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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL MERCHANT, Plaintiff and Appellant, v. OFFICETEAM, a division of Robert Half International Inc., Defendant and Respondent. KIRK D. HANSON, Appellant.	B241888 (Los Angeles County Super. Ct. No. BC461652)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Reversed and remanded.

Jackson Hanson, Jeffrey C. Jackson and Kirk D. Hanson; Esner, Chang & Boyer and Stuart B. Esner for Plaintiff and Appellant.

Paul Hastings, Paul W. Cane, Jr., Judith M. Kline and M. Kirby C. Wilcox for Defendant and Respondent.

INTRODUCTION

Named plaintiff and class representative Michael Merchant (plaintiff) and his counsel Kirk Hanson appeal from the superior court's order disqualifying Hanson as class counsel and from the dismissal without prejudice of plaintiff's putative class action against his former employer OfficeTeam, a temporary employment agency. The parties reached an early class settlement, in which Hanson agreed to seek an attorney fee award of no more than one-third of the $1.5 million settlement fund, and plaintiff agreed to request no more than $7,500 as an award for his service as class representative. After the preliminary approval hearing, the trial court ordered an award of attorney fees to class counsel in the amount of $75,000 and a $1,000 incentive award for plaintiff, and ordered the parties to revise the settlement agreement to reflect this order. When Hanson refused to comply with the order and revise the settlement agreement, the trial court disqualified Hanson as class counsel on the grounds that he had a conflict of interest with the class and had violated his fiduciary duty to them, and then dismissed the action without prejudice when plaintiff refused to find another lawyer to represent him and the putative class.

Although we are mindful of the trial court's concern over the terms of the settlement agreement, we conclude that the court erred by prematurely deciding the attorney fee and incentive payment amounts at the preliminary hearing, and that it exceeded its authority when it ordered the parties to amend their settlement agreement to include the amount of attorney fees and service award ordered by the court. Further, we conclude that the court erred in disqualifying class counsel for refusing to amend the agreement and dismissing the case without prejudice. Therefore, we reverse and remand to the trial court to proceed with the settlement approval process.

FACTUAL AND PROCEDURAL BACKGROUND

Complaint and Answer

On May 16, 2011, plaintiff filed a putative class action complaint against defendant OfficeTeam on behalf of approximately 12,039 current and former hourly employees, based on alleged violations of the Labor Code stemming from OfficeTeam's omission of its address and the inclusive dates of the pay period on employees' wage statements. (Lab. Code, §§ 2698-2699.5, 226, subd. (a)(6), 226, subd. (a)(8).) OfficeTeam denied any intentional failure to provide accurate itemized wage statements and denied that plaintiff suffered any injury as a result of inadvertent Labor Code violations.

Settlement Agreement

After engaging in informal discovery, the parties engaged in a full-day mediation session with David Rotman on September 16, 2011, resulting in a general settlement proposal. The parties continued to negotiate, resulting in a Joint Stipulation of Settlement and Release executed on January 17, 2012 (Settlement Agreement), which they submitted to the court as part of their joint motion for preliminary approval of the settlement.

The Settlement Agreement provides, in pertinent part: The maximum settlement payment is $1.5 million to be parceled out for settlement payments to class members, attorney fees and expenses, a class representative payment, the settlement administrator's fees and expenses, and a payment to the Labor and Workforce Development Agency pursuant to the Private Attorneys General Act.

With respect to class counsel's fees and costs, the Settlement Agreement includes a clause commonly referred to as a "clear-sailing" provision, which provides as follows: "Class Counsel will apply to the Court for an award of attorneys' fees not to exceed one-third of the Maximum Settlement Payment

($500,000), and costs not to exceed $50,000.00, to be paid out of the Maximum Settlement Payment. Defendant will not oppose Class Counsel's request."

With respect to the class representative payment, the Settlement Agreement provided that plaintiff would apply to the court for an amount not to exceed $7,500 as an enhancement for his service as class representative, and that OfficeTeam would not oppose the request. That payment would also come out of the $1.5 million settlement payment.

