

Tentative Rulings for October 14, 2020  
Departments 403, 501, 502, 503

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There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG00915      *J.H. Boyd Enterprises, Inc. v. Boyd et al.* (Dept. 403)

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The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

## Tentative Rulings for Department 403

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# Tentative Rulings for Department 501

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**Tentative Ruling**

Re: *LeDuc, et al. v. Infinity Select Insurance Co., et al.*  
Superior Court Case No. 19CECG01278

Hearing Date: October 14, 2020 (Dept. 501)

Motion: Demurrer by Defendants Joseph Cooper, Sr., and Cooper & Cooper, LLP to Seventh and Eighth Causes of Action of Complaint

**Tentative Ruling:**

To sustain the demurrers to the seventh and eighth causes of action of the Complaint, as to plaintiff Daniel Canchola, individually ("Canchola") only, with leave to amend. Canchola is granted 10 days leave to file an amended complaint. The time in which the complaint may be amended will run from service of the order by the clerk. (Code Civ. Proc., § 430.10, subd. (e).)

**Explanation:**

Defendants Joseph Cooper, Sr., and Cooper & Cooper, LLP (together "Cooper") demur to the seventh and eighth causes of action of the Complaint on the ground that plaintiff Canchola, individually, lacks standing to bring claims that belong to the bankruptcy trustee. The seventh cause of action is for professional negligence (i.e., legal malpractice) and the eighth is for breach of fiduciary duty.

Plaintiff must have standing to bring a claim, and lack of standing leaves a claim subject to general demurrer. (See *Cloud v. Northrop Gruman Corp.* (1998) 67 Cal.App.4th 995, 1004-1005 [employee lacked standing to bring claim against employer that belonged to bankruptcy estate, but leave to amend should have been granted to substitute the bankruptcy trustee].) Accordingly, Cooper can raise lack of standing by demurrer.

"Under the Bankruptcy Code, the filing of a bankruptcy petition creates a bankruptcy estate." (*Gladstone v. U.S. Bancorp.* (9th Cir. 2016) 811 F.3d 1133, 1139; 11 U.S. Code § 541(a).) The Bankruptcy Code sets forth the categories of property included in the bankruptcy estate, including legal interests and causes of action. (*In re Ryerson* (9th Cir. 1984) 739 F.2d 1423, 1425.) This includes malpractice claims. (*Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 68, fn omitted.)

A cause of action is property of the bankruptcy estate only if the claimant suffered pre-petition injury. (*In re Blasingame* (B.A.P. 6th Cir. 2019) 597 B.R. 614, 619 [denial of discharge was not pre-petition activity, and therefore was not bankruptcy estate property]; see also *In re Underhill* (6th Cir. 2014) 579 Fed. Appx. 480 ["a cause of action qualifies as bankruptcy estate property only if the claimant suffered a pre-petition injury"].)

The seventh and eighth causes of action are premised on the 12 breaches alleged in paragraph 83 of the Complaint, labeled "a" through "l".

Canchola concedes that most of the actions or wrongdoing alleged in paragraph 83 belong to the bankruptcy estate. The only claims that Canchola specifically contends belong to him individually are those set forth in "j" and "l".

Canchola is correct as to "j", which pertains to the settlement agreement, which was entered into months after filing of the bankruptcy petition. The reply seems to concede the point. Cooper addresses each of the lettered allegations, except for "j", explaining why the claims involve pre-petition conduct belonging to the trustee.

Canchola is incorrect as to "l", which is based on Cooper's conduct of "failing and refusing to advise Guerra and CANCHOLA as to their legal rights against INFINITY, as to INFINITY's erroneous position regarding the Subject Policy's limit of liability." As it pertains to the policy limits issue, this injury arose pre-bankruptcy petition.

Accordingly, there is at least one claim here ("j") that belongs to Canchola individually, and not the trustee. As Canchola points out, Cooper produces no authority providing that the debtor and bankruptcy trustee cannot prosecute their respective claims in the same action.

