Tentative Rulings for May 12, 2022
Department 501

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.

21CECG01880 ***Oscar Porras v. General Motors, LLC*** **is continued to Tuesday, June 07, 2022 at 3:30 p.m. in Department 501.**

16CECG03557 ***Lowe et al. v. Happy Yu LLC*** **is continued to Thursday, May 19, 2022 at 3:30 p.m. in Department 501**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 501

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(34)

Tentative Ruling

Re: ***Atilano v. Kia Motors, Inc.***
Superior Court Case No. 19CECG03728

Hearing Date: May 12, 2022 (Dept. 501)

Motion: by Defendant to Seal Filed Documents

Tentative Ruling:

To grant defendant's motion to seal documents submitted with plaintiff's opposition to summary adjudication conditionally under seal. (Cal. Rules of Court, rules 2.550 and 2.551.)

Explanation:

"A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) Also, the court must make certain express findings in order to seal records. Specifically, the court must find that the facts establish:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, Rule 2.550, subd. (d).)

In addition, "[a]n order sealing the record must: (A) Specifically state the facts that support the findings; and (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file." (Cal. Rules of Court, rule 2.550(e)(1)(A), (B).)

Here, defendant has requested an order to seal several documents submitted by plaintiff in support of her opposition to defendant's motion for summary adjudication. The documents identified were submitted to the court conditionally under seal. The documents were produced by defendant in a separate action under a protective order and produced in this action without the required consent from the defendant through its counsel in the separate action. (Tallent Decl. ¶ 13.) All documents are alleged to contain confidential trade secret information.

The ODI Complaint Analysis Report was purchased by defendant to analyze and compare complaints made with respect to Kia vehicles and other vehicles in the marketplace. (Tallent Decl. ¶ 7.) Defendant treats this information as confidential, it is not produced except when required by law, and in the event this information is shared with

competitors, defendant stands to lose substantial ground in a competitive marketplace. (Id. at ¶¶ 9 and 10.)

The section of the Kia Service Policies and Procedures Manual is a confidential, proprietary document as well. (Tallent Decl.. ¶12.) The manual contains highly sensitive information regarding how Kia handles customer relations and access to this manual is strictly limited to employees of defendant and certain permitted employees of authorized service dealerships. (Id. at ¶ 12, Exh. C "Declaration of Michele Cameron" at ¶ 7.) Public dissemination of the information in the manual would directly harm defendant by revealing confidential information regarding its customer relations policies to competitors. (Ibid.)

It does appear that the documents contain the type of private and confidential information that should be placed under seal. Releasing the information by placing it in the public file would prejudice the rights of defendant, who clearly has a strong interest in keeping its trade secrets and confidential information secret. Also, the request to seal is narrowly tailored, as only certain specific documents are being sealed, and there does not appear to be any other, less restrictive means of protecting the privacy or confidentiality rights of the defendant. Therefore, the court intends to grant the motion to seal the documents submitted conditionally under seal in plaintiff's opposition to the motion for summary adjudication.

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 5/10/2022.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Fernandez v. Suburban Propane, L.P.***
Superior Court Case No. 16CECG00418

Hearing Date: May 12, 2022 (Dept. 501)

Motion: by Plaintiffs for Preliminary Approval of Class Settlement

Tentative Ruling:

To deny the motion for preliminary approval of class settlement, without prejudice.

Explanation:

General Principles of Class Settlements: A settlement of a class action requires court approval after a hearing. (Cal. Rules of Court, rule 3.769(a).) The approval of the settlement also requires certification of a preliminary settlement class. (Cal. Rules of Court, rule 3.769(d).)

Certification of the Class: The court has already granted certification of the class.

Fairness of the Settlement: Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 240.) The court has a fiduciary responsibility as guardian of absent class members' rights to ensure that the settlement is fair. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

Generally speaking, a court will examine the entirety of the settlement structure to determine whether it should be approved, including fairness, the notice, the manner of notice, the practicality of compliance, and the manner of the claims process. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [fairness reviewed at final approval]; (*Wershba, supra,* 91 Cal.App.4th at pp. 244-45 [court is free to balance and weigh factors depending on the circumstances of the case].)

"[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 citations omitted.)

"Although '[t]here is usually an initial presumption of fairness when a proposed class settlement ... was negotiated at arm's length by counsel for the class, ... it is clear that the court should not give rubber-stamp approval. [Fn omitted.] Rather, to 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 citations omitted.)

Here, plaintiffs have not provided sufficient information to the court to show that the proposed settlement is fair, adequate and reasonable. The gross settlement is $1,975,000, which is about 31% of the $6,373,526 anticipated potential recovery if plaintiffs prevailed at trial on all of their claims. (Olsen decl., ¶¶ 22-29.) Plaintiffs' counsel contends that this is reasonable in light of the potential risks of litigation and defendant's affirmative defenses. Plaintiffs' counsel states in his declaration, there are always risks in going to trial, and there is no guarantee that plaintiffs will prevail on their claims or that they will recover the maximum amount they could potentially obtain even if they do prevail.

However, plaintiffs' counsel gives no information about the strengths and weaknesses of the case, whether defendant raised any particular affirmative defenses that might have defeated their claims, or what specific risks were involved in taking the case to trial. Most of plaintiffs' counsel's discussion centers on the same risks that are present in any trial, without any analysis of the particular problems and dangers posed by the present case. (Olsen decl., ¶ 29.) Thus, plaintiffs have not provided enough information for the court to make an intelligent determination of whether the decision to settle for 31% of the maximum possible recovery was reasonable under the circumstances.

