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SUNVALLEYTEK INTERNATIONAL, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

INES BURGOS, and MONGKOL MAHAVONGTRAKUL, individually and on behalf of other similarly situated individuals,

Plaintiffs,

v.

SUNVALLEYTEK INTERNATIONAL, INC.,

Defendant.

Case No. 4:18-cv-06910-HSG

CLASS ACTION

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ATTORNEY'S FEES PORTION OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Honorable Haywood S. Gilliam, Jr.

Defendant Sunvalleytek International, Inc. ("Sunvalleytek" or "Defendant") hereby responds to Plaintiffs' Motion for Final Approval of Class Action Settlement, Attorneys' Fees and Expenses; and Awards in order to state Defendants agreement to most aspects of the motion, but to dispute the requested award of attorneys' fees.

I. FACTUAL BACKGROUND

For purposes of this motion and settlement, Defendant does not dispute the basic factual background set forth by Plaintiffs. Sunvalleytek markets, distributes, and sells nationwide "Power Banks," portable, external battery devices that consumers use to charge their personal electronic devices such as laptops, tablets, and cell phones. First Amended Complaint, Dkt. No. 20 ("FAC") ¶ 20. From shortly after this case was initiated, it became apparent to counsel on both sides that the parties did not dispute the basic facts. Defendant promoted and sold its Power Banks based on claims that its Power Banks' "mAh" (milli-amphere hour) capacity or rating was the sum of the capacity of the internal batteries. Plaintiffs contend in this litigation that Defendant's representation is false and misleading, claiming that consumers believe the representation meant that the "mAh" capacity or rating represents the battery charging capability that would actually be available to flow into a consumer's mobile phone or other device to be charged. FAC ¶ 19. It is undisputed that, due to other components and circuitry in the Power Bank, and other numerous other issues ranging from charging cords to environmental factors, the actual charging capability delivered to the consumer's device will be less than the mAh rating or capacity stated by Sunvalleytek. Declaration of Kimberly A. Donovan ("Donovan Decl."), filed herewith, ¶ 2.

In addition to this lawsuit, filed November 14, 2018, Plaintiff's counsel brought at least seven other class action lawsuits against other manufacturers or sellers of Power Banks ("Power Bank Cases") making essentially the exact same allegations, as follows:

Case Title	Date Filed	District Court
Mancuso v. RFA Brands	November 13, 2018	WD NY
Hester v. Walmart	November 14, 2018	WD AK
Mazzone v. Topstar	November 19, 2018	ND CA

Mahavongtrakul v. Inland	November 30, 2018	ND CA
Brady v. Anker, et al.	December 6, 2018	SD NY
Young v. Mophie	May 2, 2019	SD CA
Geske v. PNY Technologies	July 31, 2019	ND IL

See copies of complaints in each of the Power Bank Cases attached as Exhibit A-G to the Declaration of Kimberly A. Donovan, filed herewith.

Sunvalleytek, as well as the defendants in the other Power Bank Cases, contended, *interalia,* that the industry standard for advertising, promoting, and selling power banks was to use the sum of the internal battery capacity as the stated mAh capacity or rating in listing and selling power banks. They believed this was not confusing but was the only reasonable way to provide consumers with a means of comparing power banks. This is illustrated in part by the at least eight class action Power Bank Cases involving the same allegations.

In the present action, Defendant answered the complaint without bringing any motions. Plaintiff later amended the complaint based on motion practice in another Power Bank Case, and Sunvalleytek then answered the First Amended Complaint. There has been no motion practice in this case, a single case management conference, a single, partial day deposition pursuant to Rule 30(b)(6), very minimal discovery, a single, partial day mediation, and settlement negotiations. Donovan Decl. ¶ 3. The case has not been heavily litigated.

II. DEFENDANT'S NON-OPPOSITION TO MOTION FOR APPROVAL

As stated in the Settlement Agreement, attached as Exhibit 1 to the Declaration of D. Greg Blankinship ("Blankinship Decl.") filed in support of Plaintiffs' Motion, Defendant does not oppose class certification for purposes of settlement. The parties engaged in arm's length negotiation to arrive at negotiated settlement of this litigation through agreed upon injunctive relief in order to address Defendant's alleged misrepresentations and to avoid any possibility of confusion by consumers.

The crux of the dispute in this case is whether Sunvalleytek's representations, and similarly the representations of all the other power bank sellers, that a power bank has a certain mAh capacity was understood by consumers to be the internal battery capacity, as Sunvalleytek

intended and contended in this lawsuit, or did consumers understand the mAh capacity stated in promoting the power banks to refer to the actual charging capability a consumer's device would be able to receive to charge their device. This issue was never ultimately resolved because the parties agreed to resolve this case through the current Settlement Agreement.

A. The Proposed Settlement Agreement

The Settlement Agreement is described in detail in the Plaintiff's Motion, and the full agreement is attached as Exhibit 1 to the Blankinship Declaration. The Settlement Agreement calls for the specified injunctive relief, payment of a service award to the two class representatives of $5,000 each, and reimbursement of reasonable costs up to $20,000. The parties engaged in an arm's length negotiation resulting in the injunctive relief and other terms set forth in the agreement, along with their agreement to leave the issue of determination of reasonable attorneys' fees to the Court.

B. Class Certification

As set forth in Plaintiffs' Motion, Plaintiff seeks certification of a class under Rule 23(b)(2). Defendant supports certification of the class for purposes of this settlement.

C. No Individual Notice to Class Members is Necessary

As stated in Plaintiffs' Motion and as supported by the authorities cited therein, individual notice to class members is not required where a Rule 23(b)(2) class is certified. Defendants did provide notice to the United States Attorney General and to the attorneys general of the 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands, in other words, all states, territories, and districts where the Sunvalleytek RavPower® Power Banks have been sold, as mandated by 17 U.S.C. §1715. Since the settlement only provides for injunctive relief, not monetary damages, nor does it include any release of monetary claims by the class, this further supports no requirement for notice to individual class members.

D. Defendant Does Not Oppose Expenses or Plaintiffs' Service Awards

As set forth in the Settlement Agreement, Defendant does not object to reimbursement of reasonable expenses of up to $20,000 and service awards to each of the Plaintiffs in the amount of $5,000.

III. DEFENDANT OBJECTS TO PLAINTIFFS' COUNSEL'S REQUEST FOR $313,000 IN ATTORNEYS' FEES

It is undisputed that, in certifying a class action and approving settlement, "the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h); *see also,* Fed.R.Civ.P. 23(e)(2). However, even where the parties agree on an attorneys' fee provision, the court must conduct an inquiry to determine whether the attorneys' fees are fair and reasonable. Fed.R.Civ.P. 23(e)(2); *In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d 935, 941 (9th Cir. 2011) ("*Bluetooth")*. Here, the parties did not agree on the reasonable amount of fees, instead agreeing that the Court would make that decision in conjunction with the motion for approval of the settlement; however, Plaintiffs agreed they would not seek more than $313,000 and Defendant agreed it would not propose less than $45,000 in attorneys' fees. Blankinship Decl., Exh. 1, p. 10:24-11:10.

In injunctive relief class actions, courts often use a lodestar calculation, beginning with multiplication of the number of hours reasonably expended by a reasonable hourly rate. *Blum v. Stenson,* 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,1029 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *Yeagley v. Wells Fargo & Co.,* 365 F.App'x 886, 887 (9th Cir. 2010). The number of hours and the rates claimed should be supported by adequate documentation and other evidence, and then the resulting figure may be adjusted upward or downward based upon reasonableness. *Hanlon, supra* at 1029.

Factors considered include the benefits obtained for the class (monetary and non-monetary), and whether the results achieved were exceptional; the complexity and novelty of the issues; risks of litigation and non-payment; reasonableness of hours; and customary fees and rates for similar cases. *Chan v. Sutter Health Sacramento Sierra Region,* 2017 WL 819903, *5 (C.D. Cal. 2017); *Garcia v. Los Angeles County Sheriff's Department,* 2015 WL 13646906 ("*Garcia")*, *12-13 (C.D. Cal. 2015); *Hanlon, supra* at 1029, *citing Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 70 (9th Cir.1975). In determining the reasonableness of class counsel's fees, the critical issue though is the work performed in relation to the benefits obtained by the class members.