The Settlement Agreement provides that "[i]f the Court declines to preliminarily approve all material aspects of the settlement, the settlement will be null and void and the Parties will have no further obligations under the settlement." The Settlement Agreement further indicates that the parties will jointly move the court for final approval of the settlement, and that plaintiff will separately move for a class representative payment and attorney fees and costs pursuant to the settlement. "Upon final approval of the settlement by the Court at or after the final approval hearing, the Parties will present their proposed judgment for the Court's entry and approval, which will, among other things: (i) approve the settlement, adjudging the terms thereof to be fair, reasonable and adequate, and directing consummation of all its terms and provision; (ii) approve Class Counsel's application for an award of attorneys' fees and costs; (iii) approve the Class Representative's service payment; [and] (iv) certify the class for settlement purposes only." "If the Court does not grant final approval of the settlement, or if the Court's final approval of the settlement is reversed or materially modified on appellate review, then this settlement will become null and void. . . . An award of a Class Representative payment of Class Counsel's attorneys' fees and costs in an amount less than sought will not constitute a failure to grant final approval or a material modification of the settlement." Finally, the parties agreed to waive all appeals from the court's final approval of the settlement, "unless the Court

materially modifies the settlement; provided, however, that Plaintiff may appeal any reduction in the attorneys' fees payment."

Preliminary Approval Hearing

Attaching the Settlement Agreement, the parties filed a joint motion requesting that the court provisionally certify the settlement class, provisionally approve the class action settlement, direct distribution of notice to the class, and set a hearing for final approval of the settlement. The supporting memorandum stated in part that "Class Counsel will seek a total award of $500,000 for their representation of Plaintiff and Class members in the case, negotiations and resulting Settlement."

On February 15, 2012, the court held a preliminary approval hearing. The court expressed serious concern about the attorney fee request for $500,000, which the court deemed excessive given the lack of motion practice and formal discovery and the small recovery for each class member. The court questioned Hanson regarding the number of hours he had devoted to the case, and Hanson replied, "My lodestar to date, I don't know off the top of my head, but not a lot." The court inquired as to Hanson's hourly rate, which Hanson thought was $550 per hour in this case. The court replied, "Well, I thought a reasonable rate would be closer to $400. But let's assume it's $500. And if you put in 50 hours, which I think was probably reasonable, that's about $25,000." Hanson responded, "It's a little more than that. I think it was quite a bit more than that. Because there was a lot of work that went on in this case pre-filing. And although there was no official discovery, there was just as much work if not more work done on exchanging information back and forth informally. So there was a fair amount of work." The court replied, "Let's say it was 100 hours at $500 an hour, that's $50,000. So there has to be some reasonable number between $50 and $500,000, which would, I think, satisfy

the concerns that you're addressing, but actually give the plaintiffs, who are the real parties in this case, something more than the peanuts of 66 bucks."

In a written order entered after the hearing, the court granted provisional approval of the settlement. However, the order stated, "As the Court advised counsel during the hearing, there are serious concerns about certain of the monetary provisions in the proposed settlement, including the requested amount of attorney's fees to plaintiff's counsel, the request for costs and the enhancement request for the named plaintiff." In particular, the court was concerned that, after deductions for the proposed fees and costs, the class members would receive only approximately $66 each. The court reasoned that Hanson's request for one-third of the gross settlement proceeds, i.e., $500,000, was "grossly excessive." The court found that "[t]his case is not complex, there were no novel or unusual issues involved and it was not at all contested. Plaintiff's counsel concedes that he did not have to propound discovery. All requested information was provided voluntarily by defendant. No discovery motions or, for that matter, any other motions were filed. Indeed, following the Case Management Conference, the parties came to court only one time and that was to announce a settlement. It appears that defendant quickly and readily conceded that there were some technical deficiencies with its wage statements and sought to resolve the case."

The court noted that the joint motion for preliminary approval did not contain any information about the actual number of hours billed by Hanson or provide information about his billable rate. The court indicated that Hanson conceded at the hearing that he had worked approximately 50 to 100 hours on the case, and that his rate was $550 per hour.

