

FILED
Superior Court of California
County of Los Angeles

JAN 27 2023

Deputy Clerk, Executive Officer/Clerk of Court
By: R. Arraiga, Deputy

FINAL RULINGS/ORDERS RE: MOTION FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT

Dmytro Martyniuk (formerly Matthew Hallowell) v. USKO Express,
Inc., et al., Case No.: 20STCV07379

The Parties' Motion for Preliminary Approval of Class Action Settlement is **GRANTED** as the settlement is fair, adequate, and reasonable.

The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$1,550,000, non-reversionary. (§I.11)

B. The Net Settlement Amount ("Net") is the GSA minus the following:

Up to \$516,666.67 (33 1/3%) for attorney fees (§I.2);

Up to \$25,000 for litigation costs (Ibid.);

Up to \$10,000 for a service award to the Named Plaintiff (§I.17);

Up to \$10,900 for settlement administration costs (§I.18);

\$45,000 (75% of \$60,000 PAGA penalty) to the LWDA (§VIII.C.1).

C. Employer share of the payroll taxes on the taxable portion of the settlement payments shall be paid separately from the GSA by Defendant.

D. Plaintiffs release of Defendants from claims described herein.

The Parties' Motion for Final Approval of Class Action Settlement must be filed by **June 29, 2023**. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed] Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and the parties must email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

Non-Appearance Case Review is set for July 6, 2023, 8:30 a.m., Department 9.

I.
BACKGROUND

Plaintiff Dmytro Martyniuk sues his former employer, Defendant USKO Express, Inc. ("Defendant" or "USKO") for alleged wage and hour violations. Defendant is a California headquartered trucking company that specializes in the transportation of a wide range of freight. Plaintiff seeks to represent a class of Defendant's current and former non-exempt employees.

On February 24, 2020, former plaintiff Matthew Hallowell filed his initial class action complaint against Defendant USKO and former defendant JS Express, LLC, alleging the following causes of action: (1) Failure to Provide Required Meal Periods; (2) Failure to Provide Required Rest Periods; (3) Failure to Pay Minimum Wage; (4) Failure to Pay All Wages Due to Discharged or Quitting Employees; (5) Failure to Furnish Accurate Itemized Wage Statements; (6) Failure to Indemnify Employees for Necessary Expenditures Incurred in Discharge of Duties; (7) Unlawful Deductions from Wages; and (8) Unfair and Unlawful Business Practices.

On July 2, 2020, the parties agreed, with the Court's approval, to stay the case pending the Ninth Circuit's determination regarding preemption of California's meal and rest break requirements in International Brotherhood of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin. ("Teamsters") (9th Cir. 2021) 986 F.3d 841. While the action was stayed, Hallowell settled his individual claims with Defendant USKO.

In March 2021, USKO filed a motion to dismiss, which Class Counsel opposed. The Court granted the motion to dismiss in part and dismissed the meal and rest break claims in light of Teamsters. Class Counsel formally moved for pre-certification discovery in efforts to locate a new Class representative.

On November 12, 2021, the parties attended a mediation facilitated by the Honorable Lisa Cole (Ret.), at which the parties reached a settlement in principle. The terms of settlement are finalized in the long-form Settlement and Release Agreement ("Settlement Agreement"), a copy of which is attached to the Declaration of Taras Kick ("Kick Decl.") as Exhibit 1.

On May 11, 2022, a First Amended Complaint was filed, adding Dmytro Martyniuk in place of Hallowell as the named Plaintiff, removing former defendant JS Express, LLC, and adding a cause of action for penalties under the Labor Code Private Attorneys General Act.

On July 27, 2022, the Court issued a "checklist" to the parties pertaining to deficiencies in the proposed settlement. In response, the parties filed further briefing, including the revised Settlement Agreement attached to the Declaration of Greg Taylor ("Taylor Decl.") as Exhibit 1.

