

Tentative Rulings for February 8, 2023

Department 503

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

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 above rule also applies to cases listed in this "must appear" section.*

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 503

Begin at the next page

(20)

Tentative Ruling

Re: **Ramirez v. Older American Housing, Inc.**
Superior Court Case No. 21CECG00151

Hearing Date: February 8, 2022 (Dept. 503)

Motion: By Plaintiff for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To deny without prejudice. In any further motion for preliminary approval of the settlement, plaintiff need only file papers addressing the issues identified below. If the complete motion is refiled, plaintiff shall place in **boldface** type any new content.

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 70 current and former hourly, non-exempt employees of defendants. (See George decl.) 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”].)

Plaintiff has submitted evidence showing that the defendant can identify and locate all proposed class members through its personnel records. Plaintiff's counsel identified the 70 members from a class list prepared by defendant's Executive Director, Kathy Angelich (see George decl., ¶ 3), and plaintiff also submits a declaration from Angelich explaining that the report was pulled from defendant's Paylocity payroll online account (Angelich decl., ¶¶ 4, 5.) This criteria is satisfied.

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.)

Plaintiff asserts that “The predominance factor is satisfied here as well. Each of the class members did not receive: meal and rest breaks, proper overtime compensation, reimbursement for business expenses, timely pay of wages, all wages due at termination, and wage statements that were in compliance with Labor Code 226(a).” (MPA 17:10-13; Ramirez decl., ¶¶ 3-4.) In denying the last motion, the court found that these conclusory statements are insufficient. The 12/8/22 order denying the last request for preliminary approval stated, “If common questions were established, the court could conclude that the claims of plaintiff, the class representative, would also be typical of the other proposed class members' claims. (Otkupmon Decl., ¶ 32; Ramirez Decl., ¶¶ 3-4.) But evidence must be submitted that he suffered the same types of Labor Code violations as the other members. ... [P]laintiff should be able to meet the community of

interest requirement for class certification once sufficient evidence is submitted. “ (12/8/22 Minute Order pp. 4-5, emphasis added.) Plaintiff made no attempt to cure this deficiency in the current motion. On this showing the court cannot find that plaintiff has satisfied the community of interest requirement.

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 intends to find 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.)

Here, plaintiff's counsel still has not presented sufficient evidence showing that the settlement is fair and reasonable.

Counsel asserts that "Plaintiff asserts novel claims" (Otkupman decl., ¶ 25), but does not explain what is novel about them. These are quite standard wage and hour claims.

In denying the previous motion, the court found counsel's valuation of the various claims to be conclusory. In the last motion, counsel asserted that the maximum potential recovery is \$740,070.85 if plaintiff was successful on all claims. (See 11/14/22 Otkupman decl., ¶ 40.) Referencing paragraph 40, the court's 12/8/22 order noted that the discussion of the potential value of each claim was based on assumptions that were not supported by any evidence or showing that any real analysis went into it. While counsel added a section discussing reasons for discounting the various causes of action, little additional information was presented to augment the "Attorney's Estimate of Total Damages Recoverable" at paragraph 42 of the current declaration. The valuations of paragraph 42 are still based on unsupported and unexplained assumptions. The overtime violations claim is based on an estimated 20 unpaid overtime minutes per pay period. There is no information as to how plaintiff came up with 20 unpaid minutes per pay period. The rest break violation claim is based on the unexplained and unsupported assumption of 2 missed rest breaks per pay period. The meal break violation analysis similarly assumes 3 missed meal breaks per pay period. The business expense reimbursement claim is based on an estimated \$15 per pay period in reimbursements, but there is no indication how counsel came up with this \$15 figure. Counsel must **show their work**. Plaintiff has not sufficiently explained why the settlement is fair, adequate, and reasonable under the circumstances.

c. Proposed Class Notice

The proposed notice will provide the class members with information regarding their time to opt out or object, the nature and amount of the settlement, the amount to be received by the class member, 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 representative. Therefore, the court intends to find that the proposed class notice is adequate.

3. Attorney's Fees and Costs

Plaintiff's counsel seeks \$70,000 in attorney's fees, which is 35% of the total gross settlement, plus costs of up to \$15,000. 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].)

Here, plaintiff's counsel has not provided any evidence of the hours worked on the case or the tasks performed to allow the court to determine whether the requested amount of fees is reasonable. Nor does counsel state their billing rates. However, inasmuch as the percentage is in the ballpark, the lodestar check can be done at the time of final approval.

4. Payment to Class Representative

The motion seeks preliminary approval of a \$7,500 "enhancement payment" to the named plaintiff/class representative, Mr. Ramirez. Mr. Ramirez states that he devoted 20-25 hours of his time to the case. Assuming 20 hours, that comes to \$375 per hour, which seems quite exorbitant for the work put into the case. (See 11/14/22 Ramirez decl., ¶¶ 7, 8.) Plaintiff did take 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. (11/14/22 Ramirez decl., ¶ 9.) The court is likely to award a lower amount for an enhancement, but that can be addressed at final approval, as \$7,500 is within the range of what is typically awarded.

