

Tentative Rulings for November 18, 2016
Departments 402, 403, 501, 502, 503

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).)

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

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

Tentative Rulings for Department 501

(19)

Tentative Ruling

Re: ***Kenner v. Oak Harbor Freight***
Court Case No. 14CECG00873

Hearing Date: November 18, 2016 (Department 501)

Motion: by parties for class certification and preliminary approval of class action settlement

Tentative Ruling:

To deem the case complex and order that the complex case fees be paid by November 30, 2016, or that the parties provide proof that they have already done so by declaration filed or before that date.

To deny the motion without prejudice.

Explanation:

1. Class Certification

i. Standards

Class certification for settlement requires the same evidence that is required for class certification when contested, but for a showing the case can be managed for trial. *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591. "First, the court must assess whether a class exists. This assessment "demand[s] undiluted, even heightened, attention in the settlement context." (*Id.* at 620.)

"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. Numerosity and Ascertainability

There is no proof of the size of the class. There is simply a statement from plaintiff's counsel, who says he was so told. This is not evidence.

See *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175: "Plaintiffs' petition to the superior court is completely devoid of any evidentiary support. It is made by plaintiffs' counsel, with no showing that plaintiffs' counsel had any percipient knowledge of any of the facts, or that counsel was qualified to give his opinion as an expert witness."

The class is limited to "line haul drivers" for defendant in California during the class period. That may well be ascertainable, but we have nothing from defendant indicating it used such a title or from plaintiff indicating that his job bore such a title.

c. Community of Interest

"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." *Medraza v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97.

On the subject of an adequate class representative, a California court cited *Amchem* in *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal. App. 4th 836, 851 (all internal quotations and other citations omitted):

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class. 'The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent.' *Amchem Products, Inc. v. Windsor* . . .)"

The proposed class representative here provides no declaration. There is no evidence of his job title, whether he was required to use his cell phone for work, whether he hauled hazardous or explosive materials, or how the "in attendance" policy found in 49 C.F.R. 397.5 affected him, if it did. He provides no information about work he did before or after shifts, or organizing pallets. Thus there is no way to determine if his claims are typical of those of all the other class members.

No evidence of any company policy is provided, although class counsel contends that such policies exist. The theory of liability relies on the employee hauling explosive or hazardous materials, but there is no evidence that every employee or every trip encompassed transport of such materials.

Pursuant to 49 C.F.R. 397.5, the hauler of explosive materials is placed under much stricter "attendance" requirements than the hauler of merely hazardous materials. Yet the settlement treats all drivers the same, whether they constantly hauled such materials or never hauled them.

Predominance does not appear here. The policies for explosive vs. hazardous vs. nonhazardous materials are not shown to be the same, or if they were made in compliance with 49 C.F.R. 397.5. Not all line haul drivers would necessarily have the hazmat endorsement, which requires a background check by the Transportation Security Administration ("TSA"), according to the DMV and the TSA. There could be people in the class who have never driven a load subject to 49 C.F.R. 397.5, which means they would be getting money for a claim they do not possess.

Further, the complaint is very vague on the actual facts underlying the claims. It should be amended to include the specifics, so that wage and hour claims having nothing to do with hazmat loads are omitted. The cell phone use might apply across the class, but the rest is unproven and questionable. There is no explanation or discussion of why the settlement is appropriate where there is no consideration of the hours spent hauling explosive vs. merely hazardous vs. non-hazardous loads.

The record currently before the Court does not permit class certification.

2. Insufficient Record to Approve Settlement

"[T]he 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." "[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." *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 130.

In *Clark v. American Residential Services, LLC* (2009) 175 Cal. App. 4th 785, proposed class counsel decreed that the overtime class' claims had "absolutely no value," and that was accepted at face value by the trial court. The Court of Appeal reversed: "While the court need not determine the ultimate legal merit of a claim, it is obliged to determine, at a minimum, whether a legitimate controversy exists on a legal point, so that it has some basis for assessing whether the parties' evaluation of the case is within the 'ballpark' of reasonableness." (*Id.* at 789.)