On January 11, 2023, the Court issued another "checklist" to the parties pertaining to remaining issues with the proposed settlement. In response, the parties filed a redlined copy of the further revised Settlement Agreement attached to the Supplemental Declaration of Greg Taylor ("Supp. Taylor Decl.") as Exhibit 2. However, no fully executed copy was filed. The court clerk requested by telephone and via a CaseAnywhere posting requested that counsel immediately file and email a fully executed copy. Counsel complied.

Now before the Court is Plaintiff's motion for preliminary approval of the settlement agreement.

II. SETTLEMENT AGREEMENT

A. Definitions

"Settlement Class": All current and former drivers, including but not limited to those misclassified as independent contractors or "owner operators," who performed work for Defendant in the State of California or who were residents of the State of California and performed work for Defendant in any state at any time from February 26, 2016 through May 23, 2022." (¶I.21)

"Class Period": February 26, 2016 through May 23, 2022. (¶I.4)

"PAGA Members" or "PAGA Employees": "All current and former drivers, including but not limited to those misclassified as independent contractors or "owner operators," who performed work for Defendant in the State of California or who were residents of the State of California and performed work for Defendant in

any state at any time during the period from May 11, 2021 through May 23, 2022 (the "PAGA Period")." (§I.24)

"PAGA Period": May 11, 2021 through May 23, 2022. (§I.23)

"Participating Class Members": all members of the Settlement Class who do not timely and effectively opt out of the Settlement. (§I.14)

The Parties stipulate to class certification for settlement purposes only. (§IV)

B. Terms of Settlement Agreement

The essential terms are:

- The Gross Settlement Amount ("GSA") is \$1,550,000, non-reversionary. (§I.11)
- The Settlement Fund ("Net") (\$942,433.33) is the GSA minus the following:
 - o Up to \$516,666.67 (33 1/3%) for attorney fees (§I.2);
 - o Up to \$25,000 for litigation costs (Ibid.);
 - o Up to \$10,000 for a service award to the Named Plaintiff (§I.17);
 - o Up to \$10,900 for settlement administration costs (§I.18); and
 - o Payment of \$45,000 (75% of \$60,000 PAGA penalty) to the LWDA (§VIII.C.1).
- Defendant shall pay employer-side taxes separately and in addition to the GSA. (§V.A.1)
- No Claim Form. Class Members will not have to submit a claim form in order to receive their settlement payment. (§VII.E)
- Response Deadline. "Response Deadline" shall mean the deadline to submit requests for exclusion, written objections, and/or miles disputes. The Response Deadline is 45 days from the date on which Notice is initially mailed. In the event that Notice must be re-mailed in order to reach a Class Member or PAGA Member, the Response Deadline for that individual will be extended by 14 days. (§I.25)
 - o In the event that five percent (5%) or more of the Class Members exercise their right to exclude themselves and opt out of the Settlement, Defendant retains the exclusive right, but not the obligation, to withdraw from and terminate the Settlement. (§IX.B.3)

