Tentative Rulings for February 2, 2023
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: ***Nieves v. Adee Honey Farms***
Superior Court Case No. 20CECG03073

Hearing Date: February 2, 2023 (Dept. 403)

Motion: Plaintiff's Motion for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To grant.

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

1. Class Certification

a. Standards

First, the court must determine whether the proposed class meets the requirements for certification before it can grant preliminary approval of the proposed settlement. 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 (rev. denied); see also Newberg, *Newberg on Class Actions* (T.R. Westlaw, 2017) Section 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.")

"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 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." (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620, internal citation omitted.)

"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

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, plaintiff seeks to certify a class for the purpose of approving the settlement consisting of approximately 74 current and former hourly, non-exempt employees of defendants. (Miller decl., ¶ 10.) The number of proposed class members thus satisfies the numerosity requirement. (*Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2009) 670 F.Supp.2d 1114, 1121 ["Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members"].)

The proposed class also satisfies the ascertainability requirement, as defendant can identify and locate all proposed class members through its personnel records. (Miller decl., ¶ 10.) As a result, the court intends to find that the numerosity and ascertainability requirements have been met.

c. Community of Interest

"[T]he '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.' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.)

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

Here, there are common questions of law and fact, as all of the proposed class members were allegedly subjected to the same types of wage and hour violations, including failure to pay overtime, failure to provide meal and rest breaks, failure to reimburse business expenses, failure to timely pay wages, and failure to pay timely final wages on separation from employment. Thus, their claims raise the same legal and factual issues, and they are suited to resolution on a class wide basis.

There is also evidence to establish that class counsel are experienced and qualified to represent the class based on the declarations of counsel. (Miller decl., ¶¶ 29-30.)

The claims of Mr. Nieves, the class representative, are also typical of the other proposed class members' claims, as he allegedly suffered the same types of Labor Code violations as the other members. (Exhibit 2 to Miller decl., Nieves decl., ¶ 5.) In addition, he states that he has no conflicts of interest that would prevent him from representing the other class members, and that he will continue to put the interests of the other class members above his own. (Id. at ¶ 6.) Therefore, plaintiff has met the community of interest requirement for class certification.

d. Superiority of Class Certification

The court intends to find that certifying the class would be superior to any other available means of resolving the disputes between the parties. Wage and hour Labor Code cases are particularly well-suited to class resolution because of the small amounts of each employee's claim, which makes it impractical to bring wage and hour cases on an individual basis. The large number of proposed class members would also make it impractical to bring the claims separately. It would be far more efficient to bring all of the claims in one action, rather than forcing the employees to bring their own separate cases. Therefore, the court finds that class certification is the superior method of resolving the case, and it intends to grant the request to certify the case for the purpose of approving the settlement.

2. 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 Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, 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.)

"[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 must be before the . . . court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery 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. Fairness and Reasonableness of the Settlement

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–245, internal citations omitted, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Plaintiff presents sufficient evidence showing that the settlement is fair and reasonable. Counsel has provided a thoughtful discussion of the maximum potential value of each cause of action, as well as the weaknesses and defenses to each cause of action that have been raised by defendants. Plaintiff's counsel sufficiently articulates the basis for reductions in value of each claim, which are based on defendants' contentions as well as numerous employee declarations submitted by defendants at mediation. Taking into account those defenses, plaintiff's counsel estimates the realistic potential recovery to be $600,180.23. The parties agreed to settle for $250,000, approximately 42% of realistic potential damages. Plaintiff has made a sufficient showing that the settlement is fair, adequate, and reasonable under the circumstances.

c. Proposed Class Notice

The notice will provide the class members with information regarding their time to opt out or object, the nature and amount of the settlement, the impact on class members if they do not opt out, the amount of attorney's fees and costs, and the service award to the named class representatives. Therefore, the court intends to find that the proposed class notice is adequate.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks $83,333.00 in attorney's fees, which is 1/3 of the total gross settlement, plus costs of $17,000. Plaintiff's counsel contends that the requested attorney's fees are reasonable and well within the range of fees that have been approved by other courts in class actions, which frequently approve fees based on a percentage of the common fund. (*City & County of San Francisco v. Sweet* (1995) 12 Cal. 4th 105, 110-11; *Quinn v. State* (1975) 15 Cal. 3d 162, 168; see also *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal. App. 4th 1253, 1270; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 26.)

