UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION — Master File No. 3:14-md-2504, MDL Docket No. 2504

THIS DOCUMENT RELATES TO:
Saldana, et al. v. Amazon.com, LLC, et al., — Case No. 3:14-cv-290-DJH

* * * * *

ORDER

The plaintiffs in this case have filed an unopposed motion for preliminary approval of a class action settlement. (Docket No. 53)[1] They also seek certification of a class for settlement purposes, appointment of class representatives, and other items related to the proposed settlement. For the reasons discussed below, the motion will be granted.

I. BACKGROUND

The plaintiffs in this class action are current or former employees of Defendant Amazon.com, LLC; SMX, LLC; Staff Management, LLC; or Golden State, FC, LLC. They allege that they were forced to spend uncompensated time waiting in line to undergo security checks at the Amazon.com fulfillment centers where they worked. The proposed settlement pertains only to current and former employees of SMX, LLC, a temporary employment agency whose services Amazon engaged. (*See* Master File D.N. 61, PageID # 1759)

[1] Two nearly identical motions were filed, one in November (D.N. 48) and the second on February 17, 2016 (D.N. 53). The primary distinction is that the latter motion requests that Thierman Buck LLP be appointed as lead class counsel, with four other law firms named as class counsel, whereas the prior motion asked the Court to appoint all five firms as class counsel. (*See* D.N. 53, PageID # 755; D.N. 48, PageID # 640) Plaintiffs' counsel confirmed at the preliminary fairness hearing that this was the only significant difference between the two motions.

The settlement agreement defines the Settlement Class as

> [a]ll non-exempt employees employed by SMX in California who worked at an Amazon.com fulfillment center from October 1, 2012 until the date that the preliminary approval of the proposed settlement is ordered ("Class Members")[.]

(D.N. 53-1, PageID # 771) Two subclasses, the "Pre-*Busk* Subclass" and the "Post-*Busk* Subclass," are also defined.[2] Pre-*Busk* Subclass members are

> [t]hose Class Members who were employed by SMX in California and who worked at an Amazon.com fulfillment center from October 1, 2012 through April 30, 2013.

(*Id.*) The Post-*Busk* Subclass consists of

> [t]hose Class Members who were employed by SMX in California and who worked at an Amazon.com fulfillment center from May 1, 2013 until the date that the preliminary approval of the proposed settlement is ordered.

(*Id.*)

The Court held a preliminary fairness hearing on March 11, 2016. (*See* D.N. 57)

II. ANALYSIS

In addition to preliminary approval of the proposed settlement, the plaintiffs' motion seeks certification of the class for settlement purposes; approval of the notice of settlement to be sent to class members; appointment of Plaintiffs David Saldana, LaDaisja Brewster, and Monica Carlin as class representatives; preliminary approval of incentive payments to the class representatives; appointment of Thierman Buck LLP as lead class counsel and four other law firms as class counsel; preliminary approval of class counsel's fees and costs; appointment of Simpluris, Inc. as the settlement administrator; and a final fairness hearing. (D.N. 53, PageID # 755) The Court will address each issue in turn.

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[2] In *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir. 2013), the Ninth Circuit held that an employee may recover under the Fair Labor Standards Act for time spent going through security checks at the end of a shift. *See id.* at 530-31. That decision was later reversed by the Supreme Court. *See Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513 (2014).

A. Settlement

The Court may approve a settlement only after determining that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, the Court must ask "whether the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litigation 4th* 309 (2004) (hereinafter *MCL*). Settlement class actions—i.e., cases where class certification and settlement approval are sought at the same time—require closer scrutiny than "settlements reached only after class certification has been litigated through the adversary process." *Id.* at 313.

There is no set standard for evaluating a settlement at the preliminary-approval stage. *Newberg on Class Actions* § 13:10 (5th ed. 2015). "The general rule is that a court will grant preliminary approval where the proposed settlement 'is neither illegal nor collusive and is within the range of possible approval.'" *Id.* (quoting *In re Vitamins Antitrust Litig.*, No. 99-197(TFH), 1999 WL 1335318, at *5 (D.D.C. 1999)). The Court must examine the proposed settlement from both procedural and substantive standpoints; "[t]he procedural element focuses on the nature of the settlement negotiations and the possibility of collusion, while the substantive element focuses on the terms of the agreement itself." *Id.*