"While the court must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case, it must eschew any rubber stamp approval in favor of an independent evaluation." (*Id.* at 799, internal citations omitted.) The lack of evidence required denial:

"Two weeks before the final fairness hearing, class counsel finally provided an evaluation of plaintiffs' case, which described the overtime claim as having 'absolutely no' value. No data was included to support counsel's evaluation and the only data anywhere in the record was a

copy of ARS's overtime policy, stating it paid overtime at one and a half times the employee's regular rate, along with a couple of pay stubs and time sheets showing some overtime payments to Clark and Gaines). Instead, counsel stated that ARS had "a legally compliant overtime policy and they actually paid overtime premium pay pursuant to their compensation policy."

(*Id.* at 801-802.)

Kullar rejected any "presumption" of fairness in class action settlements as a general rule, and particularly with regard to the one in front of it (at page 129, emphasis added):

"Class counsel asserted that information had been exchanged informally and during the course of the mediation session, but their declarations provided no specificity. The only specific was the repeated reference in the moving papers to several employee manuals that had been produced . . . Whatever information may have been exchanged during the mediation, **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**. The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement."

Counsel talks about using an Excel program to derive a sample, but there is no expert to show that such a program is scientifically likely to provide a valid sample. Further, the Excel program drew from a 20% sample provided by defendant, and there is no declaration or discovery from defendant discussing how it drew its sample. Thus the figures derived may have no statistical validity. Counsel gives none of the underlying evidence, and has not shown he is qualified to testify as an expert. Sampling is permitted, if it is validated. *Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 746-751. See *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App. 4th 1137, 1143 referring to *Duran v. U.S. Bank National Association* (2014) 59 Cal. 4th 1:

"*Duran*, a case involving a wage and hour class action, explained that sampling is a 'methodology based on inferential statistics and probability theory. 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.' [Citation.] Whether such inferences are supportable, however, depends on how representative the sample is. '[I]nferences from the part to the whole are justified [only] when the sample is representative.' [Citation.] Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population." (*Duran, supra*, at p. 38.) 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 pp. 38–46.)”

The damages figures are not supported by any foundational facts. They total some \$22,000,000, yet the settlement calls for a payment to class members of \$1,850,000, out of which class members have to pay payroll taxes owed by defendant, as well as attorney’s fees, costs, administration costs, class representative award, etc., leaving only about \$1,150,000 for the class members. That effectively discounts their recovery to 5% of the maximum total damages, which appear to omit any possible penalties, other than the \$300 for those separated from employment.

Counsel also states that the amount to be paid to the class may be further diminished by payments by defendant under the safe harbor provisions found in Labor Code section 226.2, which counsel estimates at \$1,148,000 (Hollis Decl., para. 56.) That would leave the class with no recovery at all from this case, as the statute requires payment of the same amount of money as the class without a release of any claim. The sole benefit would be to counsel, the class representative, the administrator, and the defendant, which would be released from claims not encompassed by 226.2.

The lack of supporting requires that the Court decline approval of this settlement even should the class be certifiable. So too does the proposal that perhaps less payment that called for if section 226.2 is applicable be made in return for a release of all 226.2 claims and more.

3. Other Concerns

a. Attempted Waiver of Time Constraint Under Labor Code section 226.2

The settlement proposes to waive the time constraint found in Labor Code section 226.2(b)(4), which sets December 15, 2016 as the last date an employer may take the actions necessary to perfect an affirmative defense under the statute.

The settlement agreement here is made for a class not yet certified, and which cannot complete the certification process by the December 15, 2016 date. Counsel does not represent the absent class members, and cannot waive protections for them unless the class is certified. The notice to the Class does not make clear that the absent class members may derive little, perhaps nothing, should the waiver be approved. The waiver proposed would have the effect of delaying payment to absent class members, who would then be paid in three installments over what appears to be a year, after final approval. They would receive nothing to compensate them for that delay.

The Court has serious concerns over whether or not the time limit set forth in Labor Code section 226.2(b)(4) can be waived. Civil Code section 3513 states: “Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”

Further, “prompt payment of wages due an employee is a fundamental public policy of this state.” *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 101, fnt. 3. “Full and **prompt** payment of wages due an employee is a fundamental public policy of this state.” *Davis v. Farmers Ins. Exchange* (2016) 245 Cal. App. 4th 1302, 1331 (emp. added).