- Individual Settlement Payment Calculation. The payment to each Participating Class Member will be based on the total number of miles each drove during the Class Period based on Defendant's records. (§VIII.D.1) The sum of the number of miles driven during the Class Period by Participating Class Members will be referred to as the "Total Miles." (§VIII.D.2) The amount to be paid per mile driven by a Participating Class Member will be calculated by dividing the value of the Settlement Fund by the Total Miles. (§VIII.D.5)
 - o PAGA Payments: The remaining 25% the PAGA Penalties (i.e., \$15,000) shall be paid to PAGA Members on a pro rata basis, based on the total number of miles driven by each PAGA member during the PAGA Period, which is May 11, 2021 through May 23, 2022. (§VIII.C.1) The sum of the number of miles driven during the PAGA Period by all PAGA Members will be referred to as the "Total PAGA Miles." (§VIII.C.3) Each PAGA Member's share of the \$15,000 in PAGA Penalties will be calculated by dividing the number of miles driven by the PAGA Member by the Total PAGA Miles. (§VIII.C.4)
 - o Tax Allocation. Participating Class Members' individual settlement payments will be designated as 20% wages, 40% interest, and 40% penalties. (§VIII.E.4)
- Funding and Distribution of Settlement. Within twenty-one (21) calendar days following the Effective Date, Defendant will deposit the Settlement Payment equal to the Gross Settlement Amount into the QSF account established by the Settlement Administrator. At no time prior to the Effective Date shall Defendant be required to escrow any portion of the Settlement Amount. Defendant is not responsible for paying any interest on the amount deposited and it is the responsibility of the Settlement Administrator to select and administer the interest-bearing account. (§VIII.B.2)
 - o The Settlement Administrator shall distribute the Individual Settlement Payments by check within seven (7) calendar days after the funding of the QSF or within twenty-eight (28) calendar days of the Effective Date, whichever is sooner. (§VIII.E.1)
- Uncashed Checks. If any check remains uncashed after one hundred eighty (180) days from the date the check is issued, such check(s) will be voided by the Settlement Administrator. The Parties agree that the Settlement Fund is non-reversionary, and 100% of the funds from the uncashed or undeliverable checks shall be distributed to the California Controller's Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil Procedure Section 384, subd. (b). (§VIII.E.2)

- Simpluris, Inc. will perform settlement and notice administration. (¶I.20)
- The revised Settlement Agreement was submitted to the LWDA on January 9, 2023. (Supp. Taylor Decl., Exhibit 5.)
- Notice of Entry of Judgment will be posted on the settlement administrator's website. (¶X.C)
- Participating class members and the named Plaintiff will release certain claims against Defendants. (See further discussion below)

III. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. On November 12, 2021, the parties attended a mediation facilitated by the Honorable Lisa Cole (Ret.), at which the parties reached a settlement in principle. The parties subsequently finalized terms in the Settlement Agreement. (Kick Decl. ¶14)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Class Counsel represents that the parties engaged in formal and informal discovery leading up to the mediation. Defendant produced a representative sample of its non-exempt employees' timekeeping and payroll records with information for Plaintiff to conduct a damage analysis. Class Counsel retained an expert to analyze this data which was used as a damages model for the mediation. (Id. at ¶13)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in class action litigation, including wage and hour class actions. (Id. at ¶5)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 14:139.18, ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Class Counsel has provided information, summarized below, regarding the factual basis for, and estimated maximum exposure for each of the claims alleged.

Violation	Maximum Exposure
Unpaid Minimum Wages	\$842,400.00
Reimbursement Claim	\$300,000.00
Waiting Time Penalties	\$2,400,000.00
Wage Statement Violations	\$765,000.00
PAGA Penalties	\$12,075,000.00
Total	\$16,382,400.00

(Kick Decl. ¶¶ 17-19.)

2. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

3. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (See Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.").)

4. Amount offered in settlement. Plaintiff calculated Defendant's maximum exposure at \$16,382,400. The \$1,550,000 settlement amount represents approximately 9.4% of Defendant's maximum potential damages which, given the uncertain outcomes, is within the "ballpark of reasonableness."

The \$1,550,000 settlement amount, after reduced by the requested deductions, leaves approximately \$942,433.33 to be divided among approximately 623 putative class members. Assuming

full participation, the resulting payments will average approximately \$1,512.73 per class member. [\$942,433.33 Net / 623 = \$1,512.73] .

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Class Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including wage and hour class actions.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object, opt-out and/or submit claim forms. This factor becomes relevant during the fairness hearing.

The Court concludes that the settlement can be preliminarily deemed fair, adequate, and reasonable.