However, while it is true that courts have found fee awards based on a percentage of the common fund are reasonable, the California Supreme Court has also

found that the trial court has discretion to conduct a lodestar "cross-check" to double check the reasonableness of the requested fees. (*Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480, 503-504 [although class counsel may obtain fees based on a percentage of the class settlement, courts may also perform a lodestar cross-check to ensure that the fees are reasonable in light of the number of hours worked and the attorneys' reasonable hourly rates].)

Plaintiff's counsel provides a breakdown of the hourly rates charged by attorneys who worked on this matter, ranging from $450 per hour for Ms. Miller to $750 per hour for Mr. Lavi. (Miller decl., ¶ 30.) Counsel also sets forth the "estimated hours" worked by each attorney to date, and describes in general terms the type of work they performed in the case. (*Id*. at ¶¶ 31, 32.) It is unclear what "estimated hours" means – is that work actually done, or does it include anticipated future work? Plaintiff's counsel does not provide billing records or time sheets, which typically would be provided in a lodestar analysis. The total of all "estimated hours" worked by plaintiff's attorneys is $57,240, well short of the $83,333 that plaintiff's counsel seeks in this matter. Plaintiff's counsel "anticipates expending a significant amount of additional hours on this matter up until final disposition …" (Miller decl., ¶ 33), but does not show that such further work would bring the lodestar very close to $83,333.

At this stage plaintiff's counsel has not shown that they should recover $83,333 in attorneys' fees. However, the court will grant preliminary approval, as the settlement is not contingent on this full amount being awarded. The settlement agreement provides, "Class Counsel **will apply** to the Superior Court for approval of **reasonable** attorneys' fees incurred for representing Plaintiff and the Settlement Class in the Action in an amount **not to exceed** one-third of the Maximum Settlement Amount, or a maximum total of Eighty-Three Thousand Three Hundred Thirty-Three Dollars ($83,333) ("Attorneys' Fees")." (Miller decl., Ex. A ¶ 6.a, emphasis added.) Accordingly, at the time of final approval the court can and may award a lesser amount of attorneys' fees. Since the settlement is non-reversionary, the difference will be added back in to the net settlement amount for distribution to the class members. Plaintiff's counsel shall submit a motion for award of reasonable attorneys' fees with the final approval motion, and the final amount can be set at that time. The fees motion should provide a fully supported lodestar analysis, including time/billing statements and justification for the high billing rates claimed.

4. Payment to Class Representative

Plaintiffs seek preliminary approval of a $7,500 "enhancement payment" to the named plaintiff/class representative, Mr. Nieves. It does appear that Mr. Nieves has done substantial work to assist counsel in the case, as well as taking the chance of being held liable for defendant's costs if he lost at trial. He also took the risk that other employers might not want to hire him if they discovered that he had been a class representative in the present case. (Nieves decl., ¶¶ 7-8.) Therefore, the court intends to find that the enhancement payment to Mr. Nieves is reasonable.

5. Payment to Class Administrator

The prior motion was denied in part because plaintiff failed to discuss the amount that will be paid to the class administrator, other than to state that the amount will come out of the total gross settlement. The settlement agreement provides for payment of up

to $12,000 to the settlement administrator. (Exhibit 1 to Miller decl., Settlement Agreement, p. 12, ¶ 7a.) This time around plaintiff includes a declaration from Julie Green of CPT Group, Inc., the settlement administrator. (Exhibit 3 to Miller Decl.) She details the tasks that CPT Group will perform in its administration duties, and states that CPT would be providing its settlement administrative services for a flat fee of $8,000. This appears reasonable and may be preliminarily approved.

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: JS on 1/20/2023.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Jane Doe v. Trinity Health Corporation***
Superior Court Case No. 21CECG01454

Hearing Date: February 2, 2023 (Dept. 403)

Motion: Defendant's Motion for Reconsideration

Tentative Ruling:

To deny. (Code Civ. Proc. § 1008.)

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

Defendant Trinity Health Corporation is seeking reconsideration of the court's October 20, 2022 Law and Motion Minute Order adopting the tentative ruling on defendant's demurrer to the complaint pursuant to Code of Civil Procedure section 1008, subdivision (a).

As a preliminary matter, section 1008 requires a motion for reconsideration to be heard by the judge or court who made the order. The statute's requirement for the motion to be addressed to the "same judge or court" has been interpreted to mean that if the original judge is unavailable, another judge of the same court can hear the motion for reconsideration. (*International Ins. Co. v. Superior Court (Rhone-Poulenc Basic Chemicals Co.)* (1998) 62 Cal.App.4th 784, 786, *fn* 2 [original judge unavailable due to retirement].) Due to Judge McGuire's retirement, she is unavailable, and the case has been assigned for all purposes to this department.