The court concluded that a reasonable hourly rate for Hanson was $500, and "[w]hile the Court doubts that plaintiff's counsel did in fact devote 100 hours to this case, this number will be used to calculate counsel's reasonable fees,"

resulting in a lodestar amount of $50,000. The court then applied a multiplier of 1.5 to account for the risks of litigation and because prompt settlement would benefit the class. The court thus awarded $75,000 to class counsel.

With respect to the class representative payment, the court found that plaintiff had provided no basis for the proposed payment of $7,500, which was 113 times the proposed recovery by every other class member. Instead, the court awarded $1,000.

The court ordered the parties to lodge, before February 29, 2012, an amended settlement agreement "which comports with this Order." The court set the final approval hearing for August 31, 2012.

Class Counsel's Refusal to Amend Settlement Agreement

In response to the above court order, Hanson submitted a declaration stating that the parties never agreed to the court's ordered revision of the Settlement Agreement with respect to attorney fees and the class representative payment, and plaintiff would not agree to the new terms. Hanson "respectfully submit[ted] that the Court does not have the power to order the parties to accept settlement terms that the parties have not agreed to." Counsel for OfficeTeam lodged a revised Settlement Agreement including the changes ordered by the court, and noted that the revised document had been sent to plaintiff's counsel, who declined to participate in the revised settlement.

On March 6, 2012, the court issued an order to show cause why OfficeTeam's amended settlement documents should not be approved. At the hearing, Hanson reiterated that plaintiff would not agree to revise the Settlement Agreement. While the court had assumed an upper limit of 100 billable hours in making the attorney fee award, Hanson informed the court that he had actually billed 155.8 hours as of the preliminary hearing. Further, much work remained

before and after final approval of the settlement. He requested that the court put off the ruling on the attorney fee issue until the final approval hearing.

The court characterized Hanson's argument as an unnoticed motion for reconsideration of the attorney fees award. However, the court indicated that it would consider a later application for additional fees incurred *after* the preliminary approval hearing. The court requested that the parties meet and confer again and then "endorse the Amended Agreements or a second amended agreement." OfficeTeam subsequently reported to the court that plaintiff would neither accept the Amended Agreement nor negotiate a second amended settlement agreement accepting the court's revisions but providing for an award of additional fees and costs incurred after preliminary approval.

At the continued OSC hearing on April 10, 2012, Hanson argued that "[t]he court awarded the attorney's fees at the preliminary approval hearing when there was no motion for fees pending and then ordered me to change the settlement, include that fee award in the settlement, and then re-sign it, but the court doesn't have the power to do that. The court can approve the settlement or not approve the settlement." The court responded, "I think you're misconceiving what happened. I told you that the settlement agreement would have to be modified, and you can make an application for reasonable attorney's fees. If you're declining to do that, then I'm likely to find that you're no longer adequate class counsel." Hanson requested that a further hearing on preliminary approval be held where he could submit supplemental briefing on the fee issue and his lodestar. The court refused, indicating that it had already ruled on the preliminary approval issue, and that Hanson failed to file a timely motion for reconsideration of the attorney fee award. Hanson argued, "But Your Honor, the attorney's fees are awarded at the end of the case." The court replied, "Perhaps you should have filed a motion for reconsideration."

Disqualification of Class Counsel

Following the April 10, 2012 hearing, the court issued an order indicating that it was "clear that counsel's only concern was the amount of attorney's fees he personally would be awarded. No other part of the settlement agreement was apparently in issue. The Court ordered the parties to meet and confer to resolve any and all outstanding issues. The Court also advised class counsel that it would consider a properly filed motion for attorney's fees for additional work performed finalizing the settlement. [¶] Thereafter, defendant advised the Court that class counsel remained intransigent and refused to accept the settlement agreement as modified by the Court's February 16, 2012 Order." The court found that Hanson had put his own financial interests ahead of the interests of the absent class members, and thus had breached his fiduciary duty to the class and had an actual conflict of interest with the class. The court found that "[n]ot only did class counsel initially attempt to garner a grossly excessive fee for little work in the case, he now petulantly refuses to comply with a court Order to allow a settlement more advantageous to the class to go forward." The court thus ordered that Hanson be relieved as class counsel, and further ordered plaintiff to appear in court on May 4, 2012 to show cause why he should remain as class representative, and how and when he would retain new class counsel who would properly exercise his or her fiduciary duty to protect absent class members' interests.