The demurrer is premised entirely on the principle that the debtor Canchola cannot maintain a cause of action belonging to the trustee. As the Complaint is currently drafted, Canchola is apparently asserting claims that he concedes belong to the trustee ("a"- "l", "k", "l"). Since there is one viable claim belonging to Canchola ("j"), the demurrers to the seventh and eighth causes of action will be sustained with leave to amend. Plaintiffs are to separate out the claims belonging to the bankruptcy estate and to be pled by the Trustee, from the claim belonging to Canchola individually ("j").

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: DTT on 10/8/2020.  
(Judge's initials) (Date)

(24)

**Tentative Ruling**

Re: ***Avila v. Do***  
Superior Court Case No. 19CECG03870

Hearing Date: October 14, 2020 (Dept. 501)

Motion: by Defendant Thong H. Do, M.D., for Summary Judgment

**Tentative Ruling:**

To grant. Defendant Do is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

**Explanation:**

As the moving party, defendant bears the initial burden of proof to show that plaintiffs cannot establish one or more elements of the at-issue cause of action or to show that there is a complete defense. (Code Civ. Proc. § 437c, subd. (p)(2).) Only after the moving party has carried this burden of proof does the burden of proof shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. (*Id.*)

“California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.”

(*Munro v. Regents of Univ. of Calif.* (1989) 215 Cal.App.3d 977, 984-85.)

With the expert testimony of Glenn M. Chertow, M.D., as well as well as Dr. Do's own declaration, moving defendant has made a prima facie showing that his care and treatment of plaintiffs' decedent, Juan Avila, was at all times within the applicable standard of care, and that defendant met the applicable standard of care while rendering care and treatment to plaintiffs' decedent, such that neither his actions nor inactions contributed to decedent's injuries and death. This is sufficient to negate plaintiff's claim of professional negligence. (See *Munro, supra.*) The burden therefore shifts to plaintiffs to show the existence of a triable issue of material fact. Plaintiffs have introduced no conflicting expert evidence to controvert the expert evidence introduced by defendant. Accordingly, plaintiffs have not met their burden.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: DTT on 10/8/2020.  
(Judge's initials) (Date)

## Tentative Rulings for Department 502

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**Tentative Ruling**

Re: ***Switzer v. Flournoy Management, LLC et al.***  
Superior Court Case No. 11CECG04395

Hearing Date: October 14, 2020 (Dept. 502)

Motion: Switzer's Motion to Compel Further Production of Withheld Documents from McCormick Barstow Cross-Defendants Responsive to Request for Production Set One

**Tentative Ruling:**

To grant and order McCormick Barstow Sheppard Wayte & Carruth, LLP, Gordon M. Park, Dana B. Denno and Irene V. Fitzgerald (collectively, "McCormick") to produce all documents identified in their revised privilege log served on April 6, 2020, except those documents identified on pages 5, 14, 27, 34 and 74 of said log as being unrelated to this litigation, and those documents already produced with the privilege log on April 6, 2020. The documents shall be produced within 20 days of service of the order by the clerk. (Code Civ. Proc., § Code Civ. Proc. § 2031.310, subd. (a).) To deny all parties' requests for sanctions. (Code Civ. Proc. § 2031.310, subd. (h).)

**Explanation:**

This is the third in a series of motions seeking production of documents responsive to Switzer's Request for Production of Documents Set One. There are no procedural problems with the motion. Good cause for production of the documents was established with the first motion. The instant motion was timely filed after the stay was lifted and McCormick served their amended privilege log in compliance with the court's November 15, 2016 order. There are no remaining issues particular to any individual demand to be resolved. Accordingly, a separate statement, while ordinarily required for a motion brought under Code of Civil Procedure section 2031.310, would not have been helpful or useful in the context of this motion. The sole remaining question at this stage is whether Switzer has the authority to waive the attorney-client privilege for Flournoy Management, LLC ("Flournoy"). If he can waive the privilege, then the motion must be granted. The court finds that Switzer can waive the privilege for Flournoy.

