was filed. (Dkt. No. 9) Although defendants withdrew their motion to dismiss after plaintiffs filed an amended complaint, defendants filed another motion before answering plaintiffs' discovery requests, seeking to bifurcate the case so that merits discovery would be pursued first and class discovery would come only after a determination of whether merit discovery established a basis for the Court to find willfulness. (Dkt. No. 42) Plaintiffs filed an opposition to that motion. (Dkt. No. 48) While the motion was pending, the parties agreed to engage in mediation.

***4** If the parties had not reached a settlement and this Court had ordered a bifurcation, it is likely that defendants would have filed a motion for summary judgment on the issue of willfulness and the Court would have been called upon to make a ruling on the merits of that motion prior to proceeding with class discovery and class certification. Defendant's brief in support of bifurcation motion. (Dkt. No. 47 at 9) Obviously, briefing on a summary judgment motion would have increased expense and protracted this litigation, and the losing side may well have appealed any adverse ruling, thus extending the litigation.

Plaintiffs face a number of risks in this litigation. Although each class member would be entitled to a statutory damage award between $100 and $1,000 were plaintiffs to prevail, plaintiffs would have to:

(1) Overcome defendants' summary judgment motion that I described a moment ago;

(2) Prevail on the issue of class certification;

(3) Establish willfulness at trial in order to receive a damage award. Establishing willfulness may well have required expert testimony. Of course, it is uncertain whether any significant damages award would be upheld by the Second Circuit.

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Under the terms of the settlement, each class member here will receive a $50 gift card upon approval of the settlement. This recovery must be weighed against the risk that plaintiffs would not be able to demonstrate willfulness and therefore would not obtain statutory damages available under the act.

For these reasons, I believe that there is a substantial basis for the settlement of these claims and that the proposed settlement—which provides real economic benefit to the class—is in my judgment in the interest of class members, and constitutes a fair and reasonable resolution of the parties' disputes.

The only other Grinnell factor I will highlight this morning is the reaction of the class to the settlement.

As I noted, on May 4, 2015, notice of the proposed settlement was mailed or emailed to 72,594 class members (Keough Decl. (Dkt. No. 79) paragraph 8) Although a number of these notices were subsequently returned as undeliverable, a total of 70,089 class members—more than 88 percent of the class—received direct notice. (Id. at paragraph 12)

To date, only 19 of the 70,089 class members who received direct notice have filed exclusion requests, and only one class member has filed an objection. (Id. at paragraphs 21-22)

As I noted a moment ago, the class member who filed an objection—Jessica Fealk—did not object to the overall fairness of the settlement, but rather expressed her personal dissatisfaction with the adequacy of the proposed relief as it applied to her, noting that it would be difficult for her to use the $50 gift card given that the closest Intimacy retail location is more than a four-hour car ride away from her home. See Dkt. No. 86, Ex. 1.

Class counsel has discussed the issues raised in Ms. Fealk's objection with defense counsel and with Ms. Fealk, and Ms. Fealk has agreed, subject to the Court's approval, to accept the same $50 gift card as the other class members, except that her gift card will be redeemable for an online purchase and will include a code for free shipping. Defendants have agreed to this accommodation.

Given the size of the class, the small number of exclusion requests that I have received, and the parties' resolution of the issue raised in the one objection that was submitted to the Court, the reaction of the class supports approval of the settlement.

Does anyone wish to address the merits of the proposed settlement before I turn to the issue of attorneys' fees, litigation expenses, and the incentive fee for the class representative?

***5** With respect to plaintiffs' counsel motion for an award of attorneys' fees for reimbursement of litigation expenses and an award to the class representative, class counsel seeks an award of attorneys' fees in the amount of $489,758.50, which amounts to approximately 13.8 percent of the value of the more than 70,089 $50 gift cards that will be mailed to class members who received direct notice. The requested attorneys' fees are based on approximately 944 hours that class counsel and their paralegals devoted to prosecuting this action, which resulted in a lodestar of $335,376.50. Based on the $489,758.50 attorneys' fee award sought, the lodestar yields a multiplier of approximately 1.46 percent. Class counsel also seeks $10,241.50 in litigation expenses, and approval for a payment of $3,500 to the lead plaintiff, Alana Karpoff Schwartz.