At the May 4, 2012 OSC hearing, plaintiff advised the court that he wished to keep Hanson, or Hanson's law partner Jeffrey Jackson, as class counsel. The court determined that Jackson shared the same conflict of interest because he was Hanson's law partner, and like Hanson, he was "not prepared to follow court orders and protect the interests of the class." When plaintiff refused to choose another lawyer, the court dismissed the case without prejudice.

Plaintiff and Hanson sought writ relief, which we denied on the ground that an appeal would provide an adequate remedy. However, we ordered that their appeal be expedited, and they now appeal from the disqualification of counsel order and the order dismissing the case without prejudice.[1]

DISCUSSION

We are sensitive to the trial court's concerns that Hanson and plaintiff have requested an excessive attorney fee and service award, respectively. However, as set forth below, the trial court prematurely decided these issues and then erred in disqualifying class counsel and dismissing the case after class counsel and plaintiff refused to amend the Settlement Agreement to conform to the court's order on attorney fees and the incentive payment.

I. *Procedures for Obtaining Court Approval of Class Action Settlements*

To provide context for our decision, we first discuss the typical requirements and procedures for obtaining preliminary and final court approval of a class action settlement, and define the relevant scope of the trial court's discretion in approving or disapproving a class action settlement agreement. Where we discuss matters on which California caselaw is scarce, we rely on federal authorities. (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1392, fn. 18 (*Cellphone Termination*) [""California courts may look to federal authority for guidance on matters involving class action procedures." [Citations.]' [Citation.]"]; *Garabedian v. Los Angeles Cellular Telephone. Co.* (2004) 118 Cal.App.4th 123, 127 (*Garabedian*) [same].)

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[1] Although no judgment of dismissal was entered, we exercise our discretion to treat the order of dismissal, notice of which was entered, as an appealable judgment. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1.)

A. *Requirement of Court Approval for Class Action Settlement*

A settlement of a class action "requires the approval of the court after hearing." (Cal. Rules of Court, rule 3.769(a); *Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler* (2012) 212 Cal.App.4th 172, 184 (*Barnes*).) A trial court may only approve a class action settlement agreement after determining it is fair, adequate, and reasonable. (*In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*) [settlement of a class action requires court approval to prevent fraud, collusion or unfairness to the class, "'whose rights may not have been given due regard by the negotiating parties.'"].) In exercising its broad discretion to make this determination, the court should consider relevant factors, which may include "the strength of the plaintiffs' case, the risk, expense, complexity and duration of further litigation as a class action, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of class members to the proposed settlement." (*In re Microsoft I-V Cases*, *supra*, 135 Cal.App.4th at p. 723.) "[W]hen (as here) the settlement takes place before formal class certification, settlement approval requires a 'higher standard of fairness.' [Citation.] The reason for more exacting review of class settlements reached before formal class certification is to ensure that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.' [Citations.]" (*Lane v. Facebook, Inc.* (9th Cir. 2012) 696 F.3d 811, 819; see *In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 946-947 (*Bluetooth*).)

Any agreement with respect to the payment of attorney fees must be set forth in full in any application for approval of the settlement of a class action (Cal. Rules of Court, rule 3.769(b)), and "the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms." (*Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555 (*Consumer Privacy*).) "The court has a duty, independent of any objection, to assure that the amount and mode of payment of attorney fees are fair and proper, and may not simply act as a rubberstamp for the parties' agreement." (*Consumer Privacy, supra,* 175 Cal.App.4th at p. 555; see *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1119 ["In reviewing an attorney fee provision in a class action settlement agreement, the trial court has an independent duty to determine the reasonableness of the award."]; *Garabedian, supra,* 118 Cal.App.4th at p. 127 ["Even where the parties agree as to the amount of attorney fees in . . . a settlement agreement, courts properly review and modify the agreed-upon fees if the amount is not reasonable."].) Similarly, because "'excessive payments to named class members can be an indication that the agreement was reached through fraud or collusion'" (*Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 975), an incentive fee award to a named class representative must be supported by evidence that quantifies the time and effort expended by the individual and a reasoned explanation of financial or other risks undertaken by the class representative. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806-807 (*Clark*) [reversing awards to two named plaintiffs of $25,000 each].)

