PRIORITY SEND

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

A-M-E-N-D-E-D to Correct Date for Hearing
CIVIL MINUTES -- GENERAL

Case No. EDCV 15-01100-VAP (SPx) Date: October 1, 2015

Title: ANDREW ROSEMAN -*v*- BGASC, LLC; JET BULLION CORP.; GOLDEN STATE MINT, INC.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

Marva Dillard Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS: MINUTE ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND SETTING A FINAL APPROVAL HEARING FOR FEBRUARY 29, ***2016*** (IN CHAMBERS)

On August 27, 2015, Plaintiff Andrew Roseman filed a Motion for Preliminary Approval of Partial Class Action Settlement ("Motion" or "Mot."), seeking judicial approval of an agreement to settle claims against Defendant BGASC, LLC only. (Doc. No. 17.) After consideration of the papers filed in support of the Motion, the Court GRANTS the Motion.

I. BACKGROUND

A. Procedural History

Plaintiff bought one of two types of silver "rounds" between January 9, 2009 and the present. The two types of rounds are:

(1) the "1 oz. Silver Rounds Walking Liberty Design by Jet Bullion .999 Fine," which was manufactured and sold by Defendant BGASC; and

(2) the "1 oz. Silver Rounds Walking Liberty Design by Jet Bullion .999 Fine," which was manufactured by Defendant Golden State Mint, but sold by Defendant BGASC and Golden State Mint.

Plaintiff's Complaint alleges that both of these items violate the Federal Hobby Protection Act, 15 U.S.C. § 2101, et seq., because they "purport to be, but in fact [are] not" authentic coins or are reproductions, copies, or counterfeits of an authentic coin, but are not marked with the word "COPY," as required by that statute. Plaintiff, on behalf of himself and the class, (1) seeks to enjoin Defendants from making and selling these two types of rounds, and (2) seeks restitution, money damages, or both for damages as a result of buying the alleged unlawful rounds. (See generally, Complaint (Doc. No. 1).)

On August 28, 2015, Defendant Golden State Mint filed a stipulation to extend time to respond to the Complaint. (Doc. No. 18.) The Court extended Golden State Mint's time to respond by thirty days from September 8, 2015 to October 8, 2015. (Doc. No. 20.)

B. Settlement Class

The agreement between Plaintiff and Defendant BGASC (Doc. No. 17-1 Exh. A) ("Settlement Agreement") provides for the following settlement class:

> all residents of the United States who purchased a 1 oz. Silver Rounds Walking Liberty Design by Jet Bullion .999 Fine, or a 1 oz. Silver Rounds Walking Liberty Design .999 Fine Silver Bullion without the word "COPY" inscribed thereon, that was manufactured, imported, or sold by Defendant between June 1, 2009 and the present, or both.

(Settlement Agreement at 3.)

II. LEGAL STANDARD

"[S]trong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned." Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). When parties reach a settlement agreement before class certification, courts must assess: (1) the propriety of the class certification and (2) the fairness of the settlement. Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). When reviewing the settlement, the Court should not endeavor to "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." City of Seattle, 955 F.2d at 1291.

A court should approve a proposed settlement and give notice to the proposed class where "[1] the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls within the range of possible approval . . . ." In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing Federal Judicial Center, Manual for Complex Litigation § 30.44 (2d ed. 1985)).

A. Class Certification

Parties seeking class certification for settlement purposes must satisfy the requirements of Federal Rule of Civil Procedure 23. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1996). A court considering such a request should give the Rule 23 certification factors "undiluted, even heightened, attention in the settlement context." Id.

> To bring a class action under Rule 23(a), a plaintiff must demonstrate: (1) the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy of representation"].

Fed. R. Civ. P. 23(a).

In addition to these requirements, a plaintiff must satisfy one of the three Rule 23(b) prongs to maintain a class action. Here, Plaintiff seeks class certification under Rule 23(b)(3). (Mot. at 7-10.) Where a plaintiff seeks class certification under Rule 23(b)(3), he or she must prove: "[1] the questions of law or fact common to class members predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

B. Preliminary Approval of Settlement Under Rule 23(e)

Class action settlements must also satisfy the fairness and reasonableness standard of Rule 23(e). Alberto v. GMRI, Inc., 252 F.R.D. 652, 664 (E.D. Cal. 2008). Rule 23(e) states: "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." The Court must hold a hearing and find that the settlement "is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Review of a proposed settlement generally proceeds in two stages, a hearing on preliminary approval followed by a final fairness hearing. See Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004).

