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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

BRUCE DEATON, ET AL, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. HOTWIRE, INC., and DOES 1 through 100, Defendants.	Lead Case No. CGC 05-437631 (Cons. With Nos. CGC 05-437701 and CGC 05-4387881) CLASS ACTION SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS' FEES AND COSTS Date: October 23, 2009 Time: 10:30 am Department: 304 Assigned for all purposes to the Honorable Judge Richard A. Kramer

I. INTRODUCTION

In her application for award of attorneys' fees and costs ("Fee Application"), Plaintiff indicated that, if necessary, she would file a supplemental memorandum addressing any objections to the Fee Application and providing to the Court updated information regarding Class Counsel's lodestars and the Class' response to the Settlement.

The Class' response to this Settlement was overwhelmingly positive. Of more than 1.3 million Class Members who were sent direct notice of the settlement by email, only 269 people opted-out of the Settlement, and only one person objected. [1]

The objector, Josh Wintters, submitted eight "objections" to Plaintiff's Fee Application. None of the objections are supported by California law, and all should be overruled. But even if every objection is sustained, Class Counsel should still entitled to be awarded the requested $1,938,665.59 in attorneys' fees, because that amount is *less* than their lodestar. Class Counsel also has provided sufficient evidence to support its request for $66,334.41 in costs.

II. ARGUMENT

A. Class Counsel's Current Lodestar.

Since Plaintiff submitted her Fee Application, Class Counsel has spent approximately another 59.75 hours working on this case. (Safier Supp. Decl. ¶ 4; B. Harper Supp. Decl. ¶ 6; J. Harper Supp. Decl. ¶ 5; Dumain Decl. ¶ 7.) Counsel anticipates that it will (collectively) spend about 20 hours preparing for and attending the final approval hearing. (Safier Supp. Decl. ¶ 5; B. Harper Supp. Decl. ¶ 6; J. Harper Supp. Decl. ¶ 5; Dumain Decl. ¶ 7.) Class Counsel's total lodestar, to date, is $2,807,043.50. The total fee request of $1,938,665.59 equals 69% of the lodestar.

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[1] The sole objector, appearing *pro per,* is a lawyer employed by the Weinstein law firm in Tyler, Texas. (Safier Supp. Decl. ¶ 6, Ex. A.)

B. Reaction To This Settlement Was Overwhelmingly Positive.

The period for opting-out of or objecting to the Settlement ended on September 25, 2009. There were only 269 opt-outs (0.002%) and one objection (0.00007%). The exceedingly low rate of opt-outs and objections shows that the Settlement, including the agreed-to attorneys' fees, costs and incentive payment, have met with approval from Class Members. *See, e.g., In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.* (C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627 *48 (holding that "the presence or absence of objections from the class is also a factor in determining the proper fee award.")

C. Each of Wintters' Objections Should Be Overruled.

Objector Wintters presents eight rapid-fire objections to Class Counsel's requests for attorneys' fees and costs. Each of them should be rejected because they are falsely premised and unsupported by California law. They are also essentially not relevant because Class Counsel requests a negative multiplier.

1. The Parties Have Supplied Sufficient Evidence to Justify The Lodestar.

Wintters first argues that Class Counsel's fees should be reduced because none of them provided testimony or evidence that the number of hours spent was reasonable. This is incorrect. Plaintiff's Fee Application, for example, dedicated an entire section to the reasonableness of Class Counsel's lodestar, including an express statement that the time spent on this case was done so "reasonably." Each of Class Counsel's declaration explains exactly what activities were performed in this litigation. Plaintiff is confident of this Court's ability to assess the reasonableness of Class Counsel's time spent on this case. *See Wershba*, 91 Cal. App. 4th at 255 ("An experienced trial judge is in a position to assess the value of the professional services rendered in his or her court."). In any event, Class Counsel submits herewith further declarations that the time they spent on this case was "reasonable." (Safier Supp. Decl. ¶ 7; B. Harper Supp. Decl. ¶ 2; J. Harper Supp. Decl. ¶ 3; Dumain Decl. ¶¶ 4, 5.)