B. *Courts' Lack of Authority to Alter Settlement Agreements*

In determining whether a class settlement is fair, adequate, and reasonable, the trial court must give "'[d]ue regard . . . to what is otherwise a private consensual agreement between the parties.'" (*In re Microsoft I-V Cases, supra,*

135 Cal.App.4th at p. 723.) Although we are not aware of California authority on the subject of a trial court's power to amend class action settlement agreements, there is ample federal authority on the issue. For instance, the Ninth Circuit has held that "[n]either the district court nor this court is empowered to rewrite the settlement agreed upon by the parties. We may not delete, modify, or substitute certain provisions of the consent decree. Of course, the district court may suggest modifications, but ultimately, it must consider the proposal as a whole and as submitted. Approval must then be given or withheld. Our only alternatives on appeal are to vacate and remand upon a determination that the district court abused its discretion, or to affirm its judgment. In short, the settlement must stand or fall as a whole." (*Officers for Justice v. Civil Service Commission of the City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 630 (*Officers for Justice*). The United States Supreme Court has similarly held that, while court approval of the terms of a class action settlement is required, "the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." (*Evans v. Jeff D.* (1986) 475 U.S. 717, 726; see also *Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 868; *Cotton v. Hinton* (5th Cir. 1977) 559 F.2d 1326, 1331; West's Manual for Complex Litigation (Federal Judicial Center 4th ed. 2008) § 21.61 (Manual for Complex Litigation).) We agree with the federal cases; California trial courts do not have the authority to amend class action settlement agreements negotiated by the parties, or to order the parties to amend such agreements.

C. *Stages of Approval of Class Settlement*

Review of a proposed class action settlement typically involves a two-step process: preliminary approval and a subsequent final approval hearing.

1. *Preliminary Approval Hearing*

The first step is for the court to review the proposed terms of the settlement at a preliminary hearing and make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms. (Manual for Complex Litigation, *supra*, § 21.632.)[2] "[T]he purpose of the preliminary evaluation is to determine only whether the proposed settlement and plan of distribution are within the range of possible approval and whether notice to the settlement class of its terms and conditions, and the scheduling of a . . . final approval hearing, will be worthwhile." (Newberg on Class Actions, Class Actions in State Courts, Preliminary Approval (4th ed. 2002) § 13:64; see *In re Traffic Executive Association–Eastern Railroads* (2d Cir. 1980) 627 F.2d 631, 634.) "The judge should raise questions at the preliminary hearing and perhaps seek an independent review if there are reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." (Manual for Complex Litigation, *supra*, § 21.632; see 2 McLaughlin on Class Actions, § 6:7 (9th ed.).) Although, as discussed above, a judge cannot rewrite the settlement agreement, "[a] judge's statement of conditions for approval, reasons for disapproval, or discussion of reservations about proposed settlement terms . . . might lead the parties to revise the agreement.

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[2] The Manual for Complex Litigation is a widely relied upon by federal judges as well as practitioners regarding the organization and administration of class actions and other complex litigation matters. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 298.) The Manual does not have the force of law, but in federal court it does "provide a rough guide by which to measure whether the trial judge acted within his discretion." (*In re General Motors Corp. Engine Interchange Litigation* (7th Cir. 1979) 594 F.2d 1106, 1124, fn. 22.) We rely on it here for its useful description of the relative scopes of the preliminary approval and final approval process for class settlements.

. . . The parties might be willing to make changes before the notice of the settlement agreement is sent to the class members if the judge makes such suggestions at the preliminary approval stage." (Manual for Complex Litigation, *supra*, § 21.61.)