At the preliminary approval stage, a court determines whether a proposed settlement is "within the range of possible approval" and whether or not notice should be sent to class members. Vasquez v. Coast Valley Roofing, Inc., 670 F. Supp. 2d 1125 (E.D. Cal. 2009); In re Tableware Antitrust Litig., 484 F. Supp. 2d at 1079; In re Corrugated Container Antitrust Litig., 643 F.2d 195, 205 (5th Cir. 1981); Gautreaux v. Pierce, 690 F.2d 616, 621 n. 3 (7th Cir. 1982) (stating the purpose of a preliminary approval hearing is to "ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing"); Manual for Complex Litigation, § 21.632.

III. DISCUSSION

A. Does a Class Exist? Rule 23(a) and Rule 23(b)(3)

1. Rule 23(a)

a. Numerosity

To satisfy the numerosity requirement under Rule 23(a)(1), joinder of all class members must be "impracticable," but not necessarily impossible. Parkinson v. Hyundai Motor Am., 258 F.R.D. 580, 588 (C.D. Cal. 2008). Courts have not required evidence of a specific class size or identity of class members to satisfy the requirements of Rule 23(a)(4). Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993).

Here, Plaintiff contends, and BGASC stipulated, that there are thousands of persons who bought the relevant rounds from BGASC during the relevant time period. (Mot. at 16.) Accordingly, it is undisputed that numerosity is met.

b. Commonality

Commonality "requir[es] a plaintiff to show that 'there are questions of law or fact common to the class.'" Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011) (quoting Fed. R. Civ. P. 23(a)(2)). Even a single common question will suffice. Id. at 2556.

Here, the class claims raise many common questions of law or fact, such as (1) if BGASC manufactured or sold the rounds at issue; (2) if these rounds are imitation items under the Hobby Protection Act; (3) if the Hobby Protection Act required these rounds to be marked "COPY;" (4) if BGASC's conduct violated the Hobby Protection Act; and (5) if BGASC should be enjoined from manufacturing or selling the rounds at issue without marking them with the word "COPY." (Mot. at 17.) These contentions satisfy the commonality requirement.

c. Typicality

The Ninth Circuit in Hanlon v. Chrysler Corp. explained that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Thus, to find typicality, a "court does not need to find that the claims of the purported class representatives are identical to the claims

of the other class members." Haley v. Medtronic, Inc., 169 F.R.D. 643, 649 (C.D. Cal. 1996).

Here, Plaintiff maintains that his claim is representative of other members of the class because they all bought identical rounds manufactured and sold by Defendant BGASC, which violated the Hobby Protection Act because they were not marked "COPY." (Mot. at 18.) Thus, this lawsuit is based on alleged conduct that is not unique to Plaintiff and is typical of all class members. Hence, typicality is satisfied.

d. Adequacy of Representation

Rule 23(a)(4) demands that "representative parties will fairly and adequately protect the interests of the class." This determination "is a question of fact that depends on the circumstances of each case." In re Nat'l W. Life Ins. Deferred Annuities Litig., 2010 WL 2735732, at *5 (S.D. Cal. July 12, 2010) (citing McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members[,] and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020.

Plaintiff and proposed class counsel, Stephen P. DeNittis, do not have conflicts of interest with other class members as the claims are identical. (Mot. at 19.) Moreover, Plaintiff and Class Counsel have prosecuted this action vigorously by negotiating an early settlement agreement that gives the class the relief sought in Plaintiff's Complaint. (Id.)

Mr. DeNittis has participated in over 150 class actions, serving as lead class counsel or co-lead class counsel. (Id.) In addition, Mr. DeNittis has given presentations and lectures to attorneys on class action topics at Continuing Legal Education seminars. (Id.)

Hence, Plaintiff and Class Counsel have demonstrated their "ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

As Plaintiff has met all of the Rule 23(a) criteria, the Court turns to the Rule 23(b) requirements.

2. Rule 23(b)(3)

Plaintiff seeks class certification under Rule 23(b)(3). (Mot. at 22.) Rule 23(b)(3) applies where "the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." This is commonly called the "predominance" and "superiority" analysis. Hanlon, 150 F.3d at 1023.

a. Predominance

The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and "focuses on the relationship between the common and individual issues." Hanlon, 150 F.3d at 1022. "When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1778.