With respect to attorneys' fees, the Second Circuit has held that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorneys' fees in common fund cases." Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000). While "the trend in the circuit is toward the percentage method ... which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," Wal-Mart 396 F.3d 121, "the lodestar remains useful as a baseline even if the percentage method is eventually chosen." Goldberger, 209 F.3d 50. Indeed, the Second Circuit has "encouraged the practice of requiring documentation of hours as a cross-check on the reasonableness of the requested percentage." Id. When conducting such a cross-check review, "the hours documented by counsel need not be exhaustively scrutinized by the district court," but can instead be "tested by the court's familiarity with the case." Id.

Whichever method is chosen, the Second Circuit has instructed that, "district courts should continue to be

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guided by the traditional criteria in determining a reasonable common fund fee, including:

(1) The time and labor expended by counsel;

(2) The magnitude and complexities of the litigation;

(3) The risk of the litigation ...

(4) The quality of representation;

(5) The requested fee in relation to the settlement; and

(6) Public policy considerations." Id. (quoting In re Union Carbide Corp. Consumer Products Business Securities Litigation, 724 F.Supp 160, 163 (S.D.N.Y. 1989)). In other words, "a fee award should be assessed based on scrutiny of the unique circumstances of each case." Id. at 53. Accordingly, while attorneys' fee awards in similar cases may serve as useful guideposts when evaluating the reasonableness of a fee application, they are not dispositive as a measure of reasonable attorneys' fees in a given case.

After Goldberger, when reviewing attorneys' fees under the percentage-of-the-fund method, courts in this district have found attorneys' fees of one-third of the settlement amount to be reasonable. See, for example, Silva v. Little Fish Corp., 2012 WL 2458214, at *2 (S.D.N.Y. May 1, 2012) ("Class Counsel's request for one-third of the settlement fund is also consistent with the trend in this circuit.") (citing Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar, 2009 WL 5851465 at *5 (S.D.N.Y. March 31, 2009)); McMahon v. Olivier Cheng Catering & Events, LLC, 2010 WL 2399328, at *7 (S.D.N.Y. March 3, 2010) Adair v. Bristol Tech. Sys., Inc., 1999 WL 1037878 at *3 (S.D.N.Y. November 16, 1999).

When reviewing attorneys' fees under the lodestar method, the district "multiplies hours reasonably expended against a reasonable hourly rate." Wal-Mart, 396 F.3d 121. Moreover, "courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys." Id.

***6** As to litigation expenses, "attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." In re Warner Chilcott Ltd. Sec. Litig., 2009 WL 2025160 at *5 (S.D.N.Y., July 10, 2009)

Finally, as to lead plaintiff incentive fees, such fees "are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." Beckman v. KeyBank, N.A., 293 F.R.D. 467, 483 (S.D.N.Y. 2013) "The guiding standard in determining an incentive award is broadly stated as being the existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (for example, factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim, and, of course, the ultimate recovery. Citing Roberts v. Texaco Inc., 979 F.Supp 185, 200 (S.D.N.Y. 1997).

Here, of course, we have a situation where the fees are to be paid separately from the class relief. "As a threshold matter, the Court notes that the requested attorneys' fees in this case will not be drawn from a common fund, but rather will be paid directly by defendants. Whatever attorneys' fees are awarded, therefore, will in no way diminish the benefit to the class under the settlement, which the Court has already found fair, reasonable, and adequate." Dupler v. Costco Wholesale Corp., 705 F. Supp. 2d 231, 243 (E.D.N.Y. 2010.) "This case is therefore different from other class action settlements, where the incentives of the class members and the attorneys diverge on the issue of attorneys' fees. If money paid to the attorneys comes from a common fund, and is therefore money taken from the class, then the Court must carefully review the award to protect the interests of the absent class members ... If, however, money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." McBean v. City of New York, 233 F.R.D. 377, 392 (S.D.N.Y. 2006)

In any event, even if the fees proposed here somehow affected the benefits of the class, I find that the requested attorneys' fees are reasonable under both the percentage-of-the-fund and lodestar methods of analysis.

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With respect to the percentage-of-the-fund method, class counsel's request for $489,758.50 in attorneys' fees falls well within acceptable boundaries as established by the attorneys' fee awards other courts in this district have granted in similar cases. Indeed, the approximately 14 percent of the $3,540,450 value of the settlement here is much lower than percentages awarded in similar cases. See, for example, Mohney 2009 WL 5851465 at *5 ("Class counsel's request for 33 percent of the settlement fund is typical in class action settlements in the Second Circuit.")