California Rules of Court, rule 3.769(c) provides that "[a]ny party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion." The Los Angeles Superior Court has also published Guidelines for Motions for Preliminary and Final Approval of Class Settlement (Guidelines) on its website. (www.lasuperiorcourt.org/civil/UI/pdf/PrelimFinalapproval.pdf.) The Guidelines specify the information to be included in a motion for preliminary approval of a class action settlement to enable the superior court to preliminarily evaluate the fairness and adequacy of the settlement terms as well as the propriety of class certification. With respect to attorney fees and payments to class representatives, the Guidelines provide that the motion for preliminary approval should set forth the following: "(1) The proposed fees to be paid to class counsel, the manner of payment and a preliminary justification under existing case law for such fees. Any agreement, express or implied, that has been entered into with respect to the payment of attorneys' fees or the submission of an application for the approval of attorneys' fees must be set forth in full. All fees proposed to be paid to any counsel must be disclosed. (2) Any proposed incentive payment to a named class representative and the justification for such payment." (*Guidelines, supra*, Motions for Preliminary Approval of Class Settlement, subd. (i).)

If the court grants preliminary approval of the settlement and approves certification of a provisional settlement class, its order must include the date of the final approval hearing, the notice to be sent to the class, and "any other matters

deemed necessary for the proper conduct of a settlement hearing." (Cal. Rules of Court, rule 3.769(d), (e); see Manual for Complex Litigation, *supra*, § 21.632.) Notice of the proposed settlement and the final approval hearing must then be provided to the class members so that they may file objections or appear at the final approval hearing and be heard prior to final court approval of the settlement. (Cal. Rules of Court, rule 3.769(f).)

2. *Final Approval*

"Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement." (Cal. Rules of Court, rule 3.769(g).) The Guidelines further provide that a motion for final approval "should include a lodestar calculation and supporting evidence, and a justification under existing case law for the fees sought by proposed class counsel, including a justification for any multiplier sought. All fees proposed to be paid to any counsel must be disclosed. [¶] . . . With respect to costs, the motion should include a declaration supporting the reasonableness of amounts sought in accordance with Code of Civil Procedure section 1033.5(c). [¶] . . . If the settlement includes any proposed incentive payment to a named class representative, the motion should include a declaration of the named representative, explaining the effort expended by that representative on behalf of the class, or other facts justifying the proposed incentive payment." (*Guidelines*, *supra*, Motions for Final Approval of Class Settlement, subd. (d).)

Thus, the Guidelines issued by the Los Angeles Superior Court provide that only in connection with the final approval hearing must a plaintiff provide calculations and detailed arguments in favor of the requested attorney fee and incentive award for a class representative. Moreover, in practice courts rule on attorney fees and incentive awards at the time they give final approval to the settlement (e.g., *Cellphone Termination, supra*, 186 Cal.App.4th at p. 1388, fn. 16;

Clark, supra, 175 Cal.App.4th at p. 798), or after judgment has been entered. (E.g., *Consumer Privacy, supra,* 175 Cal.App.4th at p. 551.)

D. *"Clear Sailing" Agreements*

As is the case here, it is not uncommon for a class action settlement agreement to include a "clear sailing" provision, in which class counsel agrees to petition for an attorney fee award that will not exceed a fixed amount or a given percentage of the common fund, and the defendant agrees not to oppose the fee petition. (Newberg on Class Actions, *supra*, § 11:24, p. 37.) For instance, in *Consumer Privacy,* the class settlement agreement provided that class counsel would seek court approval for payment by the defendant of not more than $4 million for attorney fees and costs, and that the defendant would not oppose such an application. (*Consumer Privacy, supra,* 175 Cal.App.4th at p. 550; see also *Garabedian, supra,* 118 Cal.App.4th at p. 125 [defendant agreed not to oppose class counsel's request for reasonable attorney fees up to $14,125,000]; *Dunk, supra*, 48 Cal.App.4th at p. 1800 [defendant agreed to pay attorney fees and costs not to exceed $1.5 million].) Similarly, such provisions are also used to set a maximum incentive payment to a class representative. (See, e.g., *Harris v. Vector Marketing Corp.* (N.D. Cal. 2011) 2011 WL 1627973.)