As discussed above, Plaintiff has demonstrated commonality amongst proposed class members. Other than the number of rounds purchased from Defendant, every other factual and legal issue in this case is the same for every class member. (Mot. at 22.) Hence, Plaintiff has demonstrated that common issues predominate over individualized concerns.

b. Superiority

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification. (Id.)

A class action appears to be superior to other available methods for fairly and efficiently adjudicating this matter. The amount of damages suffered by any one

purchaser is less than 50 dollars per round. (Mot. at 23.) Without class certification, it is unlikely that these claims would be litigated at all. Hence, Plaintiff has satisfied Rule 23(b)(3).

Since Plaintiff has satisfied Rule 23(a) and Rule 23(b), the Court concludes that class certification is proper in this case, and now turns to whether the proposed settlement is fair, adequate, and reasonable under Rule 23(e).

B. Fairness, Adequacy, and Reasonableness of the Settlement Agreement: Rule 23(e)

"[Rule] 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." Hanlon, 150 F.3d at 1026. In determining whether the settlement is fair, adequate, and reasonable, courts balance several factors, including: (1) whether the proposed settlement appears to be the product of serious, informed, non-collusive negotiations; (2) the strength of the plaintiff's case; (3) the risk, expense, complexity, and likely duration of further litigation; (4) the risk of maintaining class action status throughout the trial; and (5) the amount offered in settlement. City of Seattle, 955 F.2d at 1291 (citing Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982)); In re Tableware Antitrust Litig., 484 F. Supp. 2d at 1079 (citing Manual for Complex Litigation, § 30.44 (2d ed. 1985)).

The court need not consider all of these factors; rather, it must only consider those factors that are designed to protect absentees. Molski v. Gleich, 318 F.3d 937, 953 (9th Cir. 2003) overruled on other grounds by Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010). Moreover, as some of these factors cannot fully be assessed until the Court conducts the fairness hearing associated with the final approval of the settlement, "a full fairness analysis is unnecessary at this stage . . . ." Alberto, 252 F.R.D. at 665 (quoting W. v. Circle K Stores, Inc., 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006)).

1. Officers for Justice Factors

a. Settlement Agreement Terms

i. Parties to the Settlement Agreement

The proposed Settlement Agreement is between the named Plaintiff Andrew Roseman, individually and on behalf of all others similarly situated, and Defendant BGASC. (Settlement Agreement at 4, 5.)

ii. Settlement Payments

The Settlement Agreement requires BGASC to:

(1) stop manufacturing or selling the unmarked rounds and mark future rounds with the word "COPY;"

(2) offer all class members the opportunity to exchange the unmarked rounds that they purchased with either (i) rounds marked with the word "COPY," or (ii) a refund based on the current market value of silver; and

(3) pay for the cost of all such exchanges.

(Settlement Agreement at 7.)

b. Is the Settlement Agreement the Product of Non-Collusive Negotiations?

Here, the Settlement Agreement was reached after the parties exchanged enough factual information so that both sides had a fair opportunity to evaluate fully the factual and legal issues present in this case, as well as the risks associated with further litigation. (Mot. at 11.) As the Settlement Agreement appears to be the product of arm's-length negotiations with no indication of collusion, the Court finds this factor weighs in favor of approval.

C. Strength of the Plaintiffs' Case and Future Risks

According to Plaintiff, the claims under the Federal Hobby Projection Act are strong and the Settlement Agreement effectively provides each class member with the relief requested in Plaintiff's Complaint and available under the Act. (Mot. at 11.)

As noted previously, the Settlement Agreement was reached after arm's-length negotiations. It is likely that further lengthy and complex litigation would have taken place absent the parties' agreement to settle the case.

Given the relative strength of Plaintiff's claims, and the risks and costs associated with future complex litigation, the Settlement Agreement terms appear to be reasonable. Hence, this factor weighs in favor of the proposed settlement.

d. Risk of Maintaining Class Action Status Throughout the Trial

The Court may revisit the certification of the class at any time before entry of final judgment. See Fed. R. Civ. P. 23(c)(1)(C). Where there is a risk that class certification might not be maintained before entry of final judgment, this factor favors approving the proposed settlement.

Given the risks, costs, and uncertainty involved in class action litigation, it is likely that Defendant would have contested certification had a motion been filed. Hence, the uncertainty regarding Plaintiff's ability to maintain class certification throughout the case favors approving the proposed settlement.

As all of the factors analyzed by the Court under Officers for Justice support approving the settlement, the Court will next turn to reasonableness of the attorney's fees, costs, and incentive award payments.