2. Class Counsel's Work On This Case Was Efficient.

Wittners next objects to the lack of evidence establishing that the time spent on this case was not unnecessary, duplicative or excessive. Again this Court is aware of exactly what Class Counsel

did in this case. That information is also set forth in the declarations of Class Counsel. Class Counsel nonetheless submits supplemental declarations establishing that they did not perform unnecessary or duplicative work or "pad" hours. (Safier Supp. Decl. ¶ 7; B. Harper Supp. Decl. ¶ 2; J. Harper Supp. Decl. ¶ 3; Dumain Decl. ¶ 4, 5.) In all cases, one firm was assigned to take the lead on certain matters. (Safier Supp. Decl. ¶ 7.) The lead firm would then solicit input from the other firms and complete the task. (Id.) There were undoubtedly many times that four different firms were required to read the same document. But since each firm was appointed class counsel, and this litigation involved several plaintiffs and several consolidated cases, each firm was under an ethical duty to review many of the fillings and other papers.

3. There Is Evidence Of The Job Titles Of The Employees Of The Harper Firm.

Wintters next objects that the declaration of Blake Harper did not identify the job of each person listed. Mr. Harper's supplemental declaration includes that information. (B. Harper Supp. Decl. ¶ 3.) This objection is now moot.

4. Milberg's Rates Are Reasonable.

Wintters further objects that the rates of Milberg's support staff are "outrageously high." He provides no evidence to support this conclusion other than comparing these rates to Gutride Safier's paralegal rates from early 2005. Gutride Safier's paralegal rates have increased since that time, so this argument is falsely premised. (Safier Supp. Decl. ¶ 8.) In any event, Milberg's support staff rates are reasonable for services performed by a firm located in New York City, where Milberg is located. (Dumain Decl. ¶ 2.) Indeed, courts have approved Milberg's support staff rates in numerous cases. (Id. ¶ 3.)

5. All of Class Counsel's Rates Are Reasonable.

Wintters next objects that, other than the attorneys at Gutride Safier, Class Counsel fails to establish that their hourly rates are reasonable. Wintters is mistaken. Each firm includes with their declaration a description of the experience of the attorneys working on this case. Given that information, this Court is well aware of, and can apply, the prevailing market rates. *See Wershba*, 91 Cal. App. 4th at 255 ("An experienced trial judge is in a position to assess the value of the professional

services rendered in his or her court."). The supplemental declarations from the firms other than Gutride Safier also echo the latter firm's statement that the hourly rates are reasonable in light of the markets where they operate. (B. Harper Supp. Decl. ¶ 4; J. Harper Supp. Decl. ¶ 2; Dumain Decl. ¶ 2.) Because Wintters has no problem with the evidence submitted by Gutride Safier on this point, the evidence now submitted by the other firms should also be accepted.

6. Gutride Safier's Hourly Rates Are Reasonable.

Wintters next argues that Gutride Safier LLP's hourly rates are too high because they went up over 20% in four years and because the firm did not provide to this Court evidence that it gave the Plaintiff written notice of fee increases. This argument is somewhat contradicted by Wintters' suggestion that the Safier Declaration was exemplary for providing sufficient information regarding the reasonability of their rates. In any event, Wintters provides no evidence or information to suggest that these rates are not reasonable. As the hourly rates went up by $100 over the four-year period, or $25 per year, the increases are quite typical. Wintters also fails to provide any argument or evidence to establish that Gutride Safier's rates are unreasonable in San Francisco. As this Court is aware, Plaintiff is entitled to prevailing billing rates of comparable private attorneys in the relevant market. *See Serrano v. Unruh* (1982) 32 Cal.3d 621, 643. In this instance, Plaintiff's counsel has provided such information to this Court. Moreover, these rates have routinely been approved by this Court. *See, e.g., Vroegh v. Eastman Kodak Company, et al*, Case No. CGC-04-428953.

As to the supposed lack of evidence that Gutride Safier gave the class representative written notice of fee increases, Wintters does not establish that such evidence was required. Nor does he address the fact that any such writing between Plaintiff and her counsel would likely be protected by the attorney-client privilege. In any event, Gutride Safier did, in fact, give such written notice. (Safier Supp. Decl. ¶ 8.)

Finally, it should be noted that all of Wintters' objections fail to consider that Class Counsel requests a negative lodestar in this case. Accordingly, even if this Court were to reduce all counsel's rates or hours by, for example, 20%, the requested fee award would still be less than the lodestar. Otherwise put, all of Wintters' fee and cost objections are irrelevant.