Following trial against Wood and Access Medical, Judgment was entered on September 12, 2019. The Judgment recognized that Flournoy had ceased business operations in 2011, and was already, for all practical purposes, dissolved. Deciding equitable issues, the Judgment ordered the dissolution of Flournoy, and appointed and authorized Switzer to wind up the affairs of Flournoy.

Evidence Code section 954 provides the privilege may be asserted by (a) the holder of the privilege, (b) persons authorized by the holder of the privilege, and (c) the attorney at the time of the communication – unless "otherwise instructed by a person authorized to permit disclosure".

"[H]older of the privilege" includes a "successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence." (Evid. Code, § 953, subd. (d).)

A dissolved entity continues in existence, and the person or persons authorized to act on the dissolved entity's behalf during the winding up process can assert the privilege, at least until all matters involving the company have been fully resolved and no further proceedings are contemplated. (See *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 219; *Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1356-1357.)

In his cross-complaint Switzer asserts derivative claims on behalf of Flournoy against cross-defendants for breach of duties owed to Flournoy. The Judgment authorized Switzer to wind up the affairs of Flournoy. At this stage Switzer is the only person left and authorized to act on behalf of Flournoy. Accordingly, the court finds that he has the authority under Evidence Code section 953, subdivision (d), to waive the attorney-client privilege on Flournoy's behalf.

McCormick cannot claim work product protection, which does not lie "if the work product is relevant to an issue of breach by the attorney of a duty to the client arising out of the attorney-client relationship." (Code Civ. Proc., § 2018.080.)

No sanctions will be awarded in connection with this motion. The court finds that McCormick acted with substantial justification in asserting privilege on behalf of their former client.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By: RTM on 10/9/20.  
(Judge's initials) (Date)

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**Tentative Ruling**

Re: *Her v. Centex Homes*  
Superior Court Case No. 19CECG03604

Hearing Date: October 14, 2020 (Dept. 502)

Motion: Contractors Insurance Company of North America's unopposed motions (3x) for leave to intervene and file complaints in intervention

**Tentative Ruling:**

To grant. Contractors Insurance shall file and serve its proposed complaints in intervention within 10 days of service of this order by the clerk. (Code Civ. Proc. §387, subd. (d).)

**Explanation:**

A suspended corporation may not sue or defend itself against a lawsuit. (Rev. & Tax Code, § 23301.) Code of Civil Procedure, section 387, subdivision (d) provides that "[t]he court shall, upon timely application, permit a nonparty to intervene in the action or proceeding if either of the following conditions is satisfied ... [¶] (B) The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties."

Exposure to direct liability is sufficient to create a basis for insurer intervention in a third party action against the insured. (*Western Heritage Ins. Co. v. Superior Court* (2011) 199 Cal.App.4th 1196, 1205; see also *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 217 [suspended corporations are not allowed to exercise powers and privileges as those of a corporation in good standing, "[t]hus, an insurance company must intervene in the lawsuit to protect the rights of its insured suspended corporation."].) "Intervention may ... be allowed in the insurance context, where third party claimants are involved, when the insurer is allowed to take over in litigation if its insured is not defending an action, to avoid harm to the insurer." (*Western Heritage*, supra, 199 Cal.App.4th at p. 1205, citation and quotation marks omitted.)

An insurer must seek leave to intervene in order to protect its own interests by defending the claim against the suspended corporation. (Rev. & Tax. Code, § 19719, subd. (b); *Kaufman*, supra, 136 Cal.App.4th at pp. 221-222.) The insurer's interest must be direct, and must be an interest that is properly determined in the action. (*Hinton v. Beck* (2009) 176 Cal.App.4th 1378, 1384.)

Here, Contractors Insurance seeks leave to file its proposed complaint in intervention because its insureds are unable to appear in the action due to their suspended status. Contractors Insurance states that the only way it can protect its



## Tentative Rulings for Department 503

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(03)

**Tentative Ruling**

Re: ***Alfaro v. Barrett Business Services***  
Superior Court Case No. 17CECG02182

Hearing Date: October 14, 2020 (Dept. 503)

Motion: By Plaintiff Alfaro for Preliminary Approval of Class Settlement

**Tentative Ruling:**

To deny plaintiff's motion for preliminary approval of the class settlement and certification of the class for the purpose of settlement, without prejudice.