***7** With respect to the lodestar method of analysis, class counsel and their staff billed a combined 944 hours to this matter. This number reflects work performed over approximately two years, from the drafting of the initial class action complaint, to the evaluation of defendants' motion to dismiss and motion for bifurcation of discovery, through the time spent reaching a negotiated resolution, including participation in a mediation session, as I mentioned earlier. See Dickinson Decl (Dkt. No. 84) Exs. A-C. Moreover, class counsel undertook all of the risks of this litigation on a contingent fee basis, thus bearing the risk that no recovery would be achieved. Pltf. Br. (Dkt. No. 83) at 12.

The hourly billing rates among class counsel and their staff here range from $550 per hour to $300 per hour, while the average partner billing rate is $462.50. The hourly rates of the partners who performed the vast majority of the partner-level work on this matter—Joshua Dickinson, Bryant Lamer, Howard **Wexler**, and **Shimshon** **Wexler**—are $450, $450, $550, and $300, respectively. These hourly rates are at the high end of rates that are generally approved in this district for partner-level work on similar cases. See, for example, De La Paz v. Rubin & Rothman, LLC, 2013 WL 6184425 at *12 (S.D.N.Y. November 25, 2013) (approving hourly rates of $400 and $550 for attorneys with over 30 years of experience in consumer protection actions); Finch v. New York State Office of Children and Family Services, 861 F.Supp.2d 145, 154 (S.D.N.Y. 2012) (approving $450 hourly rate for a partner experienced in civil rights class actions); In re Arbitration between Okyere and Houslanger & Assoc., PLLC, 2015 WL 4366865, at *14 (approving hourly rates of $350 and $250 for counsel who had "experience handling a multitude of consumer protection cases.") Given that the attorneys' fee award has been agreed to by defendants and will not be drawn from a common fund, I conclude that the hourly rates are reasonable in the context of this case. See Dupler, 705 F. Supp. 2d, 244 n.10 ("Even assuming arguendo that the Court determined that the requested hourly rate should be reduced, for example, to $400 per hour for partners, the Court concludes that the requested fee of $5,380,000 and the lodestar multiplier needed to reach that amount, would nevertheless be reasonable in this case given the Court's above-discussed analysis of the Goldberger factors, as well as the fact that the amount has been agreed to by defendant and does not affect the recovery of the class.")

Class counsel's request for attorneys' fees yields a multiplier of 1.46, which falls within acceptable limits. See In re Telik, Inc. Sec. Litig., 576 F.Supp.2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multipliers of over 4 are routinely awarded by courts ... Accordingly, a 1.6 multiplier is well within the range of reasonableness.") In re Global Crossing Sec. and ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004) ("The requested 2.16 multiplier falls comfortably within the range of lodestar multipliers and implied lodestar multipliers used for cross-check purposes in common fund cases in the Southern District of New York.").

In considering the reasonableness of the attorneys' fee request, I have also considered, among other things, the fact that class members will realize a real benefit from the proposed settlement, and that the parties have resolved the issues raised in the one objection that has been submitted to the Court.

Accordingly, after considering all of the circumstances of this case and utilizing the percentage-of-the-fund method and the lodestar cross-check, I find the attorneys' fees award is reasonable. I also find the litigation expenses incurred—$10,241.50—were reasonable and that lead plaintiff's request for an incentive fee in the amount of $3,500 is reasonable. Lead plaintiff expended time and energy assisting and communicating with class counsel, she reviewed and explained necessary information, and assumed the risks of the possible diminution of her individual claims by proceeding. See Pltf. Br. (Dkt. No 83) at pages 4-5. I therefore intend to grant class counsel's motion.

***8** Does anyone wish to be heard with respect to the requested attorneys' fees, litigation expenses, and incentive fee to lead plaintiff?

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All right. I intend to grant the motion for final approval, as well as the motion for attorneys' fees, reimbursement of litigation expenses, and incentive fee for lead plaintiff. I expect to issue an appropriate order today.

Is there anything further?

MR. DICKINSON: Your Honor, nothing further from the plaintiff. Thank you.

MR. POZZUTO: Nothing from the defendant. Thank you.

(Adjourned)

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