1. Procedural Element

Nothing suggests that the proposed settlement in this case is procedurally improper. Although the case is at a fairly early stage of litigation, it had been pending for nearly two years when the settlement was reached; there has been some adversarial motion practice; and the parties engaged in significant investigation and discovery prior to settlement. (*See* D.N. 53, PageID # 747-48) These are "indications that the agreement is the product of legitimate, arms-length negotiations." *Newberg*, *supra*, § 13:14 ("Where the proposed settlement was preceded

by a lengthy period of adversarial litigation involving substantial discovery, a court is likely to conclude that settlement negotiations occurred at arms-length." (citations omitted)). The parties represent that the settlement "is the result of intensive arms' length negotiations between Class Counsel and counsel for Defendants." (D.N. 53-1, PageID # 770) The settlement negotiations were mediated by a third party (*see id.*), a further indication that no collusion was involved. *See Newberg*, *supra*, § 13:14 (citing *In re Penthouse Executive Club Compensation Litig.*, No. 10 Civ. 1145(KMW), 2013 WL 1828598, at *2 (S.D.N.Y. 2013)). In sum, the proposed settlement "appears to be the product of serious, informed, non-collusive negotiations" and thus satisfies the procedural element of the inquiry. *Id.* (quoting *In re Shell Oil Refinery*, 155 F.R.D. 552, 555 (E.D. La. 1993)).

2. Substantive Element

The proposed settlement also appears to be substantively adequate. Factors to be considered in evaluating the terms of a settlement include

> (1) the amount of the settlement in light of the class's potential recovery, discounted by the likelihood of plaintiffs prevailing at trial; (2) the extent to which the parties have engaged in sufficient discovery to evaluate the merits of the case; (3) the complexity and potential costs of trial; (4) the number and content of objections; (5) the recommendations of experienced counsel that settlement is appropriate; (6) and in some instances, the capacity for the defendant to withstand a larger judgment.

Id. at 13:15. Most of the same factors are considered at the preliminary stage, but "with somewhat less scrutiny." *Id.*

Under the terms of the proposed settlement, SMX will establish a gross settlement fund in the amount of $3,773,002.50. (D.N. 53-1, PageID # 771) The fund will "cover payments to the Settlement Class Members who make valid and timely claims, attorneys' fees and costs to Class Counsel as approved by the court, service fees to the class representatives, penalties,

interest, and taxes." (*Id.*) Each member of the Pre-*Busk* Subclass who timely submits a valid claim form will receive $20 per shift worked from October 1, 2012 through April 30, 2013. (*Id.*, PageID # 772) This amount was determined as follows:

> Plaintiffs[] alleged that it took employees approximately 20-30 minutes to pass through the anti-theft screening process at the end of the workday. In addition, Plaintiffs asserted that they were denied a full 30-minute uninterrupted meal period that is required under California law because they were required to pass through the anti-theft screening prior to being able to take their meal period. The average hourly rate of employees who worked for [SMX] was approximately $10.00 an hour. Based on Plaintiffs['] allegations, the total exposure per employee per shift for unpaid overtime and a meal and rest break violation was approximately $17.50, not including other penalties allowable under the law for failure to provide accurate itemized wage statements, waiting time penalties for former employees, and [Private Attorneys General Act] penalties.

(D.N. 53, PageID # 749) Post-*Busk* Subclass members will receive a flat payment of $30 each upon timely submission of a valid claim form. (D.N. 53-1, PageID # 772) The distinction between subclasses is based on the plaintiffs' conclusion, following discovery, "that there was little or no waiting in any lines after the Ninth Circuit's ruling in *Busk* holding that time spent in security lines was compensable." (D.N. 53, PageID # 749) Class Members may opt out of the settlement. (*See* D.N. 53-1, PageID # 779-80)

In addition to the payments to Class Members, the settlement agreement provides for injunctive relief. Under the agreement, SMX will provide its permanent and temporary employees with notice and training about employees' rights under California law with regard to overtime and meal and rest breaks. (*Id.*, PageID # 773-74) It will also conduct annual audits of its employees "to ensure compliance and understanding of all California meal, rest break, and overtime rules." (*Id.*, PageID # 774) Finally, SMX will provide copies of those rules to "any customer for whom more than 50 temporary employees of SMX perform services in any calendar year." (*Id.*)

In exchange for the settlement payments and injunctive relief, Class Members will release all claims under various California labor laws against SMX, Staff Management, Inc.; Amazon.com, LLC; and Golden State FC, LLC. (D.N. 53-1, PageID # 774-75) They will further agree to waive the protection of California Civil Code § 1542, which provides that a general release does not apply to claims not known or suspected by the releaser at the time the release was executed. Such a waiver is valid unless procured by fraud. *Reynov v. ADP Claims Servs. Grp., Inc.*, No. C 06-2056 CW, 2007 U.S. Dist. LEXIS 31631, at *8 (N.D. Cal. Apr. 30, 2007) (citing *Pac. Greyhound Lines v. Zane*, 160 F.2d 731, 736 (9th Cir. 1947)).