**Explanation:**

I. Class Certification

a. Standards

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.)

b. "Cursory Review" Not Sufficient

An agreement of the parties is not sufficient to establish a class for settlement purposes. There must be an independent assessment by a neutral court of evidence showing that a class action is proper. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81; see also Newberg, Newberg on Class Actions (T.R. Westlaw, 2017) § 7:3 ["The parties' representation of an uncontested motion for class certification does not relieve the court of the duty of determining whether certification is appropriate."].)

In *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, the United States Supreme Court stated as follows: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted], for the proposal is that there will be no trial. But other specifications of the rule - those designed to protect absentees by blocking unwarranted or overbroad class definitions - demand undiluted, even heightened, attention in the settlement context." (*Id.* at p. 620.) The level of attention required by *Amchem* "is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." (*Id.* at p. 620.)

While counsel argues that unpublished trial court decisions call for a “ cursory” review, this court is bound by the United States Supreme Court and published California appellate cases. Therefore, the court must still engage in a diligent review of the settlement agreement to ensure that it is fair and reasonable to the absent class members.

c. Numerosity and Ascertainability

Here, the class is limited to truck drivers of loads of tomatoes who drove trucks of a certain gross vehicle weight rating (GVWR). The putative class consists of 209 drivers, as attested to by defendant’s president. Thus, plaintiff has satisfied the numerosity and ascertainability factors.

d. Community of Interest

(i) Class Representatives with Typical Claims

The focus of the typicality requirement involves inquiry as to whether the plaintiff’s individual circumstances are markedly different or whether the legal theory upon which the claims are based differs from that upon which the claims of the other class members will be based. (See *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.)

Here, plaintiff alleges that he was out driving all day, every day. He claims that all drivers had the same experience with meal periods, rest breaks, and days off that he did, but fails to state how he could know such information. This was not a workplace where the employees were all on the floor of a shop or in an office at the same time. Plaintiff’s counsel states that he interviewed others, but no declaration from any other driver is offered. Thus, there is no admissible evidence before the court on these issues.

Previously, the court noted these issues in its order denying the last motion, without prejudice. This problem does not appear to be addressed in the renewed motion for approval of the class settlement, as there is still nothing in plaintiff’s declaration that would explain how he knows whether other drivers took meal breaks, rest breaks, and days off.

Plaintiff’s counsel also states that he cannot provide statements from other drivers, even though he interviewed them, due to confidentiality and work product issues. He does state, however, that his office conducted interviews at multiple facilities in Indio, Sacramento, and Firebaugh. There is also a memo attached to the Compendium of Evidence, Tab 7, which summarizes the interviews with nine different drivers. The memo has the names and identifying information redacted to protect the drivers, but does include some details about the work they did and whether they received meal and rest breaks, as well as days off. (Compendium of Evidence, Tab 7.) Unfortunately, since the memo is not itself an admissible document and appears to be entirely hearsay statements from unidentified drivers, it does not cure the defects noted in the court’s prior order.

The court also previously noted that there were no copies of driver’s logs, time cards, wage statements, etc. that would substantiate plaintiff’s claims. Plaintiff’s counsel has now provided copies of many of these documents, attached to plaintiff’s

compendium of evidence. Therefore, plaintiff has addressed this aspect of the court's prior order.

Also, there is still no evidence of any policy with regard to the seventh day of rest, other than plaintiff's own testimony, which is insufficient to show plaintiff's experience and claim is typical of the others in the class. Plaintiff has now provided a copy of the company handbook, but it does not appear that the handbook supports plaintiff's claim that he was not given meal and rest breaks or days off.

In addition, the amended complaint discusses improper deductions from pay for disciplinary purposes, but there is no evidence on this issue from the proposed class representative, defendant, or any other source.

