Tentative Rulings for November 30, 2021
Department 403

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.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(20)

Tentative Ruling

Re: ***Ramirez v. CSI***
Superior Court Case No. 18CECG004150

Hearing Date: November 30, 2021 (Dept. 403)

Motion: by plaintiff for class certification and preliminary approval of settlement

Tentative Ruling:

To grant.

Explanation:

Plaintiff has cured the few remaining issues identified in the court's February 25, 2021 order denying preliminary approval and class certification.

"California courts consider 'pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Jaimez v. DAIOHS USA* (2010) 181 Cal.App.4th 1286, 1298.)

Plaintiff has sufficiently addressed the common practice issues raised in the previous tentative ruling. Plaintiff shows that the class members were subject to common policies as set forth in the applicable collective bargaining agreement, and that class members experienced the same or similar treatment with regards to claims focused on meal and rest breaks, nonpayment for donning and doffing protective equipment. This is sufficient to warrant class treatment for settlement purposes of the claims pled in the Third Amended Complaint.

As for reasonableness of the settlement, the court previously directed plaintiff to submit an expert declaration and explain the damages estimates, including PAGA penalties. (See Chin, Wiseman et al. *Employment Litigation* (TRG, 2017) section 19:975.3.)

Plaintiff has submitted a declaration by an expert addressing the sufficiency of the sampling of data upon which the damages estimates are based. The expert also revised the damages estimates and explains how such estimates were reached. The court preliminarily finds that the settlement represents a reasonable compromise of the class claims.

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: KCK on 11/23/21

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(Judge's initials) (Date)

(36) **Tentative Ruling**

Re: ***Perales v. City of Fresno***
Superior Court Case No. 20CECG02006

Hearing Date: November 30, 2021 (Dept 403)

Motion: Petition to Approve Compromise of Claim of Judgment for Minor

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Explanation:

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5(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: KCK **on** 11/23/21 .
(Judge's initials) (Date)

(36)

Tentative Ruling

Re: ***Canalez v. Segovia***
Superior Court Case No. 19CECG00395

Hearing Date: November 30, 2021 (Dept. 403)

Motion: Default Prove-Up

Tentative Ruling:

To continue the hearing to Thursday, January 06, 2022, to allow plaintiff time to correct the errors in her application for default judgment. If plaintiff cannot correct her proof of service to show that the statement of damages was properly served on defendant Leonor Segovia, then the court must set aside the default of said defendant at the next hearing. See the explanation below for further particulars as to limitations on any judgment in the event default is not set aside.

Explanation:

The court intends to set aside the defendant's default for the following reasons:

Defective Proof of Service of Statement of Damages:

Although plaintiff filed an amended proof of service on November 18, 2019, showing that she served a statement of damages to defendant ("November 18, 2019 Proof of Service"), the November 18, 2019 Proof of Service was defective. While substituted service to an individual defendant is permitted where plaintiff attaches a declaration of due diligence, the process by which plaintiff completed the substituted service, according to the November 18, 2019 Proof of Service, is improper.

In item 5 of the November 18, 2019 Proof of Service, plaintiff's process server declares that he served the following on defendant: the Summons, Complaint, Alternative Dispute Resolution (ADR) package, Notice of Case Management Conference and Assignment of Judge For All Purposes, and Statement of Damages ("Statement of Damages et al."), by substituted service on March *17*, 2019 and *thereafter*, he mailed copies of the documents to the defendant. However, according to the attached declaration of mailing, the Statement of Damages et al. was mailed on March *15*, 2019. In other words, according to the proof of service, the process server mailed the served documents *before* accomplishing the substituted service.

Under Code of Civil Procedure section 415.20 subd, (b),

> If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, …a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, … in the presence of a

> competent member of the household … or usual mailing address, … at least 18 years of age, who shall be informed of the contents thereof, and by ***thereafter*** mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. (Code Civ. Proc., § 415.20(b), emphasis added.)

As such, mailing a copy of the Statement of Damages et al. ***prior*** to delivering a copy to the defendant's place of abode is improper service. Further, the declaration of mailing provides that the documents were mailed to:

> Leonor Segovia
> 5865 E. Lansing Way
> Fresno, CA 93727

First, this address does not match the address listed in item 3 of the November 18, 2019 Proof of Service. Further, according to plaintiff's declaration of due diligence, plaintiff was aware as early as March 6, 2019, that this address was not defendant's address, and plaintiff confirmed, on or around March 7, 2019, a new address for the defendant. The failure to complete the substituted service to the defendant's known address, and especially failing to send the mail to the same address where the physical substituted service was accomplished, renders the service defective.

In an action for personal injury, the complaint must not state the amount of damages sought. The statement of damages functions as a prayer for damages in a complaint. (Code Civ. Proc., § 425.10(b).) Absent such statement, defendant lacks notice of the potential liability threatened. (Code Civ. Proc., § 425.11; *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 433; *Weakly-Hoyt b. Foster* (2014) 230 Cal.App.4th 928, 932-933; *Janssen v. Luu* (1997) 57 CA4th 272, 275.) Where a defendant fails to appear, the statement of damages must be served ***before*** entry of default in order to preserve defendant's due process rights. (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 829, emphasis added.) This is a jurisdictional issue. As such, the court is without power to enter judgment against a defendant if the statement of damages has not been served on the defendant ***prior*** to the entry of default. (*Id* at 1325; *Stevenson v. Turner* (1979) 94CA3d 315, 318-319, emphasis added.) [where default should not have been entered, the subsequent judgment is void.] Moreover, service of the statement of damages ***after*** the entry of default but before the prove-up hearing is insufficient. (*Hamm v. Elkin* (1987) 196 CA3d 1343, 1345-1346.) If plaintiff cannot provide a corrected proof of service at the continued hearing, then the court will have no choice but to set aside defendant's default.

However, in the event plaintiff provides proof that the statement of damages was properly served by filing a corrected proof of service, then the defendant's default will stand. In that event the following limitations to entry of judgment will apply.

Required Forms Not Filed

Pursuant to Fresno County Superior Court Local Rule 2.1.14, all paperwork in conjunction with the default prove-up hearing must be filed at least ten court days prior

to the scheduled hearing date. The court expects plaintiff to abide by this rule in the future.

First, plaintiff has not filed the required "Request for Court Judgment" form (Judicial Council Form CIV-100). This is a dual-purpose form, used for requesting both entry of default and court judgment. Plaintiff used the form, on July 16, 2020, when previously requesting for court judgment by default; however, plaintiff's order was denied on February 8, 2021. In order for the court to consider plaintiff's request, she must resubmit the form as part of her default package in any subsequent request.

Second, plaintiff has not lodged a proposed judgment. (Cal. Rules of Court, Rules 3.1800, subd. (a)(6).) Again, plaintiff's prior proposed judgment, lodged on July 16, 2020 was denied on February 8, 2021. Plaintiff is to submit a new proposed judgment.

Third, plaintiff prayed for punitive damages in her complaint, and the Statement of Damages attached to the Christenson Declaration (Exhibit C) indicates plaintiff indicated she sought $25,000 in punitive damages from defendant. However, even provided plaintiff proves proper service of this on defendant (as discussed above), an award of punitive damages cannot be made without evidence of defendant's wealth, which plaintiff has not produced, and may not be able to produce in the default context. (*Adams v. Murakami* (1991) 54Cal.3d 105, 109-116; 119-123.) This burden cannot be waived by the defendant's failure to object to a plaintiff's inadequate showing, because of the public interest in meaningful judicial oversight of punitive damages awards. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1283.) Therefore, this requirement is present even in the context of a default judgment. Moreover, if plaintiff is requesting for punitive damages, this needs to be addressed in plaintiff's prove-up brief.

Fourth, plaintiff has not dismissed the Doe defendants, as required prior to seeking default judgment. (Cal. Rules of Court, Rule 3.1800, subd. (a)(7).)

Summary:

The court continues the hearing to Thursday, January 06, 2022. If possible, plaintiff must prove that the Statement of Damages was properly served on defendant in March 2019 by filing an amended proof of service. If she cannot do so (for instance, if the mailing actually was mailed to the wrong address, as indicated on the proof of service filed on November 18, 2019), then the court must set aside the default and plaintiff will need to re-serve the Statement of Damages and can only apply for default judgment in the event defendant fails to appear and her default can be taken again.

Provided plaintiff does prove proper service, then she must also file the following documents in connection with proving up her damages: 1) a new Request for Court Judgment form; 2) a new proposed order; 3) a request for dismissal of the doe defendants; and 4) any additional evidence plaintiff believes is appropriate.

All paperwork in conjunction with plaintiff's default prove-up hearing must be filed at least *ten court days* prior to the scheduled hearing date, in compliance with Fresno County Superior Court Local Rule 2.1.14.