The Court finds, on a preliminary basis, that the terms of the proposed settlement are substantively fair, reasonable, and adequate. As noted previously, the parties have engaged in significant discovery on the merits of the case. Each side believes strongly in the validity of its claims or defenses but acknowledges significant potential obstacles if the case proceeded further. (*See* D.N. 53, PageID # 747) In addition, both sides wish to avoid the expense of protracted litigation. (*Id.*) The proposed settlement payments are favorable to the Class Members in light of the parties' explanation of how the amounts were reached, and the injunctive relief should help prevent future violations. The proposed settlement's provisions for attorney fees and incentive payments to class representatives, which will be discussed separately below, also appear reasonable. Counsel for Plaintiffs and Defendants, all of whom have significant experience in employment class actions, agree that settlement is appropriate. (*See id.*, PageID # 750) To the Court's knowledge, there are no objections to the proposed settlement.

At the preliminary fairness hearing, the Court questioned counsel as to why class members should be required to release claims against Amazon.com, LLC and Golden State FC, LLC, neither of which is a party to the settlement. *See MCL* at 311 (advising courts to be wary

of proposed settlements that "releas[e] claims against parties who did not contribute to the class settlement"). Defense counsel explained that under California law, Amazon.com and Golden State could face joint employer liability in the absence of such a release. Plaintiffs' counsel concurred that the release was designed to prevent double recovery. Given this explanation, the Court is satisfied that the release is not overly broad. In sum, the Court has no substantive concerns regarding the proposed settlement at this stage.

B. Class Certification

To be certified, each class and subclass must meet the requirements of Rule 23(a) and (b). *MCL* at 272; *see* Fed. R. Civ. P. 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."). Under Rule 23(a), a class action may be maintained if

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The Court must also find that the action satisfies subsection (b)(1), (2), or (3) of Rule 23. Here, the plaintiffs rely on subsection (b)(3), which provides that a class action is appropriate if "the court finds that the questions of law or fact common to 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." Fed. R. Civ. P. 23(b)(3). Each requirement is satisfied here.

1. Numerosity

The Settlement Class is estimated to consist of 33,049 members, and there is significant overlap between the two subclasses. (D.N. 53-1, PageID # 761-62; *see* D.N. 53, PageID # 749)

Any class of 41 or more is generally considered to be sufficiently numerous for purposes of Rule 23. 5-23 *Moore's Federal Practice* § 23.22(1)(b) (2015). Thus, the numerosity requirement is easily met.

2. Commonality

A common question of fact exists among the Settlement Class members and the subclass members, namely whether the members were subjected to uncompensated security checks during the relevant time periods.

3. Typicality

The typicality requirement is satisfied "if the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members." *Id.* § 23.24(2). The class representatives in this case allegedly suffered the same injury as the other class members, arising out of the same conduct by SMX, and the same legal theories apply to all.

4. Adequacy of Representation

The primary concern with respect to this element is whether there is any conflict of interest between the class representative and other class members. *See generally id.* § 23.25. Nothing in the record suggests that any of the proposed class representatives has such a conflict, nor is there any indication that the representatives are unable to vigorously prosecute the lawsuit or lack adequate counsel. *See id.*

5. Predominance and Superiority

Under Rule 23(b)(3), the Court must find both "[t]hat common questions of law or fact predominate over questions affecting only individual members" and "[t]hat a class action is superior to other available methods for resolving the controversy." *Id.* § 23.44(1). The Court is

unaware of any substantial individual questions that could arise in the context of this case; instead, the single dispositive question is one common to all class members: whether they were forced to undergo security checks without compensation. And given the large number of class members and the fact that each member could likely recover only a small amount (too small to justify bringing an individual action), a class action is the superior method for resolving these claims. *See Newberg*, *supra*, § 4:87 (conclusion that case involves small claims generally disposes of superiority analysis); *cf. Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 567) (6th Cir. 2007) (finding that "a small possible recovery [of approximately $125] would not encourage individuals to bring suit, thereby making a class action a superior mechanism for adjudicating th[e] dispute").

C. Notice to Class Members

Notice of the settlement is required under Rule 23(e)(1). Although the rule does not specify what a notice must contain, "[t]he notice should be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Int'l Union, United Auto. Aerospace, & Agric. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

The proposed notice in this case is sufficient. It describes the nature of the action and the class claims. (D.N. 53-1, PageID # 795-96) It also explains the opt-out process, how to object to the settlement, and the binding nature of the settlement, as well as the terms of the release. (*Id.*, PageID # 799-802) It will contain the date and location of the final fairness hearing. (*Id.*, PageID # 802) Finally, the notice defines the class and subclasses, albeit not explicitly. (*See id.*, PageID # 796, 798) On the whole, the proposed notice provides sufficient information to class

members concerning what the case is about and how they may proceed. *See Int'l Union, United Auto. Aerospace, & Agric. Implement Workers of Am.*, 497 F.3d at 629. Furthermore, the proposed means of transmitting the notice—by mail to class members' last known addresses or more recent addresses ascertained by the settlement administrator—is reasonable and effective.