Plaintiff contends that his expert's testimony establishes that defendant had a practice of failing to provide rest and meal breaks, as well as days off. The expert, Jarrett Gorlick, has conducted an analysis of a random sample of 20 percent of the total class members, or 42 drivers. He has concluded that the drivers did not receive all of their meal and rest breaks, and they were denied one day off for every seven days worked. However, many of Gorlick's conclusions appear to be based on assumptions that he was asked to make by plaintiff's counsel, which, in turn, were apparently based on interviews with employees. Thus, it does not appear that the expert's testimony is admissible to establish that the violations actually occurred. Instead, his declaration appears to be intended to primarily calculate the amount of damages based on an assumption that the violations had occurred.

*Apple Inc. v. Superior Court* (2018) 19 Cal.App.5th 1101 holds that *Sargon Enterprises, Inc. v. USC* (2015) 55 Cal. 4th 747, applies when a trial court considers expert opinion evidence on a motion for class certification. Only admissible opinion can be considered, and *Sargon* sets the standards for admissibility. The court must assess the soundness of the experts' materials and methodologies.

The court in *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, held that a trial court must refer to *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, "to the degree that the class . . . proposes to use statistical sampling evidence to establish either liability or damages." (*Cochran, supra*, 228 Cal.App. at p. 1140.) "The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole. Whether such inferences are supportable, however, depends on how representative the sample is. Inferences from the part to the whole are justified only when the sample is representative. Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population. Those considerations include variability in the population, whether size of the sample is appropriate, whether the sample is random or infected by selection bias, and whether the margin of error in the statistical analysis is reasonable." (*Id.* at p.1141, internal quotes and citations omitted.)

Here, the court previously found that Gorlick had not established that he is qualified to create a statistically valid sample and analyze it. The court was also uncertain whether Gorlick had even designed the sampling methodology, or whether it had been created by defendant, which might imply some bias.

Now, Gorlick states that he has a BA in economics and psychology, and that he is a certified financial planner. He has taken courses in financial and data analysis, as well as accounting. He is a partner at Berger Consulting Group, LLC, and he has provided data analysis and damage exposure in over 1,000 cases. He has also testified as an expert in 12 cases since 2017. He states that, to his knowledge, his testimony has never been stricken or deemed inadmissible by any court. Thus, Gorlick has adequately shown that he has expertise in the field of data analysis, financial planning, and statistical analysis, and that he is qualified to perform statistical sampling here.

Gorlick further states that counsel for plaintiff and defendant agreed to do a statistical sampling by choosing 20 percent of the employee class at random using a formula in Excel, and that he randomly selected which records would be produced. As a result, plaintiff has shown that its sampling methodology was random and unbiased, and presumably provides a fair representation of defendant's practices with regard to meal and rest breaks, as well as days off. However, as discussed above, it does not appear that there is any admissible evidence supporting the expert's assumption that meal and rest breaks were not provided, or that the employees were not given a day off at least once a week.

The issue with rest breaks prior to the 2016 change does appear to be typical, in that there was no payment for such breaks prior to that season. Also, plaintiff shares a job title, basic work duties, and type of vehicle with all class members, according to his testimony and that of the company president. Nonetheless, additional evidence is needed to demonstrate plaintiff's claims are typical aside from the 2015 unpaid rest breaks.

There is also no evidence provided to show that defendant made deductions from its employees' wages for disciplinary reasons. Therefore, plaintiff has not established that defendant is likely to have any liability based on this theory.

(ii) Predominant Questions of Fact and Law

"As a general rule, if defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022.)

The first amended complaint states that class members were never allowed to take a meal break. Plaintiff has now provided a copy of defendant's employee handbook. However, the handbook appears to show that defendant did provide meals and rest breaks as required by law, which does not support plaintiff's claims that no such breaks were provided. If defendant claims legally compliant policies, evidence demonstrating the contrary is needed. (*Dilts v. Penske Logistics* (S.D. Cal. 2010) 267 F.R.D. 625, 638; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715; *Capitol People First v. DDS* (2007) 155 Cal.App.4th 676, 692-993; *Sav-On Drug Stores v. Superior Court* (2004) 34 Cal.4th 319, 333.)