C. Scope of the Release

Upon the date on which Defendant fully funds the Settlement, all members of the Settlement Class who have not submitted a timely and effective request for exclusion shall be deemed to have fully released the Released Parties from the Released Claims. (§VI.2)

Upon the date on which Defendant fully funds the Settlement, all members of the Settlement Class who do not timely and effectively opt out of the Settlement shall be deemed to have fully released the Released Parties from all claims, debts, liabilities, demands, obligations, penalties, interest, wages, compensation, premium pay, guarantees, costs, expenses, attorneys' fees, damages, claims for equitable relief, actions or causes of action that arise, or could have arisen, from the operative complaint, the First Amended Complaint (the "Released Claims"). (§VI.1)

The release shall cover Released Claims for the period of February 26, 2016, through May 23, 2022. (§VI.3)

Released Claims shall include all PAGA claims that could have been premised on the facts alleged in the Plaintiff's Notice to the LWDA. PAGA Members will release PAGA claims even if Class members request exclusion from the Class. (§VI.4)

"Released Parties" refers to Defendant and all of its former or present parents, subsidiaries, successors, predecessors, affiliates, assigns, joint employers, officers, directors, employees, insurers, directors, executors, attorneys, shareholders, related corporations, profit sharing, savings, health, and other employee benefit plans of any nature, the successors of such plans, and those plans' respective current or former trustees and administrators, agents, employees, fiduciaries, and the predecessors and successors, assigns, and legal representatives of all such entities and individuals. (§I.16)

D. May Conditional Class Certification Be Granted?

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified (Amchem Products, Inc. v. Winsor (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (Dunk at 1807, fn 19.) Finally, the Court is under no "ironclad requirement" to conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240, disapproved on another ground in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.)

1. Numerosity. There are approximately 623 Class Members. (MPA at 15:14-15.) This element is met.

2. Ascertainability. The proposed class is defined above. The class definition is "precise, objective and presently ascertainable." (Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919.) All Class Members are identifiable through a review of Defendant's records. (MPA at 15:17-18.)

3. Community of interest. "The community of interest requirement involves 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.'" (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.)

Regarding commonality, the parties do not dispute, for the purposes of settlement only, that all Class members were subject to a common policies and practices, were paid according to uniform formulae. (MPA at 16:2-8.)

Regarding typicality, the parties agree for the purposes of settlement only that Defendant's compensation and employment policies that are common and at the core of this lawsuit. Plaintiff was allegedly subject to the same employment policies and practices as all other Class members. (MPA at 16:10-15.)

Finally, as to adequacy, Plaintiff represents that he is aware of the duties and risks of serving as class representative, and has participated in the litigation. (Declaration of Dmytro Martyniuk ¶¶ 5-7.)

4. Adequacy of class counsel. As indicated above, Class Counsel has shown experience in class action litigation, including wage and hour class actions.

5. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

The Court finds that the class may be conditionally certified because the prerequisites of class certification have been satisfied.

E. Is the Notice Proper?

1. Content of class notice. A copy of the revised proposed notice to class members is attached to the Settlement Agreement as Exhibit A. Its content appears to be acceptable. It includes information such as: a summary of the litigation; the nature of the settlement; the terms of the settlement agreement; the proposed deductions from the gross settlement amount (attorney fees and costs, enhancement awards, and claims administration costs); the procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the consequences of participating in, opting out of, or objecting to, the settlement; and the date, time, and place of the final approval hearing.

The Settlement Administrator shall provide Notices to Class Members in English and Russian. (Kick Decl. ¶22)

2. Method of class notice. Defendant shall provide the Settlement Administrator within thirty (30) calendar days of preliminary approval with the Settlement Class Data. (¶VII.B) The Settlement Administrator will calculate the number of miles driven based upon the employment data provided. This information is being provided confidentially to the Settlement Administrator only, and the Settlement Administrator shall treat the information as private and confidential and take all necessary precautions to maintain the confidentiality of the Settlement Class Data. The Settlement Administrator shall not share the Settlement Class Data with any other party or counsel for any of the Parties. This information is to be used only to carry out the Settlement Administrator's duties as specified in this Agreement. The purpose of treating the Class Data as private and confidential is to protect Class Members' personal information, which serves the best interest of the Class. This confidentiality will not impede Class Counsel's ability to discharge fiduciary duties because only the Settlement Administrator requires the confidential Class Data in order to calculate and issue to the pro rata distribution of Settlement Funds. (¶VII.C)