Under Code of Civil Procedure section 1008, subdivision (a), a party moving for reconsideration of a court order must show that there are "new or different facts, circumstances, or law" that justify reconsideration of the order. (Code Civ. Proc. § 1008, subd. (a).) "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212, internal citations omitted.)

"Case law after the 1992 amendments to section 1008 has relaxed the definition of 'new or different facts,' but it is still necessary that the party seeking that relief offer some fact or circumstance not previously considered by the court." (*Id*. at pp. 212-213, internal citations omitted.) The requirements of section 1008 are jurisdictional, and failure to comply with the requirement of demonstrating new facts, circumstances or law requires denial of a motion for reconsideration. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.)

"Courts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839, citing *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 46–47 & fns. 14–15 and *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688–690.) "Section 1008's purpose is '"'to conserve judicial resources by constraining litigants who would endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider.'" To state that purpose strongly, the Legislature made section 1008 expressly jurisdictional…" (*Id*. at pp. 839–840.)

In the present case, defendant contends there is new case law published on October 18, 2022, the same day as the hearing on the demurrer at issue, which warrants the reconsideration of the court's ruling overruling the demurrer to the first and second causes of action for violations of the Confidentiality of Medical Information Act ("CMIA") and Customer Records Act ("CRA"), respectively.

The First District Court of Appeal in *Vigil v. Muir Medical Group IPA, Inc.* (2022) 84 Cal.App.5th 197 held that the trial court did not abuse its discretion in denying plaintiff's motion for class certification for lack of common issues in the action against a medical group for violations of the CMIA. The court in *Vigil* held that the breach of confidentiality under CMIA requires a showing that an unauthorized party viewed the confidential information, as held in *Sutter Health*. (*Id.* at p. 213.) Its analysis goes on to discuss whether class members individually or class-wide can prove their claim for violation of CMIA in light of the requirement of showing the unauthorized party viewed the confidential information and determined each individual class member would need to make a showing. (*Id*. at pp. 218-220.) Vigil's evidence presented with the motion for class certification did not support a class-wide showing that the confidential information of every class member had been actually viewed. (*Id*. at p. 221.) As such the court affirmed the trial court's denial of the motion for class certification based on the predominance of individual issues. (*Id*. at 221-222.)

Defendant contends the holding in *Vigil* is consistent with its arguments in support of the demurrer that to plead a clause of action for violations of CMIA the plaintiff is required to plead specific factual allegations to demonstrate the confidential information was actually viewed by the unauthorized party. This new pleading standard is not found in *Vigil*. Rather, in the context of a motion for class certification, where the burden is on the plaintiff to place substantial evidence in the record to demonstrate that common issues predominate, the court determined that the trial court did not abuse its discretion in finding that evidence presented by plaintiff did not meet that standard. (See, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 ["A trial court ruling on a certification motion determines 'whether … the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' "].) The court in *Vigil* agreed with the holding in *Sutter Health* that breach of confidentiality under the CMIA does not take place until an unauthorized person views the confidential medical information. (*Sutter Health v. Superior Court* (2014) 227 Cal.App.4th 1546, 1557.) Thus, there is no change in the law regarding

the elements to be pleaded for a cause of action for violation of CMIA and *Vigil* is not "new law" for purposes of reconsidering the court's ruling on defendant's demurrer.

The thrust of defendant's argument for reconsideration is based on its perceived pleading standard requiring specific factual allegations demonstrating that the confidential information was "actually viewed" rather than the logical inference that the information was viewed based upon the facts as alleged. On demurrer the court assumes the truth of all properly plead factual allegations and facts that can be reasonably inferred from those expressly pleaded. (*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 190.)

Likewise, defendant has presented no basis for reconsidering the order regarding the second cause of action for breach of California Security Notification Laws. Defendant repeats an argument only raised for the first time in its October 11, 2022 reply brief and fairly not addressed in the court's ruling. As no new or different facts, circumstances or law are presented and the court does not have jurisdiction to reconsider the prior ruling.

Reconsideration cannot be granted based on claims the court *misinterpreted* the law in its initial ruling (as opposed to a change in the law in the interim). That is *not* a "new" or "different" matter. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500].) Therefore, motion for reconsideration is denied.