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: KCK on 11/29/21.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re:	***Pulido v. Georgia-Pacific Corrugated III LLC*** Superior Court Case No. 18CECG00265
Hearing Date:	November 30, 2021 (Dept. 403)
Motion:	Plaintiff's Renewed Motion for Preliminary Approval of Class Action and PAGA Settlement

Tentative Ruling:

To grant and sign the order plaintiff lodged with the moving papers, as revised by the court regarding the hearing date and filing deadline for the motion for final approval. To order that the time deadlines for defendant's delivery of the class list and related information to the class administrator, for the class administrator to mail notice to the class members, and for class members to mail objections or requests for exclusion, shall be as set forth in that order. A hearing for final approval is set for May 17, 2022, at 3:30 p.m. in Department 403. Papers for this hearing must be filed on or before April 20, 2022.

Explanation:

Plaintiff has addressed the issues included in the court's ruling issued on January 19, 2021 ("prior ruling").

Class Certification

In its prior ruling, this court found that the evidence established that the class (with two sub-classes) proposed were sufficiently numerous and ascertainable, but not enough evidence was presented to show that plaintiff's claim is typical of the classes he seeks to represent. That issue has been addressed sufficiently on this motion. Commonality requires only that common legal or factual questions exist, not that all issues in the litigation are identical. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473.) Common questions raised by the defendant's conduct are central to this inquiry. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.) A company-wide policy directed at the putative class satisfies the commonality requirement. (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421.)

Plaintiff has alleged, and supports his allegations via his declaration, that defendant's corporate policy, practice or procedure violated the Labor Code by issuing inaccurate itemized wage statements and failing to pay terminated employees, or paying them late. He has also presented a sample violative wage statement as to the overtime rate shown and the incorrect total hours. The wage statements split overtime wages into two entries, for the base overtime rate and the overtime premium rate, which resulted in hours being listed twice and therefore providing an incorrect total hours worked amount. Defendant's Payroll Operations Manager, Melissa Gomes, presented a declaration confirmed this splitting of overtime hours was the practice throughout the class period. Thus, plaintiff was subjected to this common policy and practice as other

class members. The court is satisfied that plaintiff's claims are typical to those of class members, and that he does not have interest adverse to the class.

Settlement

Plaintiff's counsel sets forth his analysis of the value of plaintiff's case. Defendant produced data as to terminated employees and wage statements issued to each putative class member, which included the total number of wage statements. This allowed plaintiff's counsel to conduct a full damage analysis. There are 237 individuals in the class, taken as a whole. Regarding penalties at issue in this case, plaintiff's counsel assessed the value of the case at approximately $1.5 million.

There are 192 employees who received 4,078 wage statements at issue here, so Labor Code section 226, subdivision (e) and (f) penalties (i.e., $50 for the first violation and $100 for all subsequent violations) would total $9,650 for 192 initial violations, and $388,600 in additional penalties, for a total of $398,250. The court accepts plaintiff's analysis that for PAGA claims there would be no "subsequent penalty" for wage statement violations ($1,000 each violation), but only $250 for initial violations because there was no finding by a governmental agency that the wage statement was illegal which would have put the employer on notice to remedy the violation. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) Thus, PAGA penalties in this case might be proven to be a total of $1,019,500 ($250 x 4,078 wage statements).

As for Labor Code section 203 penalties for failure to provide final wages in a timely fashion after separation, this applied to 45 separated employees. Plaintiff's counsel calculates that potential penalties in this category is $68,317. Plaintiff's own experience was that his final wages were paid seven days late. Since defendant paid its employees every two weeks, on average the separated employees would wait 7 days to receive their final wages. Plaintiff presents evidence that the average hourly rate for employees in the separate employee class is $27.11. Therefore, the calculation of penalties under Labor Code section 203 would be $27.11 x 8 hours (daily wage) x 7 days (number of days unpaid) x 45 (number of separated employees), for a total of $68,317.