D. Appointment of Class Representatives

At the preliminary fairness hearing, plaintiffs' counsel described the proposed class representatives' involvement in the case thus far. According to counsel, Saldana, Brewster, and Carlin have played an active role in all stages of the proceedings, including participating telephonically in the mediation that resulted in the proposed settlement. Moreover, as noted above, there is no apparent conflict of interest or other adequacy-of-representation problem. *See* 5-23 *Moore's Federal Practice* § 23.25. Accordingly, the Court concludes that appointment of Saldana, Brewster, and Carlin as class representatives is appropriate.

E. Incentive Payments to Class Representatives

The proposed incentive payments are meant to reward the class representatives "for their time, effort, risks undertaken for the payment of costs in the event this action had been unsuccessful, the stigma upon future employment opportunities for having initiated this action against a former employer, and a general release of all claims." (D.N. 53, PageID # 752) Such payments are common in class actions, and nothing suggests that the relatively modest $2500 payments proposed here are unreasonable. *Cf., e.g., Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009) (noting that no party objected to $10,000 payments made to each class representative).

F. Appointment of Class Counsel

The plaintiffs seek appointment of Thierman Buck LLP as lead class counsel, with Cohelan Khoury & Singer, The Markham Law Firm, Hamner Law Offices APC, and United Employees Law Group to be named as class counsel. (*See* D.N. 53, PageID # 755) As set forth in the affidavits of Joshua Buck, Isam Khoury, Christopher Hamner, and David Markham, all of the proposed class counsel have substantial experience in complex wage and hour litigation and are well qualified to serve in this role.[3]

G. Class Counsel Fees and Costs

The Court will undertake a detailed examination of the fee request in conjunction with the final fairness hearing. At this stage, the request—$784,932.50, or 21 percent of the gross settlement amount—appears reasonable given that 25 percent is generally considered the benchmark for attorney-fee awards in class actions. *See Dick v. Sprint Commc'ns Co. L.P.*, 297 F.R.D. 283, 299 (W.D. Ky. 2014) (citing *Fournier v. PFS Invs., Inc.*, 997 F. Supp. 828, 832 (E.D. Mich. 1998)). The request of $25,000 for costs likewise appears reasonable for purposes of the present inquiry. (*See* D.N. 53-1, PageID # 774)

H. Appointment of Settlement Administrator

The parties agree that Simpluris, Inc. should be appointed as the settlement administrator. Both plaintiffs' counsel and defense counsel stated at the preliminary fairness hearing that they have employed Simpluris in previous cases and found the company to do an excellent job. The Court has no reason to doubt their assessment that Simpluris would perform similarly well in this case.

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[3] The motion for preliminary approval also cites a declaration by Walter Haines of United Employees Law Group, PC; however, Haines's declaration was apparently omitted when the motion was filed. (*See* D.N. 53, PageID # 750)

III. CONCLUSION

In sum, the proposed settlement does not present any serious concerns, and class certification for settlement purposes is appropriate. Accordingly, it is hereby

ORDERED as follows:

(1) The motion for preliminary approval (D.N. 53) is **GRANTED**. The Court preliminarily approves the parties' Joint Stipulation of Class Action Settlement and Release Agreement. The prior motion for preliminary approval (D.N. 48) is **DENIED** as moot.

(2) The class and subclasses defined in the parties' settlement agreement are **CONDITIONALLY CERTIFIED** for settlement purposes.

(3) Plaintiffs David C. Saldana, LaDaisja Brewster, and Monica Carlin are **APPOINTED** as class representatives. Incentive payments of $2500 each to Saldana, Brewster, and Carlin are **PRELIMINARILY APPROVED**.

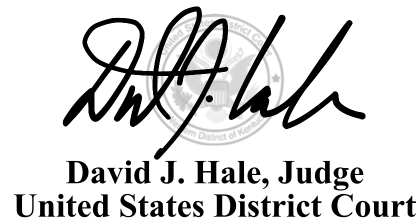
(4) Thierman Buck LLP is **APPOINTED** as lead class counsel. Cohelan Khoury & Singer, The Markham Law Firm, Hamner Law Offices APC, and United Employees Law Group are **APPOINTED** as class counsel.

(5) Simpluris, Inc. is **APPOINTED** as Settlement Administrator to administer the settlement in accordance with the settlement agreement.

(6) The proposed notice and claim form are **APPROVED**. Notice to class members shall proceed as set forth in the parties' settlement agreement.

(7) The final fairness hearing is **SET** for **August 15, 2016, at 9:30 a.m.**, at the Gene Snyder U.S. Courthouse in Louisville, Kentucky. The parties shall file briefs in support of the proposed settlement, requests for attorney fees and costs, and class representative incentive payments no later than **August 1, 2016**.

May 4, 2016



David J. Hale, Judge
United States District Court