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: JS on 1/20/2023.
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***1375/1717 West Elm Ave., LLC v. PEP Partners, LLC***
Superior Court Case No. 21CECG02754

Hearing Date: February 2, 2023 (Dept. 403)

Motion: 1) by Plaintiff and Cross-Defendants 1375/1717 West Elm Ave., LLC; Green Capital Investments, LLC; Green Capital Management Services, LLC; Barnum & Celillo Electric, Inc.; and Fred T. Barnum; and Cross-Complainants Green Capital Investments, LLC and Green Capital Management Services, LLC for Order Compelling Defendants and Cross-Complainants PEP Partners, LLC and UBBC Group, LLC to Respond to Form Interrogatories

2) by Plaintiff and Cross-Defendants 1375/1717 West Elm Ave., LLC; Green Capital Investments, LLC; Green Capital Management Services, LLC; Barnum & Celillo Electric, Inc.; and Fred T. Barnum; and Cross-Complainants Green Capital Investments, LLC and Green Capital Management Services, LLC for Order Compelling Defendants and Cross-Complainants PEP Partners, LLC and UBBC Group, LLC to Respond to Special Interrogatories

3) by Plaintiff and Cross-Defendants 1375/1717 West Elm Ave., LLC; Green Capital Investments, LLC; Green Capital Management Services, LLC; Barnum & Celillo Electric, Inc.; and Fred T. Barnum; and Cross-Complainants Green Capital Investments, LLC and Green Capital Management Services, LLC for Order Compelling Defendants and Cross-Complainants PEP Partners, LLC and UBBC Group, LLC to Respond to Request for Production of Documents

Tentative Ruling:

To grant the motions. Defendants/Cross-Complainants PEP Partners, LLC and UBBC Group, LLC shall serve responses, without objections, to the Form Interrogatories, Special Interrogatories, and Request for Production of Documents previously propounded on them by Plaintiff and Cross-Defendants 1375/1717 West Elm Ave., LLC; Green Capital Investments, LLC; Green Capital Management Services, LLC; Barnum & Celillo Electric, Inc.; and Fred T. Barnum; and Cross-Complainants Green Capital Investments, LLC and Green Capital Management Services, LLC, no later than 20 court days from the date of this order, with the time to run from the service of this minute order by the clerk.

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

Defendants/Cross-Complainants had ample time to respond to the discovery propounded by the moving parties, and have not done so. Failing to respond to

discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and "work product" protection. (Code Civ. Proc. §§ 2030.290, subd. (a), 2031.300, subd. (a); see *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.) As a courtesy, additional time to respond was provided, but still Defendants/Cross-Complainants did not respond.

The court also recognizes the concerns expressed by the moving parties regarding PEP Partners, LLC and UBBC Group, LLC's apparent lack of legal representation. However, the instant motions are not appropriate mechanisms to seek relief regarding this issue. Additionally, the court does not have authority to order PEP Partners, LLC and UBBC Group, LLC to obtain counsel, as requested pursuant to the proposed orders filed with these motions. This issue can instead be properly addressed in a motion to strike. Pursuant to Code of Civil Procedure section 436, subdivision (b), the court may, upon a motion made pursuant to section 435, "[s]trike out all or any part of any pleading not drawn in conformity with the laws of this state…"

The court also notes that the moving parties have not requested monetary sanctions. Because these motions were unopposed, sanctions are not mandatory. Therefore, the court declines to award monetary sanctions.

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: JS on 1/25/2023.
(Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***G.R. v. Clovis Unified School District, et al.***
Superior Court Case No. 20CECG01748

Hearing Date: February 2, 2023 (Dept. 403)

Motion: Application of David A. White to Appear *Pro Hac Vice* on Behalf of Defendant Schutt Sports, LLC

Tentative Ruling:

To grant. The applicant has satisfied the requirements of the California Rules of Court, rule 9.40.

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

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: JS on 1/30/2023.
(Judge's initials) (Date)

(03)

Tentative Ruling

Re: ***Smith v. Grundfos Pumps Manufacturing Corp.***
Superior Court Case No. 20CECG00674

Hearing Date: February 2, 2023 (Dept. 403)

Motion: By Plaintiff for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To deny the motion for preliminary approval of the class action settlement, without prejudice and to approve proposed PAGA claim allocation.

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

1. Class Certification

a. Standards

First, the court must determine whether the proposed class meets the requirements for certification before it can grant preliminary approval of the proposed settlement. 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 (rev. denied); see also Newberg, *Newberg on Class Actions* (T.R. Westlaw, 2017) Section 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.")

"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 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." (*Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620, internal citation omitted.)