Therefore, plaintiff presented evidence that a reasonable calculation of the value of the penalties in this case was a total maximum of $1,486,067. This means the $225,000 settlement represents a 15.5 percent recovery of the total maximum value of the case. Plaintiff feels this was an adequate settlement given the numerous obstacles he faced in prosecuting case and the issues surrounding damages, since the court could reduce the PAGA penalties significantly. Also, counsel factored in the potential for non-certification and appeals. Numerous courts have held that gross settlements approximating between 8 and 25 percent of the defendant's potential exposure were fair and reasonable. (*In re Mego Financial Corp. Securities Litigation* (9th Cir. 2000) 213 F.3d 454, 459 [well-settled that cash settlement of a fraction of potential recovery does not render settlement per se inadequate or unfair]; *Bellinghausen v. Tractor Supply Company* (N.D. Cal. 2015) 306 F.R.D. 245, 255 [settlement between 8.5% and 25% of potential exposure found fair]; *Van Ba Ma v. Covidien Holding, Inc.* (C.D. Cal., May 30, 2014, No. SACV 12-2161-DOC) 2014 WL 2472316, at *3 [Settlement at 9.1% of potential value found fair, finding "it is not uncommon for a class action settlement to amount to approximately 10% of the total

potential value."]; *Villegas v. J.P. Morgan Chase & Co.* 2012 WL 5878390 at *6 [settlement at 15% of potential recovery was fair and reasonable].

Further, in response to the court's request at the hearing on August 6, 2021, plaintiff has provided the court with several cases where the court granted approval of a settlement which included a disputed Labor Code section 203 claim. (See, *e.g., Greer v. Dick's Sporting Goods, Inc.* (E.D. Cal., Aug. 27, 2019) 2019 WL 4034478, at *4 [court recognized dispute as to whether such penalties applied and to whether the good faith defense applied]; *Caudle v. Sprint/United Management Company* (N.D. Cal., June 28, 2019) 2019 WL 2716291 at *3 [preliminary approval granted despite uncertainty of good faith defense]; *Madison v. Onestaff Medical Limited Liability Company* (E.D. Cal., July 20, 2021) 2021 WL 3047270, at *8 [accord]; *Alabsi v. Savoya, LLC* (N.D. Cal., Feb. 6, 2020) 2020 WL 587429, at *6 [accord].)

On balance, the court agrees with plaintiff's analysis and will grant preliminary approval of the settlement amount.

Other Issues Noted in Prior Ruling

- Release of Claims

The parties have amended the settlement agreement to remove language asserting the res judicata effect of the settlement, and deleting a section 1542 release of class claims for unnamed class members.

- Settlement Administrator

The parties received bids from three different settlement administrators and accepted the lowest bid, from Simpluris for $5,064, and this fee is a hard cap as long as the number of class members does not exceed 250.

- State of Mind of Absent Class Members

The language of the amended settlement agreement has been revised to remove language purporting to indicate what the class members "rely" on or "understand and agree" to, and instead it provides that the class notice will instruct the class members that they are responsible for payment of any taxes or obligations on any settlement award they receive.

- Publicity

The provision regarding confidentiality and limitations on publicity have been omitted altogether from the amended settlement agreement.

- Administrator as Dispute Resolution Agent

The amended agreement deletes the prior provision for the settlement administrator to make binding determinations regarding eligibility of class members and the amount to be paid to them, and instead provides that in the event of a dispute, the

settlement administrator will consult the parties and if they are unable to agree upon a resolution, they will ask the court to make the final determination.

Other Minor Revisions Needed to the Notice to Class

There are a few minor errors in the Notice which were not pointed out in the prior ruling and which must be corrected. The Page numbers noted below refer to the .pdf page number of the Declaration of Nick Rosenthal, since the Notice itself has no page numbers.

- There are two erroneous references to the Department number where the hearing for final approval will take place. It states "Department 501," and it should state "Department 403." (Rosenthal Dec., p. 46 and 47.)

- On page 47, the first full paragraph (beginning with "You must…"), there is the word "<<Date>>" highlighted in yellow, where the Response Deadline (i.e., the "opt out date") will be inserted, and the year "2018" follows this but is not highlighted for deletion. The year "2018" should be deleted.

- Also on page 47, the address of the court is incorrect. The correct address is **1130** "O" Street, Fresno, CA 93721.

Re Attorney Fee Splitting

On the motion for final approval of the settlement, the request for attorney fees must also set forth in full any fee-sharing agreement between plaintiff's attorneys. Failure to disclose a fee-sharing arrangement is in violation of the California Rules of Court, Rule 3.769(b), and renders the agreement unenforceable. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219, 227 [82 Cal.Rptr.3d 569, 574-575; *Lofton v. Wells Fargo Home Mortgage* (2018) 27 Cal.App.5th 1001, 1018 ["concealed" attorney fee payment of $5 million was properly disallowed and awarded to the class instead].)

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: KCK on 11/29/21.
(Judge's initials) (Date)