In *Consumer Privacy*, objectors to the settlement challenged the "clear sailing" provision in the class settlement agreement as inherently collusive, but the appellate court rejected the argument, holding that "[w]hile it is true that the propriety of 'clear sailing' attorney fee agreements has been debated in scholarly circles (see Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements* (2003) 77 Tul. L.Rev. 813, 815–816; Herr, Ann. Manual for Complex Litigation (4th ed. 2009) §§ 21.662, 21.71, pp. 522–524, 533–534), commentators have also noted that class action 'settlement agreement[s] typically

include[] a "clear sailing" clause. . . .' (Alexander, *Rethinking Damages in Securities Class Actions* (1996) 48 Stan. L.Rev. 1487, 1534.) In fact, commentators have agreed that such an agreement is proper. '[A]n agreement by the defendant to pay such sum of reasonable fees as may be awarded by the court, and agreeing also not to object to a fee award up to a certain sum, is probably still a proper and ethical practice. This practice serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure of total monetary liability for the judgment and fees in a case. To the extent it facilitates completion of settlements, this practice should not be discouraged.'" (*Consumer Privacy, supra,* 175 Cal.App.4th at p. 553, quoting Newberg on Class Actions, *supra*, § 15:34, p. 112.)

The appellate court found no cause for alarm where the "defendant merely established the outer limits of its liability for fees, and agreed not to oppose a fee application within the defined range, without conceding the propriety of any particular amount. A court must still determine the reasonableness of the fee, and must do so whether or not there is an objection presented from the class." (*Consumer Privacy, supra*, 175 Cal.App.4th at p. 559[3]; see *Garabedian, supra,* 118 Cal.App.4th at p. 125 [court retains obligation to award only attorney fees that are reasonable despite agreement of parties that defendant would pay a maximum of $14,125,000]; *Weinberger v. Great Northern Nekoosa Corp.* (1st Cir. 1991) 925 F.2d 518, 520 [In the case of a "clear sailing" agreement, "rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable."]; *Harris v. Vector Marketing Corp.* (N.D. Cal.

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[3] While in *Consumer Privacy* the parties agreed that class counsel would petition for no more than $4 million for fees and costs, ultimately the trial court granted an attorney fee and cost award of $3,018,355. (*Consumer Privacy, supra,* 175 Cal.App.4th at p. 552.)

2011) 2011 WL 1627973 [despite parties' agreement to particular service award for named plaintiff, court would determine whether she was entitled to such an award and the reasonableness of the amount requested].)

The Ninth Circuit has been somewhat more critical of such provisions, finding that "'the very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class.'" (*Bluetooth, supra,* 654 F.3d at p. 948.) That court has held that trial courts have a heightened duty to examine such provisions carefully and to "scrutinize closely the relationship between attorneys' fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested.' [Citation.]" (*Ibid.*) In *Bluetooth*, the court held that "approval of the settlement had to be supported by a clear explanation of why the disproportionate fee is justified and does not betray the class's interests." (*Id.* at p. 949.) We agree that, given the potential pitfalls, heightened scrutiny of such clear sailing provisions is appropriate at the trial court and appellate level.

With this background in place, we now examine whether the trial court erred in its handling of the motion for preliminary approval of the class settlement agreement and its orders following the hearing on that motion.

II. *Trial Court Exceeded its Authority in Disqualifying Hanson and Dismissing Case*

In this case, the parties submitted the Settlement Agreement to the court for preliminary approval, including the provision stating that class counsel would file an unopposed motion for an award of attorney fees not to exceed one-third of the settlement fund, costs not to exceed $50,000, and an incentive award not to exceed $7,500 for plaintiff, to be paid out of the settlement fund of $1.5 million. In indicating that class counsel intended to seek a total award of fees of $500,000

under the common fund doctrine and that OfficeTeam would not oppose the petition, the parties' joint motion for preliminary approval of class action settlement complied with the superior court's local Guidelines for such motions. The motion further provided a "preliminary justification under existing case law for such fees" (*Guidelines*, *supra*, Motions for Preliminary Approval of Class Settlement, subd. (i)), citing precedent approving the common fund doctrine and arguing that a recovery of one-third of the settlement amount was within the range customarily approved by California courts in comparable wage and hour class actions.[4]

Pursuant to the Guidelines, no lodestar calculation or evidence supporting the attorney fee application was due at the time of the preliminary approval hearing; rather, such information was to be provided in the motion for *final* approval of the settlement, along with a fuller argument justifying the fee award and any multiplier sought. (*Guidelines*, *supra*, Motions for Final Approval of Class Settlement, subd. (d)(1).) Further, the Guidelines provided that the final approval stage would be the appropriate time to submit a declaration from plaintiff explaining his efforts and other facts justifying his proposed incentive payment of $7,500. (*Id.*, subd. (d)(3).)

