E-Filed: April 28, 2014

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THOMAS LUSBY, ET AL., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GAMESTOP INC., ET AL.,

Defendants.

_____/

No. C12-03783 HRL

INTERIM ORDER RE PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

[Re: Docket No. 33]

Plaintiffs, representing a putative class, sue Gamestop Inc. and Gamestop Corporation (collectively, "Gamestop") asserting various wage and hour claims. In March 2013, the Court denied a motion for preliminary approval of class action settlement. A First Amended Complaint was filed in October adding a few new plaintiffs, and in November they filed the instant Amended Motion for Order: (1) Granting Preliminary Approval of Class Action Settlement Agreement; (2) Granting Conditional Certification of the Settlement Class; (3) Appointing Class Counsel; (4) Appointing Class Representative; (5) Appointing Claims Administrator; and (6) Approving Class Notice and Claim Form and Timeline for Administration. *See* Dkt. No. 33. A hearing on the motion was held in December in which the Court expressed several concerns, most of which were addressed in the Second Supplemental Declaration of Molly A. DeSario filed in January 2014. However, the Court still has some concerns that were not alleviated by counsel's declaration, particularly with respect to the calculation of settlement amounts.

LEGAL STANDARD

Settlement of a class action requires judicial review and approval. *See* Fed. R. Civ. P. 23(e). At the preliminary fairness stage, the court must assess the validity of the settlement class pursuant to Rule 23(a) and (b), as well as evaluate the fairness, reasonableness and adequacy of the settlement agreement pursuant to Rule 23(e). Although the court's role in reviewing a proposed settlement, is critical, it is also a limited one. The court does not have the ability to "delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citations omitted) (internal quotation marks omitted). The court may, however, voice its reservations about the proposed settlement and set conditions that, if satisfied, might lead the court to approve it. *See* Fed. Judicial Ctr., *Manual for Complex Litigation* § 21.61 (4th ed. 2004).

DISCUSSION

A. Settlement Calculation

As is relevant here, the class is divided into four subclasses corresponding to four positions or job titles: Game Advisor (GA), Senior Game Advisor (SGA), Assistant Store Manager (ASM) and Store Manager (SM). Before any payments are made to individual claimants, the Net Settlement Amount is first distributed among the four subclasses. This distribution is initially calculated based on the total number of weeks worked by employees in each subclass. Thus, because more class members were employed as GAs than any other position, more weeks were worked by GAs, and the GA subclass is initially apportioned the largest share. However, GAs typically earn the lowest hourly wage and work the fewest hours. To account for these differences among the subclasses, as well as the fact that the claims may not apply to each subclass with equal force, the settlement agreement provides that a multiplier is to be applied to the initial workweek-based distribution. "The parties agree that the average hourly rate for members of each Subclass will serve as a reasonable proxy of differences in hourly rates, average hours worked, and claims, and will serve as a multiplier to allocate additional settlement funds to certain Subclasses." *See* DeSario Decl., Ex. A, at ¶ 57(B).

The Court is concerned that the average hourly rate of each subclass may not be a reasonable proxy for all three factors. Certainly, the average hourly rate is a reasonably proxy of differences in hourly rates. But, to be a reasonable proxy for all three factors taken together, the second and third factors, average hours worked and claims, must then offset one another to some extent. The parties have represented that, in addition to earning a higher hourly wage, the more senior positions also work progressively more hours per week. Thus, to balance out, the senior positions must have progressively fewer or weaker claims if the average hourly rate is to remain a reasonable proxy.

However, that does not appear to be the case. For example, that the more senior positions work longer hours would tend to increase the likelihood that they suffered violations related to overtime and meal or rest breaks. Additionally, it appears that GAs were less likely to have performed bank runs or interstoring, responsibilities which form the basis of the failure to reimburse claims. Accordingly, it seems that, in addition to earning a higher hourly wage and working more hours per week, class members in the more senior positions also have more claims to assert, in which case the average hourly wage would not be a very reasonable proxy for all three factors.

On the other hand, it is possible that the junior positions have stronger claims. Or it could certainly be that the applicability of claims to subclasses is too uncertain or inconsistent across the subclasses to be quantifiable. Regardless, though, the average hours per week for each subclass is easily quantifiable. At the hearing, counsel represented that SMs typically work five full shifts per week, ASMs four, and GAs/SGAs between one and three. The Court thinks that incorporating the average hours per week into the multiplier would more fairly account for the differences among subclasses. Particularly since the parties are using workweeks to determine the settlement amount, it seems more equitable to incorporate into the multiplier both the average hourly wage and average hours per week, effectively the average weekly wage.

The parties may have good reason to believe that average hourly rate alone is a more reasonable proxy and that incorporating the average hours worked would unfairly skew the distribution. Whatever the case may be, the parties shall explain why "the average hourly rate for members of each Subclass [is] a reasonable proxy of differences in hourly rates, average hours worked, and claims, and will serve as a multiplier to allocate additional settlement funds to certain

Subclasses." While the differences between the subclasses with respect to hourly rates and average hours worked are understood, the parties shall specifically address how the claims apply to the subclasses and are factored into the multiplier. Moreover, they are invited to consider the Court's suggestion to incorporate average hours per week into the multiplier and opine as to whether doing so would make for a more equitable distribution.

B. Additional Information

At the hearing, the parties estimated that claimants would receive between $7.75 and $8.38 per workweek based on 30% participation. The Court would like the parties to provide the specific figures for each subclass as well as a revised estimate based on any proposed amendment. Additionally, the Court requests an estimate based on 100% participation and an estimate of the potential recovery if the class members were to prevail on each of their claims.

Finally, the Court previously requested but did not receive an estimate of Gamestop's share of payroll taxes that would be deducted from the Net Settlement Amount.

CONCLUSION

The parties shall file a response to the issues discussed above within 14 days of the date of this order.

IT IS SO ORDERED.

Dated: April 28, 2014

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

C12-03783 HRL N**otice will be electronically mailed to:**

Carrie Anne Gonell cgonell@morganlewis.com, pmartin@morganlewis.com

John David Hayashi jhayashi@morganlewis.com, dghani@morganlewis.com

Molly Ann DeSario mdesario@scalaw.com, grafal@scalaw.com, jmusgrave@scalaw.com, kweekes@scalaw.com, mbainer@scalaw.com, mkim@scalaw.com, mmedrano@scalaw.com, scole@scalaw.com

Scott Edward Cole scole@scalaw.com, cdavis@scalaw.com, jcampbell@scalaw.com, jmusgrave@scalaw.com, Mbainer@scalaw.com, mdesario@scalaw.com, mkim@scalaw.com, mmedrano@scalaw.com

Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.