The question of overtime is determinable by reference to driver logs, and a common body of law. That claim does present common questions of law and fact. As

the waiting time penalties derive from the meal period and rest break violations, commonality depends on the documents, evidence from other class members, and sample validity. That is also true for other penalties. Plaintiff has now provided drivers' logs and time cards for the employees. The expert's declaration is also sufficient to show that the sampling method is valid and unbiased. However, it does not appear that there is sufficient evidence to support plaintiff's claims regarding missed meal and rest breaks or days off as to the entire class, for the same reasons discussed above.

d. Adequacy

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 669.) Counsel have shown that they are experienced and that they have successfully litigated other class actions. They have also now provided substantially more evidence to support the renewed motion. Therefore, it does appear that class counsel have shown that they are adequate to represent the interests of the class. The named representative also appears to be an adequate class representative, as he shares the same claims and interests as the other class members, and there is no evidence that he has any conflict of interest in representing the other class members.

II. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under [Federal] Rule [of Civil Procedure] 23(e) before securing the court's approval as fair." (*Koby v. ARS Nat'l. Serv. Inc.* (9th Cir. 2017) 846 F.3d 1071, 1079.)

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement. . . . The courts are supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129, internal quotes and citations omitted.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished. . . [Therefore,] the factual record before the . . . court must be sufficiently developed." (*Id.* at p. 130, internal quotes and citations omitted.) "The court 'must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case,' but nonetheless it 'must eschew any rubber stamp approval in favor of

an independent evaluation.” (*Id.* at p. 130, internal citation omitted.) The court must be skeptical of a situation where “there was nothing before the court to establish the sufficiency of class counsel’s investigation other than their assurance that they had seen what they needed to see.” (*Id.* at p. 129.)

b. Adequacy of the Settlement

Plaintiff’s counsel contends that the settlement is fair and reasonable, as it represents approximately 25 percent of defendant’s maximum liability, and defendant has provided documentation showing that it cannot afford to pay the maximum damages if it were to lose at trial. Plaintiff also argues that the damages may have been significantly less than the theoretical maximum amount if the case went to trial, since the law regarding meal and rest break claims does not necessarily favor plaintiff’s position, and there are considerable uncertainties in going to trial in all cases.

For example, defendant has now provided written policies that show that its employees were permitted to take meal and rest breaks, which undercuts plaintiff’s claim that the employees were not allowed to take breaks. There is also uncertainty with regard to the question of whether the class would have been certified. Denial of certification would result in no damages at all to the class members. Also, about half of the estimated damages were based on Private Attorneys General Act (“PAGA”) penalties, but the court has discretion as to the amount of PAGA penalties that it awards based on the facts and circumstances of the case.

It does appear that these factors weigh in favor of approving the settlement as fair and reasonable. The amount of the settlement is fairly high compared to the maximum possible recovery here, which is an amount that may have been somewhat optimistic, especially since some of plaintiff’s claims might have been difficult to prove given that defendant’s written policies appear to comply with the law regarding meals and rest breaks. Also, there appear to be real concerns with whether defendant could have afforded to pay millions of dollars to plaintiffs if they did manage to prevail and obtain a large award, which supports plaintiff’s contention that it was reasonable to settle for less than the full amount of potential damages.

Counsel has adequately demonstrated why nothing is sought for claims prior to 2015, as defendant’s president states that there were no employees prior to that date. The potential value of the meal and rest break claims are premised on the average rate of pay, which is, in turn, dependent on the validity of the sampling, which plaintiff has now shown to be adequate.

There is evidence that the class members are exempt from overtime requirements, as shown by the declaration of defendant’s president attesting to the GVWR of the tomato hauling trucks as being in excess of that to qualify as a “commercial motor carrier.” (*McCall v. DAV* (8th Cir. 2013) 723 F.3d 962, 964.) The wage order covering transportation workers is found at Title 8 California Code of Regulations section 11090. Subsection 3, which specifically relates to overtime, does not apply under subsection (L) “to employees whose hours of service are regulated by: [¶] [] Title 13 of the California Code of Regulations . . . Section 1200 and the following sections.” In turn, Title 13 of the California Code of Regulations, section 1200 applies to vehicles covered by Vehicle

Code section 34500(k) – which lists “[a] commercial motor vehicle with a gross vehicle weight rating of 26,001 or more pounds . . . .” That is enough to establish that the overtime claim was properly compromised for no money, as defendant’s president testifies that the weight of the trucks involved was over 26,001 pounds. (Carlucci Decl., ¶ 4.)

