

# Incentive awards for non-class representatives

## Seeking compensation for a deeply involved individual who is not a named plaintiff in the litigation

**By Cristina Molteni**

Incentive awards are generally sought after a settlement or verdict has been achieved. Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they undertake during the class-action litigation. But what happens when a class member, who is not a named plaintiff, is deeply involved in the litigation, executing declarations, providing documents, contacting fellow class members, preparing and sitting for depositions? There is a dearth of California case law regarding the request of enhancement awards for non-class representatives.

In this article, we will show why it is good practice to request service awards for those non-class representatives who are pivotal in the successful litigation of a class lawsuit.

### The evolution of class representatives' enhancement awards in California

***Van Vranken v. Atl. Richfield Co.*** (N.D.Cal. 1995) 901 F.Supp. 294

In *Van Vranken*, class counsel applied for an incentive award of $100,000 for the named class representative, for his efforts during the litigation. None of the class members opposed that award. The court established a series of criteria that may be considered in determining whether to make an incentive award, including (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. (*Van Vranken v. Atl. Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299-300.)

The court found that several of the above factors supported Van Vranken's request for an incentive award, such as the length of the litigation, his testimony at trial, and the percentage of his claims

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compared to the total of the common fund. However, the court found that the amount requested was excessive because there was no itemization about the actual hours spent and the actual expenses incurred by the class representative when litigating the case, and therefore reduced this incentive award to $50,000. These criteria have been adopted by California courts. (See *Golba v. Dick's Sporting Goods, Inc.* (2015) 238 Cal.App.4th 1251, 1253.)

In addition, courts also take into consideration reasonable fears of workplace retaliation as a factor in evaluating the propriety of an incentive award (*Staton v. Boeing Co*. (9th Cir. 2003) 327 F.3d 938, 977.)

***Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785**

In *Clark*, class counsel applied for an incentive award of $25,000 to each of the two class representatives; however, the California Court of Appeal found that to permit such an incentive was an abuse of discretion of the trial court. The court, mostly citing Seventh Circuit cases, stated that a compensation to a named plaintiff may be necessary to induce an individual to participate in the lawsuit, equating it to the lawyers' non-legal but essential case-specific reimbursable expenses.

In addition to *Van Vranken*'s factors above, the court identified other relevant factors to consider in deciding whether an incentive award for the class representative is warranted, such as (1) the actions the plaintiff took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the plaintiff expended in pursuing the litigation. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804, citing *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016.)

***Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380**

In *Cellphone*, the court noted that "incentive awards are fairly typical in class action cases." They are discretionary and intended to compensate class representatives for work done on behalf of the class, making up for financial or reputational risk undertaken in bringing the action, and, sometimes, recognizing plaintiffs' willingness to act as a private attorney general. (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1394.) The court explicitly adopted the criteria cited in the cases above, and stated that there was no presumption of fairness in the review of an incentive fee award; however, it deferred to the trial court's finding that the incentive awards were justified because of the trial court's familiarity with the history of a lengthy litigation and with the evidence about the class representatives work and risk undertaken on behalf of the class. (*Id.*, at 1395.)

## Payment of service awards to non-class representatives in federal courts

Service awards are customarily awarded in FLSA collective actions to opt-in plaintiffs and class members who participated in depositions or provided written discovery. It has been a long and established practice in federal courts, and it is time for California courts to embrace it as well. For instance, in *Huguley v. Gen. Motors Corp.,* (E.D.Mich. 1989) 128 F.R.D. 81, the court noted that "named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation they have borne." (*Id.*, at 85.) In *Huguley*, a group of 88 named potential and anecdotal witnesses and named plaintiffs received a one-time distribution of more than $300,000 and no objection was received criticizing these awards as too large. On the contrary, objections were made that the awards were too small. (*Ibid.*)

In *Nilsen v. York County,* (D.Me. 2005) 382 F.Supp.2d 206, the court held that "the seventeen class members who were deposed deserve the $500 incentive payment to recognize the time and effort they expended in preparing for and attending the deposition. Their participation was valuable in advancing discovery in this case and helping both sides evaluate the merits of their respective positions." (*Id.*, at 216.) The court approved incentive payments of $5,000-$5,500 for class representatives and of $500 for deponents, finding the payments fair, reasonable, and adequate to compensate the class representatives and deponents for their valuable efforts on behalf of the class. (*Id.*, at 215.)

In *Equal Rights Ctr. v. Wash. Metro. Area Transit Auth.*, (D.D.C. 2008) 573 F. Supp.2d 205, the court observed that "the incentive awards of $5,000 and $1,000 granted to named plaintiffs and (16) deposed class members are not uncommon in class action litigation." (*Id.*, at 214 n.10.) The court further found that additional payments granted to named and deposed class members were reasonable in light of the class members' disabilities, which made travel to and from depositions and other court proceedings especially difficult. (*Ibid.*)

In *Wineland v. Casey's Gen. Stores, Inc.*, (S.D.Iowa 2009) 267 F.R.D. 669, the court approved incentive payments of $10,000 per named plaintiff and $1,000 for each deponent in this FLSA case on behalf of over 11,000 cooks and cashiers employed by a convenience store chain. The court found that witnesses who submitted to depositions furthered the litigation in immeasurable ways and, through these actions, significant benefits on behalf of all settlement class members were achieved. For that reason, the court concluded that "the preferential treatment of the named plaintiffs and deponents is not excessive, but is fair and reasonable under the circumstances." (*Id.*, at 678. See also, *Jones v. Casey's General Stores, Inc.*, (S.D. Iowa 2009) 266 F.R.D. 222, 231 decided the same year by the same court, granted $10,000 for each named plaintiff and $1,000 for each deponent; *Burch v. Qwest Communications International Inc.* No. 06-CV-3523 MJD/AJB (D. Minn. Sept. 14, 2012).)

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In *In re Tyson Foods Inc., Chicken Raised Without Antibiotics Consumer Litigation*, No. RDB-08-1982 2010 U.S. Dist. LEXIS 48518, 2010 WL 1924012 (D. Md. May 11, 2010), plaintiffs requested an award of $2,500 for each of the four named plaintiffs and four other class members who were deposed. The court found the request reasonable and stated that the payment "compensates the Plaintiffs and class members for their contribution to the process of the litigation." (*Id*., at *14.)

In *In re Bank of Am. Wage & Hour Emp. Litig*., No. 10-MD-2138-JWL 2013 U.S. Dist. LEXIS 180056, 2013 WL 6670602, (D. Kan. Dec. 18, 2013), the court approved the parties' proposal of awarding $3,000 to the named plaintiffs, $1,000 to the plaintiffs who provided a deposition, $500 to the plaintiffs who responded to interrogatories, and $300 to the plaintiffs who provided a declaration or responded to document requests. The agreement provided that, if a plaintiff qualified for more than one payment, he or she would receive one payment in the highest qualifying amount. (*Id*., at *26.) The court found that those payments were reasonable and justified based upon the level of assistance provided, because the recipients of those payments expended time and effort protecting the interests of the class and, at least for current employees, some element of risk was involved. (*Ibid*.)

In *McClean v. Health Systems, Inc.*, No. 6:11-CV-03037-DGK (W.D. Mo., Aug. 4, 2015), the court stated that it was within its discretion to approve incentive awards to class representatives or other participating plaintiffs who materially contributed to the lawsuit's success and the deponents' actions assisted in achieving class certification, approving a $5,000 incentive award to each of the two named plaintiffs and a $500 service award to each of the eight deponents. (*Id.*, at *7-8.)

In *Irvine v. Destination Wild Dunes Mgmt., Inc.*, (D.S.C. 2016) 204 F. Supp. 3d 846, class representatives received $5,000 each, named plaintiffs received $2,500, and each of the 10 individuals who participated in depositions and written discovery received $1,000. The court stated that "without their actions, this settlement may not have been achieved." (*Id*., at 851.)

Ultimately, California federal courts embraced approving service awards to non-class representatives. In *Satchell v. Fed. Express Corp*., No. 3:03-cv-02659 SI, (N.D. Cal. Aug. 14, 2007), the Hon. Susan Illston approved service awards of $30,000 to each of the nine class representatives and $5,000 to each of the 18 declarants in the case. The declarants provided significant and valuable assistance to the class in that they were interviewed repeatedly, participated in conference calls and meetings, and were deposed. However, it is noteworthy that one of the class representatives was only awarded $5,000 because she did not act as a class representative for much of the litigation. (*Id*., at *2.) In *Boyd v. Bank of America Corp*., No. 8:13-cv-00561-DOC (C.D. Cal. Jan. 19, 2016), the Hon. David Carter approved service awards of $25,000 for each of the four representative plaintiffs for their time and effort in the litigation and their broader releases, and $2,000 for each of the class member deponents for their time and effort in providing deposition testimony supporting class claims. (*Id*., at * 3.)

To sum up, incentive payments for people other than class representatives should show that the recipients contributed to the prosecution of the litigation or experienced some type of potential retaliation, which were not shared by the class as a whole. (*Trujillo v. City of Ontario* No. EDCV 04-1015-VAP (C.D. Cal. Aug. 24, 2009), at *13.)

## The request of service awards in state courts

When moving for fees in state courts, employment practitioners should consider requesting service awards for class members who provided declarations or sat for depositions, advancing class certification. Depositions of class members are currently prevalent because courts adopt an extended non-statutory briefing schedule for class certification motions, and defendants oppose such motions by heavily relying on depositions of those class members. Declarants are then tasked with not only meeting with class counsel, but preparing for depositions, reviewing their declarations and documents and, most of the time, facing the uncertainty of their first deposition. Moreover, those class members eventually become plaintiffs at the time of verdict or settlement agreement.

The lack of case law should not be a hurdle for skillful attorneys to move for service awards for those witnesses. Courts may still find themselves uneasy to grant these service awards to avoid any type of self-dealing when class members are aware of the dynamic at the negotiation table or are not proper members of the class; however, California courts have started to recognize that class members that are non-class representatives are not merely fact witnesses, but they are the driving force behind employment lawsuits, assisting plaintiffs and class counsel and contributing to produce substantial benefits for the class. Witnesses of workplace violations play a crucial role in bringing justice to those who would otherwise be without a remedy, especially in the current political climate. Undocumented workers, for instance, have valid concerns about participating in a lawsuit, putting their names out there, and placing themselves in the spotlight. Furthermore, workers in niche industries or markets may suffer reputational risk or actual backlash, particularly with regards to future employment opportunities when supporting class lawsuits.

Finally, service awards are not per se inappropriate; however, the approval of service awards and their amounts will depend on the specific circumstances of the

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case and its prosecution. The sole purpose of these awards is to compensate those individuals for work done on behalf of the class, and courts will not award them sua sponte. For that reason, class counsel should start including these requests in their moving papers for final approval. If you do not ask the court, it will not grant them.


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