

Tentative Rulings for February 9, 2023
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.

22CECG02308 *Dritz v. PVHOME PPA 1, LLC* is continued to Wednesday, February 22, 2023 at 3:30 p.m. in Department 501

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Tentative Ruling

Re: **Luciano Hernandez v. Burford Farming Company, Inc.**
Superior Court Case No. 21CECG03817

Hearing Date: February 9, 2023 (Dept. 501)

Motion: by Plaintiffs for Preliminary Approval of Class Action Settlement

Tentative Ruling:

To grant plaintiffs' motion for preliminary approval of the class settlement. Moving counsel shall contact the calendaring clerk to set the final approval hearing.

Explanation:

1. Settlement

The court “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; see also *Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F.3d 1071, 1079 [“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.”].)

“[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.” (*Kullar, supra*, 168 Cal.App.4th at p. 130.) The court must cautiously approach 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.)

“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.)

Plaintiffs contend and provide evidence that the proposed settlement is the product of arms-length adversarial negotiations between counsel for plaintiffs and counsel for defendant, including a mediation session with Honorable Howard Broadman (Ret.), a well-known mediator. (See Marquez, Decl. ¶ 7.) Plaintiffs' counsel has also engaged an expert, whose findings support the alleged non-compliance. (*Id.* at ¶ 16.) The expert is not identified. Nevertheless, at least for purposes of preliminary approval, counsel's summary of the expert's findings is sufficient.

Considering the depth of the expert's analysis, the inclusion of realistic probabilities of prevailing verse the attendant risks of not collecting after a trial, the settlement appears reasonable.

Proposed Class Notice

The proposed notice appears to be adequate, as the class 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, the service award to the named class representatives, and the settlement administrator's fees and costs. (See Marquez Decl, Ex. 1, Ex. A.) Therefore, the court finds that the proposed class notice is adequate.

Attorney Fees and Costs/Payments to Class Representative and Administrator

Plaintiffs agree to not apply for attorneys' fees exceeding one third of the total settlement fund, and costs not exceeding \$20,000. Plaintiffs' counsel also states the hours incurred, includes a lodestar calculation, and states that the total amount recoverable is capped at \$200,000 (one-third of the settlement amount). (See Marquez, Decl. ¶¶ 32-33.) Similarly, the attorneys' cost award is capped at \$20,000. (*Ibid.*)

Plaintiffs' counsel provides a breakdown of the hourly rates charged by attorneys who worked on this matter, ranging from \$850 per hour for Mr. Marquez to \$450 per hour for Arrash Fattahi. (Marquez Decl., ¶ 32.) Counsel also sets forth the hours worked by each attorney to date. The total of all hours worked by plaintiffs' attorneys is \$117,750, well short of the \$200,000 that plaintiffs' counsel seeks in this matter, but counsel anticipates an estimated 50-100 hours to monitor progress. (*Id.* at ¶ 36.)

At this stage, the court grants preliminary approval, as the settlement is not contingent on this full amount being awarded. The settlement agreement provides, "A Class Counsel Fees Payment of not more than 33 1/3%, which is currently estimated to be \$200,000 and a Class Counsel Litigation Expenses Payment of not more than \$20,000.00. Burford will not oppose requests for these payments provided that do not exceed these amounts. Plaintiffs and/or Class Counsel will file a motion for Class Counsel Fees Payment

and Class Litigation Expenses Payment no later than 16 court days prior to the Final Approval Hearing.” (Marquez, Decl. Ex. 1, § 3.2.2.)

Accordingly, at the time of final approval the court can and may award a lesser amount of attorneys' fees. The fees motion should provide a fully supported lodestar analysis, including time/billing statements and justification for the billing rates claimed. Plaintiffs' counsel describes the assistance of plaintiffs and the justification for their service payments. Assuming this information is supported by the plaintiffs' own declarations at the time of final approval, the service payments look acceptable.

The settlement agreement provides for payment of up to \$7,250 to the settlement administrator, and the bid is attached, it too appears reasonable. (Marquez, Decl. Ex. 2.)

2. Conditional Certification

A precertification settlement may stipulate that a defined class be conditionally certified for settlement purposes. The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (Cal. Rules of Court, rule 3.769(d).) Before the court may approve the settlement, however, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem Products, Inc. v. Windsor* (1997) 521 US 591, 625-627; see also Newberg, *Newberg and Rubenstein on Class Actions* (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.”])

“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. [Citations.] 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.” (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.)

Numerosity and Ascertainability

“Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) In essence, to determine the identity of potential class members, the court will look to whether there are any objective criteria to describe them and whether they can be found without unreasonable expense or effort through business or official records. (*Lewis v. Robinson Ford Sales, Inc.* (2007) 156 Cal.App.4th 359, 369-370, citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706 [proposed class action of taxi cab users from 1960 to 1964 who paid by coupons identifiable where they could be identified by serial numbers which were kept manually, not in computerized form].)

Here, the 97 class members are identifiable through defendant's records (Marquez, Decl. ¶ 14), and the class is defined as "all current and former hourly-paid or non-exempt employees who worked for Defendant Burford Farming Company, Inc., in the State of California during the Class Period" (Points & Auth. at p. 4:12-15).

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.) Common issues predominate when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810.) Common questions need only be "sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits." (*ibid.*)

In addition, the class representative must be able to represent the class adequately. (*Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 669.) "[I]t has never been the law in California that the class representative must have identical interests with the class members . . . 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.)

Plaintiffs contend that the class members' claims are premised on whether defendant had legally compliant policies and practices. In addition, the named plaintiffs' claims involve similar legal theories as those asserted by the other class members and class counsel assert credentials and qualifications indicating they are adequate to represent the interests of the class for purposes of settlement. Finally, given the common issues and common evidence, multiple trials do not appear efficient, thus class treatment appears the superior method of 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 2/7/2023.
(Judge's initials) (Date)