Thus, on the whole, it appears that plaintiff has shown that the amount of the settlement is fair and reasonable under the circumstances.

### III. Other Problems

#### a. Fee Split

The court previously expressed a concern that the moving party had failed to provide the agreement approving for a split of fees between the two firms representing plaintiff, signed by plaintiff, and also that the notice to class made no mention of any fee-splitting agreement. The court held that failure to provide such information means that fees cannot be collected. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219.) Case law calls for such information to be provided so that class members have a foundation on which to make their decision to opt in or opt out, or to object. (*In RE BMC Engine Interchange Litigation* (7th Cir. 1979) 594 F.2d 1106, 1129-1130.)

A written agreement for the fee split is necessary, “so the client will know the extent of, and the basis for, the sharing of such fees by attorneys. Knowledge of these matters helps assure the client that he or she will not be charged unwarranted fees just so that the attorney who actually provides the client with representation on the legal matter has ‘sufficient compensation’ to be able to share fees with the referring attorney.” (*Strong v. Beydoun* (2008) 166 Cal.App.4th 1398, 1402; see also Rules of Professional Conduct, rule 2-200.) The fee-splitting agreement must be submitted, and a discussion of the same set forth in the notice to class.

Plaintiff’s counsel has now stated that plaintiff was informed of the fee-splitting agreement, and that he consented in writing to the fee split. (Suppl. Bradley Decl., ¶ 40.) However, counsel does not provide a copy of the fee-splitting agreement for the court’s review. Plaintiff’s counsel claims that the class notice has been changed to disclose the fee-splitting agreement, but he does not state where the fee-splitting language is located in the notice, and the court was not able to find it. If the language is buried in the fine print of the notice, it does not presumably give adequate notice to potential class members of the fee-splitting agreement. Therefore, this concern has not yet been addressed.

In the prior order denying the last motion for preliminary approval of the settlement, the court was also concerned that there was no evidence of the number of hours, hourly rates, and tasks performed by plaintiff’s counsel, so it was not possible for the court to make a preliminary determination that fees are reasonable. Nor was there a breakdown of costs.

Plaintiff’s counsel’s supplemental declaration still contains no description of the hours spent on the case, counsel’s hourly rates, or the tasks performed, other than some vague references to investigation, discovery, negotiation, and drafting the settlement

and preliminary approval motion papers. (Suppl. Bradley Decl., ¶ 34.) Therefore, plaintiff has still failed to provide adequate evidence to support the requested amount of fees.

b. Use of Qualified Settlement Fund

The court previously expressed a concern that the settlement contained language that provided for a qualified settlement fund, noting that such instruments are used to transfer liability from the defendant to the fund. (26 U.S.C. § 468B, subd. (d)(2)(A).) Defendant needs to remain liable until the funds are distributed, at which time defendant will be released by a satisfaction of judgment. It is inappropriate to release attorneys and insurers from liability, and such language in the settlement agreement must be removed. If defendant should go bankrupt, insurance may be the only source that will be available for collection of the settlement amounts. Attorneys would ordinarily not be liable unless there was some misfeasance, and there is no basis to settle any such claim via this action. The court noted it would not approve such a fund or inclusion of such persons and companies in the released parties.

The new version of the settlement agreement continues to contain the same problematic language regarding the qualified settlement fund. (Settlement Agreement, pp. 12-13.) Therefore, this concern has not been addressed.

c. Settlement Agreement as Evidence

Previously, the court stated that the settlement agreement contains improper language specifying what might and might not be used as evidence. The court found that it is not for parties to a lawsuit, or even a court, to attempt to create privileges in addition to those already found in statute. "Courts may not create nonstatutory privileges as a matter of judicial policy." (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 720, fn. 4.) "It is clear that the privileges contained in the Evidence Code are exclusive and the courts are not free to create new privileges as a matter of judicial policy." (*Valley Bank v. Superior Court* (1975) 15 Cal. 3d 652, 656.)