Plaintiffs' counsel notes that the settlement was reached after extensive litigation, investigation and discovery, and was the product of arm's length negotiations and mediation between the parties. The case was also hotly litigated for several years and almost went to trial before settling at mediation, which supports plaintiffs' claim that there was no collusion between the parties. Furthermore, class counsel are experienced in similar types of class action litigation. These factors all weigh in favor of finding that the settlement is fair, adequate and reasonable.

However, plaintiffs' counsel does not state how many class members there are, or how much each class member will be likely to receive. The net settlement will be divided among the class members on a pro rata basis based on how many weeks they worked for defendant, but counsel does not state what each class member will receive, on average, or even how many members will be sharing in the settlement. Therefore, it is not possible for the court to make a determination as to whether the amount of the settlement is fair, adequate and reasonable at this time.

Attorney's Fees: Plaintiffs' counsel seek $790,000 in fees, which is 40% of the total gross settlement. However, counsel has not provided the court with enough information to justify the requested fees.

While courts have permitted use of a "percentage of the fund" method for calculating fees in class actions, the court may also use the lodestar method to cross-check the requested amount of fees. (*Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480, 503-504 [holding that trial court did not abuse its discretion in using percentage of

fund method to determine attorney's fees in class action case, but also holding that court could double check reasonableness of percentage fee through a lodestar calculation].)

Courts have approved fees that are about 30% of the total gross settlement in class actions. (*Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66, fn. 11, quoting *Shaw v. Toshiba America Information Systems, Inc*. (E.D.Tex.2000) 91 F.Supp.2d 942, 972.) However, "[t]he Ninth Circuit has repeatedly held that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method and that if the Court departs from that benchmark, the record must indicate the Court's reasons for doing so. 'The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.' (*Glass v. UBS Financial Services, Inc.* (N.D. Cal., Jan. 26, 2007, No. C-06-4068 MMC) 2007 WL 221862, at *14, internal citations omitted.)

Here, plaintiffs' counsel is seeking fees equal to 40% of the gross settlement, which is significantly higher than the normal 25-30% of the gross settlement approved in other cases. Counsel also fails to provide the court with enough information to perform a lodestar cross-check. For example, while counsel states that his firm incurred about $239,398 in fees during the course of the litigation, he does not state how many hours of work were performed, what his or the other attorneys' hourly rates are, or what type of work they did. (Webb decl., ¶ 7.) As a result, counsel has not given the court enough information to allow it to determine whether the amount of fees he claims were actually incurred is reasonable.

In any event, even if counsel did justify his claim to have incurred $239,000 in actual fees, he does not explain why his firm should receive $790,000 in fees, which is equivalent to about a 3.3 multiplier. Such a high multiplier would indicate that counsel had done exceptional work on the case or taken unusually great risks to bring the case to settlement. Yet there is no evidence that counsel's work here was exceptional or that they took greater than normal risks in litigating the case. Therefore, counsel has failed to show that the request for $790,000 in fees is reasonable, and the court cannot approve the requested fees without more evidence.

Costs: Plaintiffs have requested an award of court costs of up to $21,000. Again, however, plaintiffs' counsel has not provided the court with sufficient information to justify the requested costs. Counsel does not provide a breakdown of the requested costs, or provided any explanation for how the costs were calculated. In fact, there is no information about costs in counsel's declaration. (Olsen decl., ¶¶ 32-33.) As a result, the court cannot determine that the costs are reasonable at this time.

Class Administrator's Fees: Plaintiffs request approval of a maximum of $16,000 in class administrator's fees. Again, however, plaintiffs' counsel has not provided any information or evidence regarding the class administrator's fees, how the fees were calculated, or why the requested amount is reasonable here. Nor have plaintiffs provided a declaration from a representative of the claims administrator stating what their rates are, or how the $16,000 in fees was calculated. Therefore, the court cannot approve the request for $16,000 in administrator's fees at this time.

Incentive Award to Class Representative: Plaintiffs also request that each class representative be awarded an incentive fee of $10,000 for their role in obtaining the settlement.

"While there has been scholarly debate about the propriety of individual awards to named plaintiffs, '[i]ncentive awards are fairly typical in class action cases.' These awards 'are discretionary, [citation], and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'" (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393–1394, quoting *Rodriguez v. West Publishing Corp.* (9th Cir.2009) 563 F.3d 948, 958.)

" '[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. [Citation.]' These 'incentive awards' to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit." (*Id*. at pp. 1394–1395, internal citations omitted.)

Here, plaintiffs seek an incentive award of $10,000 to each of the two named representatives. Plaintiffs have provided declarations from both class representatives, which state that they spent about 60 hours of time working on the case, including searching for documents, answering written discovery, fielding phone calls, emails and letters from their attorneys, and being deposed for a full day. (Fernandez decl., ¶¶ 6, 7; Salcedo decl., ¶¶ 7, 8.) They were also prepared to go to trial and testify. (Fernandez decl., at ¶ 7; Salcedo decl., at ¶ 8.) They have spent about three to four years working on the case. (Fernandez decl. ¶ 8; Salcedo decl., ¶ 9.)

It appears that an incentive award of $10,000 to each of the class representatives is fair and reasonable under the circumstances. However, in light of the other problems with the motion, the court intends to deny the motion for preliminary approval of the class settlement, without prejudice.

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 5/10/2022.
(Judge's initials) (Date)