Bluetooth, supra, 941-42; *see also, Cox v. Clarus Marketing Group, LLC,* 291 FRD 473, 482-483 (S.D. CA 2013). Applying these considerations to the present litigation, Defendant proposes that the "reasonable" attorneys' fees in this case should be reduced to 30-40% of the sum requested, resulting in an attorneys' fees award between $105,000 and $126,000.

A. The Benefit Conferred to the Class Was Minimal and Did Not Involve Novel, Complex Issues

In order to evaluate the benefit conferred, courts consider the plaintiffs' objectives in the litigation compared to the results obtained, including whether an exceptional result was achieved. *Bronson v. Samsung Electronics America, Inc.* 2020 WL 1503662, *4 (N.D. Cal. 2020); *Chan v. Sutter Health, supra,* 2017 WL 819903 at *5; *Hanlon, supra* at 1029. Here, Plaintiffs sought certification of multiple classes within the United States, including a nationwide, a California, and a New York class under Rule 23(b)(3), and sought extensive damages as well as injunctive relief. Complaint, Dkt. No. 1. The case involved claims that the representations made by Defendant regarding the mAh capacity or rating was not correct and was not understood by consumers in the same manner as Defendant (and, in other cases, other power bank retailers) understood the representations. This is not a unique or novel issue. Ultimately, the relief obtained consisted of the simple injunctive relief, as set forth in the Settlement Agreement. Blankenship Decl, Exh. 1, pp. 7-8. This relief is not an exceptional result and is only a small part of the plaintiffs' objectives, as described in the complaint. The issues were not novel or complex, and the result was not exceptional.

B. The Hours Claimed Were Excessive Under the Circumstances

"A court may award attorneys' fees only for the number of hours it concludes were reasonably expended on the litigation. *Hensley [v. Eckerhart],* 461 U.S. [424], 434 [(1983)]. ('[Counsel] should make a good faith effort to exclude hours that are excessive, redundant, or otherwise unnecessary.')." *Garcia, supra,* 2015 WL 13646906 at *14. Counsel seeking an award of attorneys' fees bears the burden of providing appropriate evidence and detailed documentation to support the hours claimed. *Id. (citations omitted).*

Plaintiffs' counsel did not provide detailed timesheets showing work by legal professionals detailed by date, time and activity, but instead provided a chart specifying the hours spent by legal professional in particular categories, with the hours totaling 546.05. (Blankinship Decl., Exh. 4.) While this category method may be used in particular cases, it does make it difficult to fully evaluate the work performed, particularly here where Plaintiffs' counsel was simultaneously pursuing at least eight cases claiming the very same power bank "mAh" representation claims against various companies in this field. Certainly, there was substantial duplicative work for these cases that should not all be apportioned to Sunvalleytek, yet counsel only cut 20 hours for inefficiencies. Blankinship Decl. ¶ 19.

Plaintiff's counsel brought this action on November 14, 2018. Plaintiff's counsel filed five additional cases making the same allegations against other companies selling power banks between November 13 and December 6, 2018, and two more cases in 2019. Donovan Decl. Exh. A-G. The fact that Plaintiffs' counsel was pursuing eight cases involving exactly the same factual basis must be considered in evaluating the legal professional time spent in this case.

Plaintiffs' counsel claims a total of 93.1 hours of attorney time for its presuit investigation and drafting of the complaint. However, based on counsel's expense records, no legal research fees nor expert fees were incurred prior to the filing of the complaint. Blankinship Decl. Exh. 3. The information provided in the complaint (paragraph 19) suggests that an output test did occur on Plaintiffs' two products. There is nothing suggesting any other pre-suit investigation occurred, nor does the Plaintiffs' responses to discovery reveal any additional pre-suit investigation. Donovan Decl., Exh. J & K.

With regard to preparation of the complaint, the complaint in the instant lawsuit is nearly identical (other than the parties' names and identifying information) to the complaints in at least the first six other power bank cases filed by Plaintiffs' counsel.[1] *See and compare,* Donovan Decl. Exh. A-G to Complaint, Dkt. No. 1.

[1] Plaintiffs' counsel does not appear to be lead counsel in the final power bank case that was filed, Geske v. PNY Technologies, and the complaint in that action differs substantially. Donovan Decl. Exh. G.

Since minimal pre-suit investigation appears to have taken place and the time to prepare the complaint should be apportioned among at least the seven cases with virtually identical complaints, 93 hours of attorney time seems extremely excessive for this category of work.

The next category of professional time is "Motion Practice and Hearings," in which Plaintiffs' counsel indicates 39.8 hours. There were no motions filed in this case. While this category may encompass time associated with the single case management conference, once again, this time seems excessive.

Plaintiffs' counsel asserts that it spent 20.9 hours on "ESI," however, Plaintiffs did not have or produce any ESI.

The largest single category of professional time is the 173.45 attorney hours claimed for Written Discovery, plus an additional 20.1 hours listed as "Document Discovery." However, the written discovery practice in this case does not demonstrate value consistent with this amount of attorney time. Plaintiffs served one set of seven (7) interrogatories and one set of thirty-eight (38) requests for production of documents. Donovan Decl. Exh. J & K. These discovery requests consist of standard, boiler plate discovery requests applicable to any CLRA class action case, an area of law in which Plaintiffs' counsel specializes. While Defendant does not have access to discovery in other CLRA cases pursued by Plaintiffs' counsel, Defendant's counsel did review discovery propounded in one of the other power bank cases filed and litigated by Plaintiffs' counsel and found the discovery to be virtually identical. Donovan Decl. ¶¶ 11 & 12. Accordingly, very little time could be attributable to preparation of this discovery.

Defendants propounded a first set of interrogatories to Plaintiffs, consisting of 15 interrogatories, and received minimal responses showing minimal facts, information, or support for Plaintiffs' claims. Donovan Decl. Exh. J&K. Defendants propounded two additional sets of interrogatories to each of the Plaintiffs, one containing seven requests and one containing three. Plaintiffs never responded to these requests. Donovan Decl., ¶ 15. Defendants propounded an initial set of 52 Requests for Production of documents jointly to the two plaintiffs. Plaintiffs responded with evasive, unproductive responses and did not produce any actual documents. Donovan Decl. Exh. L, ¶ 16. Defendants propounded a second set of seven requests for

production, but never received a response. Donovan Decl. ¶ 16. Finally, Defendant propounded six requests for admissions to each Plaintiff and received responses. Donovan Decl. Exh. M & N. The 173.45 hours categorized as "Written Discovery" and the 20.1 hours listed as "Document Discovery" seem to be well in excess of reasonable hours in light of the minimal discovery, generic requests, evasive responses or non-existent responses. The parties did engage in meet and confer activities, but not enough to explain the number of hours claimed here in light of the actual discovery practices.

The parties conducted a total of one deposition during the litigation, consisting of a single half-day Rule 30(b)(6) deposition of Defendant's representative. Plaintiffs' lead counsel, Mr. Blankinship, travelled to California for this deposition and necessarily incurred time for preparation, travel, and taking of the deposition. His first-year associate Sara Bonaiuto also made the trip to California for this deposition. She did not take the deposition and her time was not necessary to accomplish reasonable litigation purposes in this case. It had been agreed that this same deponent would likely be deposed again regarding more substantive issues (this was an early, initial deposition to allow Plaintiffs' counsel to have a better understanding of Defendants' business operations). Donovan Decl. ¶ 19. The 103 hours billed to this single, short deposition are excessive, even with travel time. While Ms. Bonaiuto may have provided assistance in preparation for this short deposition, any time in excess of 4-6 hours for preparation time should not be charged since her travel and presence were not reasonable nor necessary. The nearly 54 hours charged by Mr. Blankinship also seems excessive for a single partial day deposition by an experienced litigator billing $850 per hour.

