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YELP! INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUSTIN LARKIN, ANTHONY TIJERINO, and AHMAD DEANES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

YELP! INC.,

Defendant.

CASE NO. CV 11-1503 EMC

DEFENDANT'S NOTICE OF NON-OPPOSITION TO MOTION FOR FINAL APPROVAL OF CLASS AND COLLECTIVE ACTION SETTLEMENT

Date: November 30, 2012
Time: 2:30
Courtroom: 5, 17th Floor
Judge: Honorable Edward M. Chen

Rule 23 of the Federal Rules of Civil Procedure requires court approval for any settlement of a class action. Fed. Rule Civ. Pro., Rule 23(e). Similarly, private settlements containing waivers of FLSA claims, like the settlement here, must be approved by a court or the Department of Labor. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); *Jarrard v. Se. Shipbldg. Corp.*, 163 F.2d 960, 961 (5th Cir. 1947). Accordingly, Plaintiffs have sought Court approval for the settlement in this case, and pursuant to Civil L.R. 7-3(b), Defendant Yelp! Inc. hereby states that it does not oppose, and instead respectfully requests that the Court grant, Plaintiffs' Motion for Final Approval of Class and Collective Action Settlement. *See* Docket Entry No. 48.

It is axiomatic that federal law strongly favors and encourages settlements, especially in class actions. *See Franklin v. Kaypro Corp.* 884 F.2d 1222, 1229 (9th Cir. 1989), cert. denied, *Franklin v. Peat Marwick Main & Co.*, 498 U.S. 890 (1990) ("it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits") (internal quotation and citation omitted).

Because Plaintiffs have thoroughly addressed the bases for final approval in their motion, Defendant will not reiterate all of these points but does respectfully wish to address three topics: (a) the results of the notice and claims process confirm that the settlement is worthy of final approval; (b) the settlement is fair to class members because Defendant had numerous defenses to liability; and (c) the parties have met and conferred and resolved an issue concerning the total amount of the payments made by Defendant under the settlement.

A. The Results of the Notice Process are Clear

As set forth in Plaintiffs' motion, the results of the notice process clearly support final approval. Although there are several criteria that district courts can consider when making this fairness inquiry, and Plaintiffs have addressed all of them, it bears stressing that the Ninth Circuit and other federal courts have recognized that the number or percentage of class members who object to or opt out of the settlement is a factor of great significance. *See Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 837 (9th Cir. 1976); *see also In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) ("[i]t is well settled that the

reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (internal quotation marks and citation omitted).

On one hand, numerous federal courts have held that a relatively high percentage of objectors or opt outs will not necessarily preclude approval of a class settlement. *See, e.g., Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 23 (2d Cir. 1987) (citing numerous cases in which class settlements were approved despite the fact that significant percentages, ranging from 15% to 56%, of relevant Class Members opted out of the settlement or otherwise objected).

At the same time, other courts have made clear that a relatively low percentage of objectors or opt outs is a very strong sign of fairness that factors heavily in favor of approval. *See Cody v. Hillard*, 88 F. Supp. 2d 1049, 1059-60 (D. S.D. 2000) (approving the relevant settlement in large part because only 3% of the apparent class had objected to the settlement); *In re Dun & Bradstreet Credit Servs. Customer Litig.,* 130 F.R.D. 366, 372 (S.D. Ohio 1990) (approving the relevant settlement and affording "substantial weight" to the fact that fewer than 5% of the class members elected to opt out of the settlement); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983) (approving the settlement and holding that the fact that none of the class members had objected and a small percentage opted out of the settlement was "entitled to nearly dispositive weight").

Critically, in this case, *not one* Class Member has objected to the settlement. Moreover, only two Class Members have elected to opt out. These individuals constitute well less than one percent of the Class. Defendant respectfully submits that this is a very telling factor establishing the fairness of this settlement.

B. Defendant Had Several Grounded Defenses to this Action

As stated before in the preliminary approval process and the settlement itself, Defendant does not admit and instead denies any wrongdoing or liability. Furthermore, and most pertinent to this Court's review of the pending settlement, Defendant contends that if this matter were litigated further, Plaintiffs would face significant obstacles to obtaining class or collective action certification and establishing liability.

First, as Defendant demonstrated to Plaintiffs in the discussions that led up to the

settlement, a large number of the former employees in the proposed California class (including the two named California plaintiffs themselves) executed severance agreements with general releases, which covered the state law claims at issue here. Courts throughout California have consistently held that a general release signed by an employee in a severance agreement bars that employee from later seeking overtime or other wage claims under California law -- in other words, courts consistently uphold the exact sort of release at issue here. *See, e.g. Jimenez v. JP Morgan Chase & Co.*, 2008 WL 2036896, *3 (S.D. Cal. 2008); *Renov v. ADP Claims Services Group, Inc.*, 2007 WL 5307977, *3 (N.D. Cal. 2007).

In addition, and also in exchange for monetary consideration, a large number of the people within the proposed class voluntarily executed release agreements, which expressly and specifically released the claims subsequently filed in this lawsuit. Just as California courts have made clear that separation releases are valid, they have also held that pre-certification releases like those signed by Account Executives here are valid. *See, e.g. Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 796, 803 (2009).