2. Attorney's Fees and Costs, and Incentive Payments

Plaintiff seeks attorney's fees and actual litigation costs, and incentive award payments. Therefore, the Court will also evaluate the fairness, adequacy, and reasonableness of these allocations. Staton, 327 F.3d at 963 ("[T]o avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement.").

a. Attorney's Fees and Costs

Plaintiff seeks, and Defendant has agreed not to oppose, attorney's fees, costs and expenses not to exceed thirty thousand dollars ($30,000.00), to be paid by Defendant, subject to Court approval. (Settlement Agreement at 11.) The parties acknowledge that Class Counsel is not entitled to an award of any other attorney's fees and costs, including any future costs of an appeal, related to this action, litigation or the dispute between the parties and class members, except to the amount specified in the Settlement Agreement. (Id.)

To calculate the reasonableness of an award of attorney's fees, the Court may use either the percentage-of-the-fund method[1] or the lodestar/multiplier method.[2] In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295 (9th Cir. 1994) ("[T]he district court has discretion to use either method in common fund cases."). Regardless of the method used, "the district court should be guided by the fundamental principle that fee awards out of common funds be "reasonable under the circumstances." In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d at 1296 (quoting State of Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990)).

The Settlement Agreement requests no more than $30,000 in fees and costs. (Settlement Agreement at 11.) Rule 23(h) provides that the Court may award reasonable costs. Fed. R. Civ. P. 23(h). Though Plaintiff's counsel has not attached any accounting of past costs, the request for up to $30,000 in fees and costs appears reasonable. The Court tentatively agrees that Settlement Agreement's costs allocation is reasonable, subject to revision following the final approval of the settlement.

b. Incentive Awards

The named Plaintiff, Andrew Roseman, seeks an incentive award of five hundred dollars ($500.00). (Settlement Agreement at 12.) "[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments."

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[1] Under the percentage-of-the-fund method, the court calculates the fee award by designating a percentage of the total common fund. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

[2] Under the lodestar method, the court calculates the fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and then enhancing that figure, if necessary to account for the risks associated with representation. Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989).

Here, the amount set is a modest one, in keeping with the limited efforts involved before the early resolution of the case. The Court tentatively approves the incentive award, and will set the final amount at the final fairness hearing. See Rodriguez v. D.M. Camp & Sons, 2012 WL 6115651, at *10 (E.D. Cal. Dec. 7, 2012) (approving preliminary class settlement incentive award as the court was given the flexibility to award "up to $10,000.").

3. Notice and Administrative Procedures

Under Rule 23(e), the Court must "direct notice in a reasonable manner to all class members who would be bound" by the proposed settlement. Fed. R. Civ. P. 23(e)(1). Plaintiff must provide notice that is "timely, accurate, and informative." See Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 172 (1989). Likewise, claims forms must be informative and accurate. Id. at 172; Churchill Village, LLC v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004).

(1) Claim Forms

Claim forms must be timely, accurate, and informative. Hoffman-LaRoche, 493 U.S. at 172.

According to the Notice of Proposed Class Action Settlement, class members who wish to participate in the partial settlement must complete a claim form within ninety days of preliminary approval. (Settlement Agreement Legal Notice ("Proposed Notice") at 2.) Moreover, all costs associated with returning unmarked rounds or getting a refund will be covered by Defendant. (Id.) The Proposed Notice also provides class members the option of opting out, objecting, or doing nothing. (Id. at 2, 3.) The Court finds that the Proposed Notice is acceptable.

(2) Claim Administration

The parties propose that Defendant serve as the settlement administrator in order to maintain the privacy of class members. (Settlement Agreement at 8.) As settlement administrator, Defendant would have the authority to determine the validity of claims, subject to monitoring and input by counsel for the parties. Sixty days after the expiration of the claims period, Defendant shall submit a report to counsel for the parties. (Id.) In the event that Defendant and class counsel cannot

resolve disagreements over disputed claims, the matter will be submitted in writing to the Court, whose ruling as to the validity of such disputes will be binding and final, without further appeal.

The Court finds that the procedures as detailed in the Settlement Agreement are adequate.

As the Settlement Agreement complies with Rule 23(a), Rule 23(b), and Rule 23(e), the Court approves the proposed Settlement Agreement.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Plaintiff's Motion for Preliminary Approval of Class Action Settlement and sets the final approval hearing for ***February 29, 2016, at 2:00 p.m.***

IT IS SO ORDERED.