The final categories are expert discovery, with a total of 14.8 hours and Mediation and Settlement with a total of 67.2 hours. While no expert discovery was conducted, Defendants understand that some time was spent with Plaintiffs' expert, which could have made some hours necessary. Regarding mediation and settlement, the parties engaged in a mediation and negotiated settlement. From the perspective of Defendants' counsel, only Mr. Blankinship was involved in these efforts, and 67 hours is greater than Defendants' counsel would expect based on the partial day mediation and the time counsel spent in negotiations. Donovan Decl. Exh. 20.

Most of the issues in this case were undisputed. The parties agreed that Defendant advertised, promoted, and labelled its power bank products with mAh representations based upon the sum of the internal batteries contained in the power bank devices. Plaintiffs contend this was deceiving because they believe a reasonable consumer would understand the mAh representations to refer to the actual charging capacity that would be available to be transmitted to a consumer's device.

Considering the minimal issues in dispute, duplicative pleadings, lack of motion practice, minimal discovery (most of which seemed to be generic CLRA discovery and duplicative of other cases), and non-existent expert discovery, the number of hours reasonably attributable to this case should be sharply reduced. Defendants contend that reducing the hours by one half to one third of those claimed would be appropriate here.

C. The Hourly Rates Are High, Relative to the Level of Work Performed

Defendant does not dispute that Mr. Blankinship is an experienced attorney in this area of law and well regarded in the field. The other attorneys involved in the action do not seem to have a high level of experience in this area. Sara Bonaiuto graduated from law school in 2018 and Plaintiff's counsel's firm was her first legal job – in fact, she began work the same month the instant case was filed according to social media. Donovan Decl. ¶ 21. Scott Terrell previously worked for the District Attorney's office, such that when he joined Plaintiff's counsel's firm it was his first civil law position. Donovan Decl. ¶ 21. While Plaintiffs' counsel's firm is experienced in this area, it would not have the overhead and expenses one would expect and therefore the hourly rates anticipated in a large, multinational firm such as Milbank Tweed Hadley and McCloy, the firm in *Garcia.* In *Bronson v. Samsung Electronics America, Inc.* 2020 WL 1503662, (N.D. Cal. 2020) the rates ranged from $350 - $675 per hour for a case involving a nationally recognized firm. In *Chan v. Sutter Health Sacramento Sierra Region,* 2017 WL 819903, *5 (C.D. Cal. 2017) the rates ranged from $365 to $595 for senior associates through senior partners. The rates here, ranging from $300 per hour for a new associate to $850 per hour for a senior partner, with the largest number of hours by the senior partner, are very significant and Plaintiffs' counsel, who bears the burden of proving reasonableness, should provide further

proof of that these rates are reasonable and comparable, or counsel should offer to reduce the lodestar.

D. The Lodestar Attorneys' Fees Award Should Be Reduced In this Case

Courts have recognized that "'counting all hours spent on the litigation – even those reasonably spent – may produce an excessive amount' and courts are to "award only that amount of fees that is reasonable in the relation to the results obtained.'" *Chan v. Sutter Health, supra,* 2017 WL 819903 at *5, *citing Bluetooth, supra* at 941. This is particularly true where plaintiff has achieved only limited success. *Garcia, supra,* 2015 WL 13646906 at *12, *citing Bluetooth, supra* at 941-42. In many cases Plaintiffs' counsel propose attorneys' fees with a significant reduction in the lodestar fees, *e.g., Bronson v. Samsung Electronics America, Inc.* 2020 WL 1503662, *4 (N.D. Cal. 2020), a complex case where the lodestar of $1,400,000 was reduced to an attorney's fees and expenses request of $487,000; *Garcia, supra,* 2015 WL 13646906, where counsel sought $256,000 despite a lodestar amount of $327,031 in a complex, heavily litigated case. Considering the numerous factors here, and in particular the limited success achieved and the numerous similar cases, a substantial reduction in the lodestar is reasonable.

IV. CONCLUSION

Defendant Sunvalleytek does not object to certification of the class for purposes of this settlement, or to approval of the settlement, expenses, or class representatives' service awards. Defendant only objects to the attorneys' fees sought by way of this motion. Defendant believes the fees sought are excessive under the circumstances and, for the reasons set forth in this opposition, should be reduced to about one third to one half the amount sought.

Dated: May 20, 2020

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