Finally, many of the employees not subject to releases executed arbitration agreements that contain class and collective action waivers. Defendant submits that there can be little doubt that these arbitration provisions are enforceable in the context of standard wage and hour claims. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *Valle v. Lowe's HIW, Inc.*, No. 11–1489 SC, 2011 WL 3667441 (N.D.Cal. Aug. 22, 2011) (upholding the validity of a class action waiver in the context of a wage and hour action and citing cases for the proposition that "in light of *Concepcion, Gentry* is no longer good law").[1]

Second, Defendant contends that even if those individuals not subject to the release agreements could somehow proceed in court, they would still be unable to obtain class or collective action certification. This is because Plaintiffs are essentially alleging that they worked

[1] Indeed, even if *Gentry* somehow remained good law, the class/collective action waiver provision would still be enforceable because employees were given the option to opt out of the arbitration program. *See Arellano v. T-Mobile USA, Inc.*, No. C 10–05663 WHA, 2011 WL 1362165 (N.D. Cal. 2011) (holding that a class waiver was not unconscionable under former California law because the individuals in question had an opportunity to opt out of the arbitration program) (citing *Circuit City Stores, Inc., v. Ahmed,* 283 F.3d 1198, 1199–200 (9th Cir. 2002) and *Circuit City Stores, Inc., v. Najd,* 294 F.3d 1104, 1108 (9th Cir. 2002)).

off-the-clock during the pertinent period and that Defendant knew that they were doing so, but did not make additional payments.

Although Plaintiffs do not and cannot allege that Defendant affirmatively required the pertinent employees to work overtime without extra compensation, Plaintiffs argued that Defendant knew or should have known about such overtime work because, they contend, (a) Yelp encourages overtime work by offering incentive compensation; and (b) any overtime work would occur in the office. But, the mere fact that an employer offers incentive compensation does not establish that employees choose to work unrecorded overtime and that the company has actual or constructive knowledge of such practices. Companies frequently offer incentive compensation to encourage efficient and high quality work, and doing so is not a *per se* violation of either California or federal overtime law. *See Koike v. Starbucks Corp.*, 2008 WL 7796650 (N.D. Cal. 2008) ("it does not follow that simply because [the employees] had an incentive to work off the clock that they actually did so and that [the employer] knew of such off-the-clock work"). Similarly, though it is true that any overtime would occur in the office, this alone does not establish that employees actually worked overtime or that Defendant's management knew or should have known of such work. As such, and as explained in greater detail in the preliminary approval process, Defendant takes the position if litigation were to proceed, primary contested factual issues would include (a) whether each Account Executive worked overtime; (b) whether Yelp knew or should have known that the Account Executive worked overtime; and (c) if so, whether such time was *de minimis*. These issues, Defendant contends, are all inherently individualized.

Third, Defendant vigorously disputes the notion that any of the Account Executives in question worked significant amounts of overtime without additional compensation during the pertinent period. Because the key component of an Account Executive's job is communicating with local businesses, an Account Executive's hours necessarily mimic the hours that local businesses are open. In addition, one reason why Yelp is so popular with its employees is that its culture encourages Account Executives to work less than eight hours a day and to frequently take breaks for lunch, personal errands, and in-office socializing.

Perhaps more importantly, Defendant analyzed objective data from the company's data systems, and these data confirmed that during the pertinent periods, Account Executives generally did not work more than eight hours a day or forty hours per week. Defendant also obtained statements from pertinent employees confirming that they did not work uncompensated overtime. And, Defendant is not aware of any objective data sample to the contrary.

C. Class Counsel Has Not Sought the Maximum Fee Award

In what Defendant respectfully submits is another indication of the propriety of the settlement, Class Counsel has sought only about two-thirds of the maximum amount of fees they could have sought under the settlement. Accordingly, pursuant to the terms of the settlement, these unsought and therefore un-awarded amounts are added to the maximum settlement amounts (the initial funds) and re-distributed to the participating claimants consistent with the claims rate. It should be noted that Plaintiffs initial motion contained the suggestion that the total payout on all aspects of the settlement would be approximately $845,000, but in fact, the total payout will be approximately $800,000.[2] The parties, through counsel, have met and conferred on this issue, and as explained in Plaintiffs' recent status report (Docket Entry No. 49) they are in agreement that if the settlement is approved and the judgment is issued, the total approximate payout would be $800,000.

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[2] Specifically, pursuant to the settlement agreement, any portion of the maximum attorney fee award to Class Counsel that is not awarded is added to the maximum settlement amounts for each class, with two-thirds going to the maximum amount for the California Class and one-third to the maximum amount for the National Class. The settlement sums for the Class Members are then recalculated (and necessarily increased) for all Class Member, and of course those amounts will eventually be paid to the Class Members who have become Participating Claimants. *See* Settlement Agreement at ¶¶ 1.24, 1.24 & 2.8.1. Put differently, while the settlement agreement provides that the portion of the funds Class Counsel did not seek in fees is redistributed to the maximum settlement amounts for each class, this money (like all money in these maximum settlement funds) is paid according to the claims rates.

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Despite strong defenses to the instant claims, Defendant chose to work with Plaintiffs and their counsel to resolve this matter. The notice process and associated response have now confirmed the propriety of the settlement. Accordingly, Defendant therefore respectfully joins Plaintiffs in requesting that the Court grant final approval for the class and collective action settlement.

DATED: November 9, 2012

Munger, Tolles & Olson LLP

By: /s/ *Malcolm A. Heinicke*
Malcolm A. Heinicke
Attorneys for Defendant
YELP! INC.