5. Payment to Class Administrator

The settlement provides that the class administrator would be paid up to \$7,499. In the last order the court noted that plaintiff had not provided any evidence, such as a declaration from a representative of the class administrator, to support the request for \$7,499 in settlement administration costs. This time plaintiff submits a declaration by an employee of Simpluris, detailing the work to be performed and providing a copy of the bid that was submitted. The court intends to preliminarily approve the payment to the class administrator.

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

(24)

Tentative Ruling

Re: ***In re Isaiah Henry Anthony Estrada***
Superior Court Case No. 23CECG00229

Hearing Date: February 8, 2023 (Dept. 503)

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To grant. Orders signed. No appearances necessary.

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: ijh on 2/6/23 .
 (Judge's initials) (Date)

(38)

Tentative Ruling

Re: ***Tapia v. Paul Blanco's Good Car Company Fresno, Inc.***
Superior Court Case No. 18CECG01290

Hearing Date: February 8, 2023 (Dept. 503)

Motion: Plaintiff Francisco Tapia's Motion to Tax Costs

Tentative Ruling:

To grant in part and tax costs of defendant Paul Blanco in the sum of \$870.00. Paul Blanco's recoverable costs are reduced to \$451.06. (Code Civ. Proc. § 1033.5.)

Explanation:

A "defendant in whose favor a dismissal is entered" is a prevailing party. (Code Civ. Proc., § 1032, subd. (a).) Moreover, "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).)

Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5(c)(4).) All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5(c)(1), (2) and (3).)

Prevailing Party

Plaintiff argues that defendant Paul Blanco is not a prevailing party and thus is not entitled to recover costs. Citing no authority on the point, plaintiff appears to argue that he is the prevailing party because his damages were satisfied in a settlement with defendant Santander Consumer USA, Inc. Plaintiff also claims defendant refused to participate in court-ordered arbitration and refuses to make required arbitration payments.

However, as defendant correctly notes in his opposition, pursuant to Code of Civil Procedure section 1032, subdivision (a)(4), a prevailing party includes "a defendant in whose favor a dismissal is entered ... and a defendant as against those plaintiffs who do not recover any relief against that defendant." Here, a voluntary dismissal of the entire action was entered July 12, 2022. Hence, each of the defendants is "a defendant in whose favor a dismissal is entered" and is considered a "prevailing party" under the statute. The settlement with defendant Santander Consumer USA, Inc. and the alleged refusal to participate in the arbitration and pay the arbitration fees has no bearing on the analysis.

Filing Fees

Defendant Paul Blanco's memorandum of costs claims the \$435 first appearance filing fee for himself as well as the \$435 first appearance filing fee for defendant Paul Blanco's Good Car Company and the \$435 first appearance filing fee for defendant Putu Blanco. Plaintiff moves to tax the \$870.00 in filing fees claimed for defendants Paul Blanco's Good Car Company and Putu Blanco. The motion is granted. The filing fees for defendants Paul Blanco's Good Car Company and Putu Blanco are not recoverable by defendant Paul Blanco.

In opposition, defendant claims that he paid the first appearance filing fees for Paul Blanco's Good Car Company and Putu Blanco and submits documentary evidence of the payments. Defendant Paul Blanco's filing fees (first appearance and substitution of attorney) are allowable costs pursuant to Code of Civil Procedure section 1033.5, subdivision (a)(1). However, no authority is provided to recover the filing fees Mr. Blanco apparently paid on behalf of the other defendants. Mr. Blanco asserts that that all costs claimed in his memorandum were incurred reasonably and were necessary to litigate this action. This assertion is unsupported. "Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (Code Civ. Proc. § 1033.5(c)(2).) There is no explanation provided as to why defendants Paul Blanco's Good Car Company and Putu Blanco did not pay their own filing fees. While it appears that it was convenient or beneficial for defendant Paul Blanco to pay the filing fees of the other defendants, there is no indication that doing so was reasonably necessary to the conduct of the litigation.

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** 2/7/23 .
 (Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***In re Jace Lee***
Superior Court Case No. 23CECG00199

In re Starlison Lee
Superior Court Case No. 23CECG00200

Hearing Date: ~~February 8, 2023~~ (Dept. 503) – see below

Motion: Petition to Approve Compromise of Disputed Claim of Minor

Tentative Ruling:

To continue the hearing regarding the Amended Petitions filed in each case to Tuesday, February 28, 2023, at 3:30 p.m. in Department 503. The hearing date of February 8, 2023, was given for the original petitions. Counsel should have obtained a new date for the amended petitions.

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** 2/7/23 .
(Judge's initials) (Date)