"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

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, plaintiff seeks to certify a class for the purpose of approving the settlement consisting of all current and former employees of defendants from February 24, 2016 to August 5, 2021. The class appears to be ascertainable, as defendants' personnel records should be sufficient to allow the parties to identify the class members. The class is likely also sufficiently numerous to justify certification, as plaintiff's counsel claims that there are about 500 class members. However, plaintiff has not provided any admissible evidence to show the number of class members. Plaintiff's counsel states in the points and authorities brief that the proposed class consists of approximately 500 people, but the representations of counsel in the points and authorities brief are not evidence and do not establish that the class is sufficiently numerous to justify certification. Therefore, plaintiff has not met its burden of showing that the class is numerous for the purpose of certifying it for preliminary approval of the settlement.

c. Community of Interest

"[T]he '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.'" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.)

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

"[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.)

Here, it does appear that there are common questions of law and fact, as all of the proposed class members worked for the same defendants and allegedly suffered the same type of Labor Code violations. Therefore, the proposed class involves common issues of law and fact.

With regard to the requirement of typicality of the representative's claims, it does appear that Mr. Smith's claims are typical of the rest of the class and that he seeks the same relief as the other class members based on his allegations and prayer for relief in

the complaint. There is no evidence that Smith has any conflicts between his interests and the interests of the other class members that would make him unsuitable to represent their interests. Therefore, plaintiffs have shown that Mr. Smith has claims typical of the other class members.

In addition, there is evidence to establish that class counsel are experienced and qualified to represent the class based on the declarations of counsel. (See declaration of Raul Perez. ¶¶ 71-79.) Therefore, the court Intends to find that the community of interest requirement has been met.

d. Superiority of Class Certification

It does appear that certifying the class would be superior to any other available means of resolving the disputes between the parties. Absent class certification, each employee of defendants would have to litigate their claims individually, which would result in wasted time and resources relitigating the same issues and presenting the same testimony and evidence. Class certification will allow the employees' claims to be resolved in a relatively efficient and fair manner. (*Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Therefore, it does appear that class certification is the superior means of resolving the plaintiffs' claims.

e. Conclusion: While plaintiff has met most of the requirements for certification of the class for the purpose of approving the settlement, plaintiff has not established that the class is sufficiently numerous to warrant certification. Therefore, the court intends to deny the motion to certify the class for the purposes of settlement. The denial will be without prejudice, however, as it appears that plaintiff can cure the defects in the motion with additional admissible evidence regarding the size of the proposed class.

2. 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 Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, 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.)

"[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 must be before the . . . court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery 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. Fairness and Reasonableness of the Settlement

"In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–245, internal citations omitted, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Here, plaintiff's counsel has presented a sufficient discussion of the strength of the case if it went to trial, the risks, complexity, and duration of further litigation, and an explanation of why the settlement is fair and reasonable in light of the risks of taking the case to trial. (See Perez decl., ¶¶ 12-45.) Plaintiff's counsel has provided a detailed explanation of the claims and defenses raised by the parties, and the problems and risks inherent in plaintiff's case. Counsel's analysis supports a finding that the risks, costs and uncertainties of taking the case to trial weigh in favor of settling the action for approximately 15% of the potential maximum recovery. Plaintiff also offers evidence regarding the views and experience of counsel, who state that they believe that the settlement is fair and reasonable based on their experience with class litigation. (*Ibid*.) Plaintiff also points out that the settlement was reached after arm's length mediation, and that counsel conducted extensive discovery to investigate the claims and learn the strengths and weaknesses of the case. These factors also weigh in favor of finding that the settlement is fair, adequate, and reasonable.

c. Proposed Class Notice

The proposed notice appears to be adequate, as the settlement administrator will mail out notices to the class members. The notices will provide the class members with information regarding their time to opt out or object, the nature and amount of the settlement, the impact on class members if they do not opt out, the amount of attorney's fees and costs, and the service award to the named class representatives. Therefore, the court should find that the proposed class notice is adequate.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks attorney's fees of $400,000 and costs of $20,000. The fees are equivalent to 1/3 of the gross settlement amount. Plaintiff's counsel contends that courts routinely approve attorney's fees of 1/3 of the gross settlement fund in class actions, so the court should approve a 1/3 payment here.