The revised settlement agreement still contains the problematic language regarding whether the settlement may be used as evidence in the action. (Settlement Agreement, pp. 4-5, ¶ B.) Therefore, this concern has not yet been addressed.

d. Objection Clause

The court previously noted that the notice to class states that, unless an objector files a notice he/she intends to appear at the final approval hearing, the court will not consider the objection. The court held that this portion of the notice was incorrect, and that an appearance is not necessary.

It does not appear that the problematic language in the notice has been revised or changed since the last motion. Therefore, this concern has not yet been addressed. (See Class Notice, p. 5, § 7.)

e. Opt-Out Clause

The court was previously concerned that the opt-out clause required that the class member provide a telephone number and social security number information, noting that requiring such private information could dissuade a person from opting out of the settlement.

The newly revised settlement agreement and notice to class still contain the same requirements for disclosure of social security numbers and telephone numbers, although only the last four digits of the social security number are required. (See Settlement Agreement, § 7, and Notice to Class, § 6.) Therefore, this concern has not yet been addressed.

f. Continuing Jurisdiction Clause

The court was also concerned in its previous order about language in the settlement agreement that states that the absent class members consent to jurisdiction in Fresno. The court noted that, while plaintiff and defendant may consent to the court's jurisdiction, they cannot deem their consent to apply to matters involving anyone but themselves, such as absent class members. Absent class members are not parties and thus cannot be deemed to have consented to the court's jurisdiction. (*Eggert v. Pacific States Savings and Loan Co* (1942) 20 Cal.2d 199; *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

The revised settlement agreement still has the problematic language. (See Settlement Agreement, p. 19, § 15.) Therefore, this concern has not been addressed.

g. Distribution of Uncollected Funds

In its prior order denying the last motion for preliminary approval, the court was also concerned that the settlement agreement states that uncashed checks will be distributed to the Unclaimed Wages Fund, but also that only 20 percent of the money represented by such checks is in fact wages. The court was concerned that such confusing treatment of the funds could result in additional taxes for class members. Further, Code of Civil Procedure section 384 states:

Except as provided in subdivision (c), prior to the entry of any judgment in a class action established pursuant to Section 382, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing





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**Tentative Ruling**

Re: ***Cervantes v. Ruiz***  
Superior Court Case No. 17CECG00099

Hearing Date: October 14, 2020 (Dept. 503)

Motion: Motion to Tax Costs

**Tentative Ruling:**

To grant, in part, and tax costs in the sum of \$900.

**Explanation:**

Under Code of Civil Procedure section 1032, subdivision (b), "a prevailing party is entitled as a matter of right to recover costs in any proceeding." The losing party may dispute any or all of the items in the prevailing party's costs memorandum by a motion to strike or tax costs. (See Cal. Rules of Court, rule 3.1700(b).)

If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs.

(*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)

**Item 4 – Deposition Costs**

Code of Civil Procedure section 1033.5, subdivision (a)(3), allows costs for "[t]aking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed." Such costs still must be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc., § 1033.5, subd. (c)(2); *Perko 's Enters., Inc. v. RRNS Enters.* (1992) 4 Cal.App.4th 238, 244-245.)

Plaintiff challenges the cost for videotaping his deposition as not reasonably necessary because the videotape was not used at the arbitration. The court disagrees and finds opposing counsel's declaration to provide a reasonable basis for videotaping the deposition at the time. (See Makasian Dec. ¶¶ 4-7.)

Plaintiff also challenges the cost for taking and transcribing the deposition of Paula Dictos, plaintiff's designated non-retained expert witness. Plaintiff contends the deposition was not reasonably necessary because he withdrew the designation before the deposition. However, the notice was served the morning of the deposition, and was not discovered by opposing counsel until after the deposition was complete. (See Makasian Dec. ¶¶ 8-10.) Under the circumstances, taking the deposition was clearly