At the preliminary hearing, the trial court reasonably expressed concern that the $500,000 attorney fee award sought by class counsel was excessive, given the lack of motion practice and formal discovery and the small recovery for each class member. It would have been quite appropriate to signal to class counsel that such a fee request would be met with great skepticism at the final approval hearing. However, the court treated the issue of attorney fees as one to be disposed of at the

[4] The joint motion did not reference the proposed incentive payment to plaintiff. However, the Settlement Agreement, attached as an exhibit, did.

preliminary hearing. The court questioned class counsel about the amount of hours he had billed on the case, but Hanson said he did not know the amount offhand, only that it was quite a bit more than the 50 hours that the court estimated he must have spent. In its written order granting provisional approval of the settlement, the court expanded on its concerns about the "grossly excessive" fee request of $500,000. Noting that the motion for preliminary approval did not contain information about Hanson's billable rate or the hours he had billed on the case, the court incorrectly stated that Hanson had conceded at the hearing that he worked 50 to 100 hours on the case. Concluding that a reasonable rate for Hanson would be $500 per hour, and applying a multiplier of 1.5, the court awarded $75,000 in attorney fees.

With respect to the service award for Merchant, the court found that the proposed enhancement of $7,500 was excessive in that it was approximately 113 times the proposed recovery of the unnamed class members. It awarded a $1,000 incentive payment instead.

The court then ordered the parties to lodge an amended settlement agreement that comported with the court's order. Although OfficeTeam argues that the trial court subsequently afforded Hanson opportunities to meet and confer with OfficeTeam to devise an approach on the attorney fee issue that would be more satisfactory to Hanson, the record does not support its contention. The trial court indicated only that it would entertain a request for additional fees incurred *after* the preliminary approval hearing, but it never deviated from its order that the parties amend the Settlement Agreement to award Hanson only $75,000 for work leading up to the preliminary approval hearing. As we have explained, the court lacked the authority to order the parties to endorse particular terms in their settlement. While the court could suggest changes, its power to enter an order was limited to approving or disproving the parties' settlement agreement.

When class counsel refused to amend the agreement at a series of hearings on the ground that the court did not have the power to order amendments, the court disqualified Hanson and his partner on the ground that they had a conflict with the class, and then dismissed the action without prejudice when Merchant refused to obtain a new lawyer. This was error.

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] . . . However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144; see *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1052 ["'"The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion."'"].) The same standard of review applies to the trial court's dismissal of the case. (*Adams v. Roses* (1986) 183 Cal.App.3d 498, 505.) Here, the court's order of disqualification was based on its determination that class counsel had a conflict of interest because he refused to amend the settlement agreement as ordered by the court. But the court had no power to order the amendment, and counsel's refusal to agree to terms the court had no power to require cannot be deemed a disqualifying conflict.

OfficeTeam argues that Hanson should have agreed to amend the Settlement Agreement as per the court's order and then availed himself of the appeal mechanism prescribed in the Settlement Agreement, which provided that class counsel "may appeal any reduction in the attorneys' fees payment." We disagree. Agreeing to amend the Settlement Agreement with respect to the attorney fee award likely would be deemed a waiver of his right to appeal the issue.

For the foregoing reasons, we reverse the court's orders disqualifying class counsel and dismissing the case, and remand the matter so that the court may enter a revised order either granting or denying preliminary approval of the class action settlement. If the settlement is approved, the court shall provisionally certify a class, set a date for the final approval hearing, and direct that notice be sent to class members.

DISPOSITION

The judgment is reversed and remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.