Labor Code section 226.2 provided a limited period where an employer could make back payments of wages due and avoid liability. Permitting a contract which abrogated that deadline for absent class members does not comport with the public policy of prompt payment.

b. “Clear Sailing” Provision Coupled with Reverter

The settlement here provides that each absent class member must make a claim and complete a form in order to be paid. 25% of the amount allotted for the class will revert to defendant if insufficient claims are made. The amount allotted for the absent class members if all other expenses and costs are approved, to include the employer taxes, is **less** than the required payments if Labor Code section 226.2 applies, according to paragraph 56 of proposed class counsel's declaration. With the waiver proposed above, the claims process would almost certainly find defendant paying less than the 4% called for under section 226.2. The prime beneficiaries of the settlement would then be counsel, the class representative, and defendant, as defendant will have its share of taxes paid by the class.

International Precious Metals Corp. v. Waters (2000) 530 U.S. 1223 was a matter where the Court denied certiorari but Justice O'Connor was sufficiently disturbed to issue a written opinion decrying settlements where counsel's fees were divorced from the actual amount recovered for the class:

“Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiffs' recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class.”

Her statements were quoted in *Vought v. Bank of America* (C.D. Ill. 2012) 901 F. Supp. 2d 1071, which took a decidedly negative view of the situation (at p. 1099):

“The terms of the settlement, despite the superficially generous \$500,000 cap, ended up being a zero-sum framework where the putative attorneys' fees award cannibalized the funds that would otherwise have gone to the class. Presumably, BANA does not care who it pays so long as it maintains its public image and precludes subsequent actions. Other courts have dealt with the problem of overcompensating the claiming

class members by capping each individual member's recovery and directing the residual be paid to an alternate *cy pres* recipient."

The Court also cited *Sylvester v. CIGNA Corp.* (D. Mass 2005) 369 F. Supp. 2d 34, where only 10.8% of the class willing to put in claims. The judge ultimately found that the settlement was not fair at the final fairness hearing. The coupling of a claims-made settlement with a significant reversion to the defendant, along with a "clear-sailing agreement" as to attorney fees, was noted to be particularly odious.¹ The Court quoted from William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 835 (2003): "It is important to recognize that it would be relatively rare for a plaintiff's attorney to agree to a reverter-fund settlement without also having the security of a clear sailing agreement to reduce the uncertainty in his fee award." Further (*Id.* at 46):

"[T]he presence of both a reverter clause and a clear sailing clause should be viewed with even greater suspicion and not be presumed fair to the class. Because of the problems inherent in a class settlement agreement that includes both a reverter clause and a clear sailing clause, the Court believes that the presence of these two provisions in any settlement agreement should present a presumption of *unfairness* that must be overcome by the proponents of the settlement."

Accord *International Precious Metals Corp. v. Waters* (2000) 530 U.S. 1223 (J. O'Connor's statement on the denial of certiorari).

There is no justification given here for requiring a claim form. A payment made pursuant to Labor Code section 226.2 requires no form. Defendant has records of contact information for class members, which are to be checked by the administrator who will be paid from the class fund. Section 226.2 requires that the employer, at its own expense, make a diligent effort to locate all who would be paid under that section. The sole potential benefit to the class member from filing out a form is that such class member might be able to contest the number of work weeks listed, if he or she had documentary proof. Defendant's records are presumed correct absent such proof under the terms of the settlement.

In this set of circumstances, the Court should find that the presumption of unfairness inherent in a clear sailing agreement concurrent with a reverter is unrebutted.

c. Attempt to Create Privilege

The settlement purports to limit its own admissibility. (Settlement, para. 48.) The California Supreme Court has made clear that the judiciary is without power to create or recognize a new privilege not found in statutes. "Courts may not create nonstatutory privileges as a matter of judicial policy." *Schnabel v. Superior Court*

¹ A "clear sailing agreement" is where the defendant agrees not to oppose class counsel's request for fees and costs up to a certain amount.

(1993) 5 Cal. 4th 704, 720, nt. 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 restrictions on use of settlements to prove liability are set forth in Evidence Code section 1152. This Court is not in a position to make new privileges to be applied to other courts or in other proceedings.

d. Conflict between Settlement and Notice to Class

The Settlement calls for those wishing to opt out to so state in writing and provide their name and address. (Settlement, 14:12-14.) The Notice to Class requires them to provide their Social Security number and telephone number as well. (Notice at page 6, para. 19.) There is some right of privacy inherent in a telephone number. *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554. There is stronger right of privacy in a Social Security number, which is deemed "highly restricted personal information." 18 U.S.C. 2721. See also California Rules of Court, Rule 1.2(b). Class members may be afraid to provide such information in response to an unsolicited mailing, and they should not be barred from opting out if that is the case. Defendant should be able to determine which employees have opted out based on information already in its possession.

e. Deduction of Employer Taxes from Class Members' Settlement Funds

The settlement calls for part of the \$1,850,000 offered in settlement to be used to pay the employer's payroll taxes. That provides no benefit to the class members, who do not owe such taxes. It may raise the amount of settlement for purposes of calculating a percentage attorney fee share, but that is no benefit to the class either. The employer need pay its own taxes.

f. Overbroad Release

"The Court may approve a settlement which releases claims not specifically alleged in the complaint as long as they are based on the same factual predicate as those claims litigated and contemplated by the settlement." *Strube v. Am. Equity Inv. Life Ins. Co.* (M.D. Fla. 2005) 226 F.R.D. 688, 700. "A federal court may release not only those claims alleged in the complaint, but also a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented . . ." *Class Plaintiffs v. Seattle* (9th Cir. 1992) 955 F.2d 1268, 1287.

"[T]he law is well established in this Circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *In re American Exp. Financial Advisors Securities Litigation* (2nd Cir. 2011) 672 F. 3d 113. "[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual

predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." See also *Matsushita Elec. Indus. Co., Ltd. v. Epstein* (1996) 516 U.S. 367, 376-377.

The complaint in this action is markedly vague, and could be interpreted to cover many kinds of wage deprivation or unpaid business expense claims which are not at issue according to the facts presented by counsel in his declaration. The papers supporting the settlement describe loss of wages due to hauling of explosive and hazardous materials and the federal regulations that require close attendance to commercial motor vehicles hauling such loads. The business expense claims are factually limited in those papers to cell phones used for work. The factual predicate in the complaint is insufficient certain to permit a release of all claims arising out of the few very general facts.

Further, the release in the settlement states that absent class members would be releasing all claims "based on or arising out of each and all of the allegations in the Complaint in the Litigation for harms arising during the Class Period." There is a release of hidden or concealed claims as well, but there is no consideration shown to absent class members for such a release.

There is a bar on any action by an absent class member, whether administrative or otherwise, arising out of the "released claims." The entry of the settlement as judgment is a judgment entitled to res judicata treatment, but is not up to this Court to pre-determine the scope of that doctrine to as yet unfiled actions.

g. Retention of Jurisdiction

The Court is required to maintain jurisdiction to enforce the settlement, not to maintain jurisdiction until the parties release the Court. Nor will the Court assume jurisdiction over any and all disputes over the agreement. That is not appropriate; it is up to defendant to raise the bar of res judicata in the other case. See *Harrison v. Lewis* (D.D.C. 1983) 559 F. Supp. 943, 947: "In general, the court conducting a class action cannot predetermine the res judicata effect of its judgment."

h. Secrecy

Paragraph 103 requires silence about the settlement except as to a notice of class counsel's website. Any settlement will be part of this Court's public file. The lack of publicity is not justified in the papers, and may result in lack of notice to absent class members. Such cannot be approved absent justification.

i. Final Determination of Enforceability

Paragraph 106 prohibits distribution under the settlement "until the enforceability or validity of this Agreement has been finally determined." The language used is vague enough that it could permit withholding of class member payments upon any dispute by anyone over the settlement. The Court will not approve a settlement with this language; a date certain for distribution is required.

Tentative Rulings for Department 502

Tentative Rulings for Department 503