7. The Requested Costs Are Reasonable.

Wintters next objects that there is no evidence that the costs were reasonable. Again, each firm submitted declarations establishing exactly how much was spent and on what.

Wintters persists that the firms failed to explain, for example, how much they charged per page for copies or whether first class airfare or private jets were used. While Plaintiff disagrees that such information is required, she has nothing to hide. No travel was done by private jet. No firm travelled first class, with the possible exception of the Milberg firm, which represented that it never paid more than the business-class fare. The rates used for copies ranges from $.10 to $.25 per page. To satisfy Wintters, Plaintiff provides further declarations regarding their costs. (Safier Supp. Decl. ¶ 10; B. Harper Supp. Decl. ¶ 5; J. Harper Supp. Decl. ¶ 4; Dumain Decl. ¶ 6.)

Finally, it should be mentioned this is again much ado about nothing, because even if all of the costs were disallowed, the fee award should increase, so that the total of $2,005,000 is awarded for fees. This amount would still be less than Plaintiff's counsel's lodestar.

8. There Is No Requirement That A Cross-Check Be Performed on Redeemed Claims.

Objector Wintters finally argues that no fee should be awarded on the amount that reverts to Defendant. Although not entirely clear, Wintters seems to suggest that the Court, in determining the fee, should base the cross-check only on claims actually made. This is, of course, impossible because the claims period will not end until 30 days after final approval. Even if it were possible, it would still not be required.

To begin with, fees can be awarded based on the lodestar-and-multiplier approach without reference to the value of the settlement. *See, e.g., Lealao*, 82 Cal.App. 4th 19; *see also Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (holding that the lodestar-multiplier method was the appropriate method of fee determination in the context of a coupon-based settlement.) As set forth above, the lodestar (and *negative multiplier*) requested by Class Counsel is easily justified even without regard to class benefit. Indeed, California courts are empowered to use certain factors (other than assessing the value of the class benefit) to determine or enhance a lodestar award, such as the novelty and complexity of the issues, the special skill and experience of counsel, and the

contingent nature of the recovery, to increase an award. *See Lealao*, 82 Cal.App. 4th at 52-53 *citing* Pearl, *Cal. Attorney Fee Awards* § 11.4.

Next, in cross-checking Class Counsel's lodestar against the percentage of benefit, courts look at the value of the benefit made available, not the benefit actually claimed. *See Lealao,* 82 Cal.App. 4th at 51 ("fee in a traditional common fund case…may be calculated on the basis of the total fund made available rather than the actual payments made to the class"), *citing Boeing Co. v. Van Gemert,* 444 U.S. 472, 477 (1980) and *Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026, 1027 (9th Cir. 1997) (in calculating award of attorneys' fees in common fund settlement, it was error to apply benchmark percentage only to value of claims made, even if balance of fund will revert to defendant; percentage must be applied to value of entire fund); *see also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1997) ("attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims against the fund so that money remains in it that otherwise would be returned to the defendants"); *Hopson v. Hanesbrands Inc*., 2009 U.S. Dist. LEXIS 33900 *32 (N.D. Cal. Apr. 3, 2009) ("The appropriate measure of the fee amount is against the potential amount available to the class, not a lesser amount reflecting the amount actually claimed by the members.")

The citations offered by Wintters' in support of his argument are not in conflict. Indeed, Wintters misreads each of those cases. *See, e.g., Lealao, supra*; *Strong v. BellSouth Telecommuncations, Inc*., 137 F.3d 844, 852 (5th Cir. 1998) (holding that a court may, *at its discretion*, consider the actual claims awarded; no requirement that it must consider redeemed claims.) [2]

[2] The possible exception is *In re TJX Companies Retail Sec. Breach Litigation*, 584 F. Supp.2d 396 (D. Mass. 2008). But *TJX* is both not binding on this Court and is plainly in conflict with California law.

III. CONCLUSION

For the foregoing reasons, Class Counsel asks this Court to grant this application for an award of $5,000 to Plaintiff Salisbury, and $2,005,000 in attorneys' fees and expenses incurred in this Litigation.

Respectfully submitted,

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