However, while it is true that the California Supreme Court has found that fee awards based on a percentage of the gross settlement in class action cases are proper, the court further held that the trial court may also double-check the reasonableness of the fees by performing a lodestar analysis to ensure that the requested amount of fees is reasonable based on the difficulty of the issues, the amount of work done, and the attorney's hourly rate. (*Laffitte v. Robert Half Internat. Inc*. (2016) 1 Cal.5th 480, 503-505.) "As noted earlier, '[t]he lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved.' A lodestar cross-check thus provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee. If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage." (*Id*. at p. 504, internal citations omitted.)

Here, counsel provides no evidence regarding the hours worked on the case or their hourly rates, so it is impossible for the court to determine if the requested fees are reasonable under the circumstances. Nor has counsel provided any information about the costs incurred during the course of the litigation, so the request for $20,000 in costs is completely unsupported by evidence. Therefore, the court will not approve the request for attorney's fees and costs at this time, and will require counsel to provide more evidence to allow the court to perform a lodestar cross-check of the requested fees, as well as evidence to support the requested costs.

4. Payment to Class Representative

Plaintiff seeks preliminary approval of a $10,000 "service payment" to the named plaintiff/class representative, Mr. Smith. Smith has provided his own declaration, which indicates that he has performed about 20 to 30 hours of work on the case, including consulting with his attorneys, reviewing the complaint and settlement, and otherwise assisting counsel in prosecuting the case and representing the interests of the class. He will also be releasing defendants from any further liability for all claims that he might bring arising out of his employment with them.

It appears that the requested service payment to Mr. Smith is reasonable under the circumstances, so the court intends to approve it.

5. Payment to Class Administrator

Plaintiff seeks approval of up to $15,000 for the settlement administrator's fees. However, plaintiff has not presented any evidence from the settlement administrator, CPT Group, Inc., to support the requested payment. Therefore, the request for approval of

the $15,000 payment to the settlement administrator is not supported by admissible evidence, and the court cannot approve it at this time.

6. PAGA Settlement

Plaintiff proposes to allocate $80,000 of the settlement to the PAGA claims, with $60,000 being paid to the LWDA as required by law and the other $20,000 being paid out to the class members. Plaintiff's counsel has also sent notice of the settlement to the LWDA, and they have not objected to the settlement. Plaintiff's counsel has adequately explained why the $80,000 PAGA allocation is reasonable under the circumstances. (Perez decl., ¶¶ 46-52.) Therefore, the court intends to find that the proposed allocation of $80,000 to the PAGA claims with $60,000 going to the LWDA and the rest going to the class members is fair and reasonable under the circumstances.

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: jyh on 1/31/23.
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Winchester v. Khroud***
Superior Court Case No. 20CECG01583

Hearing Date: ~~February 2, 2022~~ (Dept. 403) *(see below)*

Motion: Defendant Jay Bhandal's Demurrer to the First Amended Complaint

Tentative Ruling:

To continue the motion to Thursday, March 2, 2023, at 3:30 p.m. in Department 403, in order to allow the parties to meet and confer *in person or by telephone*, as required. If this resolves the issues, defendant shall call the calendar clerk to take the motion off calendar. If it does not resolve the issues, defense counsel shall file a declaration, on or before February 21, 2023, stating the efforts made. If no declaration is filed, the motion will be taken off calendar.

If oral argument is timely requested, the matter will be heard on Thursday, February 2, 2023 at 3:00 p.m. in Dept. 503

Explanation:

Code of Civil Procedure section 430.41 makes it very clear that meet and confer must be conducted "in person or by telephone." (*Id.*, subd. (a).) Sending written communication first, as defense counsel did here, can be helpful to the process, but this does not shift the burden for meeting and conferring to the plaintiff. The Legislature specified in-person or telephone contact. The moving party is not excused from this requirement unless they show that the plaintiff failed to respond to the meet and confer request or otherwise failed to meet and confer in good faith. (*Id.*, subd. (a)(3)(B).) It does not appear defense counsel attempted to set a telephone appointment with plaintiff's counsel. Furthermore, the letter defense counsel sent on July 18, 2022, is more in the nature of a demand letter (stating that the complaint must be amended by a date certain, or the demurrer would be filed), than a meet and confer letter. The evidence did not show a bad faith refusal to meet and confer on plaintiff's part that would excuse defendants from complying with the statute.

The parties must engage in good faith meet and confer, in person or by telephone, as set forth in the statute. The court's normal practice in such instances is to take the motion off calendar, subject to being re-calendared once the parties have met and conferred. However, given the extreme congestion in the court's calendar currently, the court will instead continue the hearing to allow the parties to meet and confer, and only if efforts are unsuccessful will it rule on the merits.

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: jyh on 1/31/23.
(Judge's initials) (Date)