The Settlement Administrator will send a Class Notice to each member of the Settlement Class by First Class U.S. Mail within ten (10) calendar days of receipt of the Settlement Class Data. (¶VII.D)

To provide the best notice practicable, any Class Notice returned to the Settlement Administrator as non-deliverable with an updated mailing address affixed shall be sent by First Class U.S. Mail to the forwarding address affixed thereto within 5 business days of receipt by the Settlement Administrator. If a Class Notice is returned as undeliverable without a forwarding address affixed thereto, the Settlement Administrator shall attempt to locate a current mailing address for the member of the Settlement Class by skip tracing within 5 business days of receipt and will mail the Class Notice to the updated address identified within 5 business days of identifying the updated address. If no current address can be located, the Class Notice for that individual will be deemed undeliverable. If a Class Member's Notice must be re-mailed, that Class Member's deadline to submit a miles dispute, objection, or opt-out request will be extended by 14 days. (¶VII.F)

3. Cost of class notice. As indicated above, settlement administration costs are estimated to be \$10,900. Prior to the time of the final fairness hearing, the settlement administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

F. Attorney Fees and Costs

CRC rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095-1096; Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615, 625-626; Ketchum III v. Moses (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by the parties to the contrary, "the court ha[s] an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th 123, 128.)

The question of whether Class Counsel is entitled to \$516,666.67 (33 1/3%) in attorney fees will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees. Class counsel must provide the court with billing information so that it can properly apply the lodestar method, and must indicate what multiplier (if applicable) is being sought as to each counsel.

Class Counsel should also be prepared to justify the costs sought (capped at \$25,000) by detailing how they were incurred.

G. Incentive Award to Class Representative

The Settlement Agreement provides for an enhancement award of up to \$10,000 for the class representative.

In connection with the final fairness hearing, the named Plaintiff must submit a declaration attesting to why he should be entitled to an enhancement award in the proposed amount. The

named Plaintiff must explain why he "should be compensated for the expense or risk she has incurred in conferring a benefit on other members of the class." (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than pro forma claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit'" (Id. at 806-807, italics and ellipsis in original.)

The Court will decide the issue of the enhancement award at the time of final approval.

IV. CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Preliminary Approval of class action settlement is GRANTED as the settlement is fair, adequate, and reasonable.

2) The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$1,550,000, non-reversionary. (§I.11)

B. The Net Settlement Amount ("Net") is the GSA minus the following:

Up to \$516,666.67 (33 1/3%) for attorney fees (§I.2);
Up to \$25,000 for litigation costs (Ibid.);
Up to \$10,000 for a service award to the Named
Plaintiff (§I.17);
Up to \$10,900 for settlement administration costs
(§I.18);
\$45,000 (75% of \$60,000 PAGA penalty) to the LWDA
(§VIII.C.1).

C. Employer share of the payroll taxes on the taxable portion of the settlement payments shall be paid separately from the GSA by Defendant.

D. Plaintiffs release of Defendants from claims described herein.

3) The Parties' Motion for Final Approval of Class Action Settlement must be filed by June 29, 2023. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

4) The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed] Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and the parties must email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

5) Non-Appearance Case Review is set for July 6, 2023, 8:30 a.m., Department 9.

CLERK TO GIVE NOTICE TO MOVING PARTY. THE MOVING PARTY TO GIVE NOTICE TO ALL OTHER PARTIES.

IT IS SO ORDERED.

DATED: January 27, 2023

A handwritten signature in black ink, appearing to read "Yvette M. Palazuelos", written in a cursive style.

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT