

EDDIE MARTINEZ v. STINK, LLC, et al.

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: October 21, 2021 at 11:00 a.m.

Department: SSC-11

Case No.: 20STCV10301

TENTATIVE RULING

Upon agreement to modify the settlement agreement to (1) provide for the judgment to be entered upon the completion of the funding of the litigation, the ruling below will issue, (2) provide notice of the judgment to the class, the Court would adopt the preliminary approval ruling below.

To provide the parties with sufficient time to make these modifications and to provide supplemental pleadings showing that the changes to the settlement have been made, the Court issues the following order:

(1) Supplemental pleadings modifying the settlement agreement as shown above shall be filed and e-served on or before September 27, 2021. A non-appearance review to verify that these supplemental pleadings were filed will be set on that same date at 8:30 a.m.

The motion for preliminary approval will be set for October 21, 2021 at 11:00 a.m.

The Court GRANTS preliminary approval of the Settlement Agreement and finds as follows:

- (1) The settlement appears to be in the range of reasonableness of a settlement that could ultimately be granted final approval by the Court;
- (2) Grant conditional class certification;
- (3) Appoint Harris & Ruble as Class Counsel;
- (4) Appoint Plaintiff Eddie Martinez as Class Representative;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below; and
- (7) Plaintiff's counsel shall file a proposed Order, consistent with this ruling by _____, 2021.

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

As a "fiduciary" of the absent class members, the trial court's duty is to have before it sufficient information to determine if the settlement is fair, adequate, and reasonable. (7-

Eleven Owners for Fair Franchising v. The Southland Corp. (2000) 85 Cal.App.4th 1135, 1151, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, 1802 (“*Dunk*”).)

California Rules of Court, rule 3.769 governs settlements of class actions. Any party to a settlement agreement may submit a written notice for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. California Rules of Court, rule 3.769(c).

In determining whether to approve a class settlement, the court’s responsibility is to “prevent fraud, collusion or unfairness to the class” through settlement and dismissal of the class action because the rights of the class members, and even named plaintiffs, “may not have been given due regard by the negotiating parties.” (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 60.)

FAIRNESS OF THE SETTLEMENT AGREEMENT

In an effort to aid the Court in the determination of the fairness of the settlement, *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245 (“*Wershba*”), discusses factors that the Court should consider when testing the reasonableness of the settlement.

A presumption of fairness exists where: 1) the settlement is reached through arm’s length bargaining; 2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; 3) counsel is experienced in similar litigation; and 4) the percentage of objectors is small. (*Wershba* at 245, citing *Dunk* at 1802.) The test is not the maximum amount plaintiff might have obtained at trial on the complaint but, rather, whether the settlement is reasonable under all of the circumstances. (*Wershba* at 250.)

In making this determination, the Court considers all relevant factors including “the strength of [the] 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.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (“*Kullar*”), citing *Dunk* at 1801.)

“The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” (*City of Detroit v. Grinnell Corporation* (2d Cir. 1974) 495 F.2d 448, 455; see also *Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 (“[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”)

TERMS OF SETTLEMENT AGREEMENT

For settlement purposes only, the Parties agree to the certification of a “Settlement Class” pursuant to California Code of Civil Procedure § 382 defined as: all persons who are or were engaged by Stink, LLC to render services in the State of California in connection with a music

video for Gregory Porter, shot in December 2019 (the "Porter Video"), at any time between December 1, 2019 to January 24, 2020. (¶I.R)

- "Settlement Period" means the time period from December 1, 2019 to January 24, 2020. (¶I.S)

The Settlement Amount is \$125,000, non-reversionary. (¶I.Q)

The Net Settlement Amount ("NSA") of \$60,083.33 is the Settlement Amount minus:

- Up to \$41,666.67 (33 1/3%) for attorneys' fees (¶XIII);
- Up to \$12,500 for attorneys' costs (*Ibid.*);
- Up to \$5,000 for a Service Award to the class representative (¶XIV);
- Up to \$5,000 for costs of settlement administration (¶VIII); and
- Payment of \$750 (75% of \$1,000 PAGA penalty) to the LWDA (¶XVI).

The Parties agree that, based upon an analysis of the facts and law relating to the Litigation, all Net Settlement Payments to all members of the Settlement Class will be treated as penalties and interest and shall not be subject to employment taxes. (¶XV)

No Claim Requirement. Class Members shall not be required to submit a claim form in order to receive an individual settlement payment. (Notice pg. 1)

Response Deadline. Class members will have 45 days from the initial mailing of the notice to postmark and submit workweek disputes (¶IX), written objections (¶IX.B), or requests for exclusion (¶IX.C) to the Settlement Administrator.

- If more than six (6) members of the Settlement Class opt out of the Settlement Class, Defendants shall have the right to terminate this Agreement. (¶XVII.B)

Calculation of Individual Settlement Payments: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims set forth in Section VII(A), in an amount determined by the Settlement Administrator as follows: First, the administrator determines the NSA. Second, the NSA is divided by the total number of Eligible Workweeks for all Settlement Class members to compute the Workweek Amount. Third, the Class Administrator multiplies the Workweek Amount by the number of Eligible Workweeks worked by the individual class member as determined by the Settlement Administrator in accordance with Section X. (¶XI.A)

- Tax Allocation: All Net Settlement Payments to all members of the Settlement Class will be treated as penalties and interest and shall not be subject to employment taxes. (¶XV)

Funding of the Settlement. Within twenty-one (21) calendar days following the date on which the Court grants Final Approval of the Resolution and a determination of the pro-rata share of the settlement amount to which each member of the Settlement Class is entitled, Defendants will deposit the Settlement Amount into an interest-bearing trust account for the benefit of the

participating Settlement Class members and Class Counsel, through the Settlement Administrator. At no time prior to Final Approval of the Resolution shall Defendants be required to escrow any portion of the Settlement Amount. (¶XI.B)

Uncashed Checks. Any settlement checks that remain uncashed one hundred eighty (180) or more calendar days after issuance by the Settlement Administrator shall be voided. The Settlement Administrator will remit the entire amount of each Class Member's uncashed Net Settlement Payment to the California State Controller's Office in the name of the Class Member to whom the uncashed Net Settlement Payment check was addressed. (¶XI.C)

The Parties agree to use Phoenix Class Action Administration as the Settlement Administrator. (¶I.O)

Notice of Final Judgment will be ____.

The proposed Settlement Agreement was submitted to the LWDA on April 12, 2021. (Declaration of Alan Harris ("Harris Decl.") ¶2, Exhibit 1.)

All class members who do not opt out will release certain claims, discussed in detail below.

ANALYSIS OF SETTLEMENT AGREEMENT

A. Does a Presumption of Fairness Exist?

1. Was the Settlement reached through arm's-length bargaining? Yes. On December 1, 2020, the Parties attended a full-day mediation before Lisa Klerman, and reached a resolution by accepting a mediator's proposal. (Harris Decl. ¶8.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Class Counsel represents that their investigation included the exchange of information pursuant to informal discovery, numerous meetings and conferences between Class Counsel and Defendants' Counsel, and review and analysis of records pursuant to informal discovery. (*Ibid.*) Such discovery and investigations included, inter alia, interviews with potential witnesses and the exchange of detailed information regarding the putative class members' work. (*Id.* at ¶9.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in complex litigation, including wage and hour class action cases. (*Id.* at ¶¶ 3-6.)

4. What percentage of class has objected? This cannot be determined until the fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 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.")

B. Is the settlement fair, adequate and reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar* at 130.) Class Counsel has provided information, summarized below, regarding the maximum values of the claims asserted:

Violation	Maximum Exposure
Wage Statement Violations	\$8,500.00
Unpaid/Underpaid Minimum Wages and Overtime	No value
Waiting Time Penalties	\$120,000.00
Failure to Provide Records Upon Request	\$1,500.00
PAGA Penalties	\$21,500.00
Failure to Maintain Accurate Payroll Records	\$500.00
Total	\$152,000.00

(Harris Decl. ¶11.)

2. Risk, expense, complexity and likely duration of further litigation. Further litigation carried the possibility of non-certification and unfavorable rulings on the merits on the above legal issues.

3. Risk of maintaining class action status through trial. It would have been Plaintiff's burden to maintain the class action through trial.

4. Amount offered in settlement. Plaintiff calculated Defendant's maximum exposure at \$152,000. The settlement amount of \$125,000 represents approximately 82% of Defendant's maximum exposure, which, given the uncertain outcomes is within the "ballpark of reasonableness."

Assuming the requested deductions are taken in full, \$60,083.33 will remain for distribution to approximately 70 class members. Assuming full participation, each Class Member will receive approximately \$858.33 after all other deductions are taken from the settlement amount. [$\$60,083.33 / 71 = \858.33]

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Class Counsel has completed sufficient discovery in order to make an informed decision.

6. Experience and views of counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations.

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 or opt-out. This factor becomes relevant during the fairness hearing.

SCOPE OF RELEASE

Release as to All Settlement Class Members. Upon the Date of Final Approval, for the Settlement Period, Named Plaintiff and all members of the Settlement Class, except those that make a valid and timely request to be excluded from the Settlement Class and Resolution, waive, release, discharge, and promise never to assert in any forum any and all claims against: [the Releasees; see below], from any and all claims, demands, rights, liabilities fees, costs, and causes of action of every nature, including, but not limited to, violations of any state or federal

statutes, rules, regulations, orders, or principles of common law, that were alleged in the Litigation or which could have been alleged in the Litigation, whether known or unknown, suspected or unsuspected, asserted or unasserted, latent or patent, regardless of legal theory or type or amount of relief or damages claimed, which any Named Plaintiff and all members of the Settlement Class now has, at any time ever had, or hereafter may have against any Releasee, and which in any way arises out of, is based on, or relates in any way to: (i) the Porter Video, including, but not limited to, the facts asserted in the Litigation, including but not limited to: 1) Failure to Pay Wages and Overtime Compensation; 2) Failure to Pay Minimum Wages; 3) Failure to Timely Pay Wages Due At Termination and/or Resignation; 4) Failure to Provide Accurate Itemized Employee Wage Statements; 5) Violation of Business & Professions Code § 17200, et seq.; 6) Failure to Provide Records including personnel or wage records; 7) Penalties Pursuant to PAGA (Labor Code § 2698, et seq.); and 8) any other applicable provisions of state or federal law, including the applicable IWC wage orders, based on the facts alleged in the Litigation; (ii) attorneys' fees due or allegedly due under Labor Code Section 218.5 or any other statute, regulation, or contractual provision; (iii) other claims that Named Plaintiff or member of the Settlement Class has arising out of, based upon, or relating to the Porter Video, including, but not limited to, the allegations contained in the Litigation; and (iv) penalties or other payments which in any way arise out of, are based on, or relate in any way to any of the foregoing, including but not limited to penalties, premiums, or payments under Labor Code Sections 203, 210, 226(e), 226.3, 226.7, 226.8, 558, 1174.5, 2802, the federal Fair Labor Standards Act, any California Industrial Commission Wage Order, and/or any other statute or regulation regarding the payment of wages (hereinafter the "Settled Claims"). (§VII.A)

- Without in any way limiting the foregoing, Settled Claims shall include all claims, liabilities, rights, demands, suits, matters, obligations, liens, damages, losses, costs, expenses, debts, actions, and causes of action under statutes and regulations set forth in this Section VII(A), whether enforced directly or pursuant to Labor Code Section 2699, Business and Professions Code Section 17200, et seq., or any other mechanism. (*Ibid.*)
- "Releasees" are defined as: (i) Defendants and each and all of Defendants' respective past or present spouses, heir, assigns, partners, parents, subsidiaries, affiliates, licensors, assignors, licensees, assignees distributors, exhibitors, as well as any person or entity who or which collaborated on or contributed to the creation, authorship or production of the Porter Video, including, but not limited to, Stink Digital USA, LLC, Stink US Holding, Inc., Universal Music Group, Blue Note Records, and Gregory Porter; (ii) each and all of the predecessor or successor entities of any of those entities identified in subparagraph (i); (iii) any other individuals or entities of any kind, including but not limited to any payroll companies, which have been or could be alleged to be in any manner responsible (whether on an alter ego, joint employer, integrated enterprise, or any other theory) for any actual or alleged violations described in the Litigation; and (iv) all past and present directors, officers, principals, investors representatives, insurers, agents, shareholders, partners, members, managers, lawyers, and employees of any of the individuals or entities identified in subparagraphs (i), (ii), or (iii), including but not limited to New Caps, LLC, and any and all other entities with whom they have been, are now, or may hereafter be affiliated. (*Ibid.*)

- Without conceding that any release of claims under the Fair Labor Standards Act ("FLSA") requires any affirmative conduct or opt-in by the members of the Settlement Class, the Parties agree that the cashing of checks by the members of the Settlement Class shall be deemed an opt-in to an FLSA collective action, the settlement of which includes the FLSA releases specified in this Section VII(A). However, nothing in this Section or elsewhere in this Agreement shall preclude members of the Settlement Class from being bound by the releases in this Agreement whether or not they receive or cash their checks. (¶VII.A at pg. 11)
- Named Plaintiff and Settlement Class Members will additionally provide a general release and §1542 waiver. (¶VII.A at pg. 10)

CONDITIONAL CLASS CERTIFICATION

A. Standards

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. Windsor* (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.) Because a settlement eliminates the need for a trial, when considering whether to certify a settlement class, the court is not faced with the case management issues present in certification of a litigation class. (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859.) 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* at 240.)

B. Analysis

1. Numerosity. There are approximately 70 putative class members. (Harris Decl. ¶20.) Thus, numerosity has been sufficiently established.

2. Ascertainability. "A class is ascertainable, as would support certification under statute governing class actions generally, when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 961.) Here, the class is defined above. Class members are ascertainable from Defendant's records. (Harris Decl. ¶20.)

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.)

As to commonality, Plaintiff asserts that to each and every Class member, issues of fact and law are common across the settlement Class, as the Class Members all worked during the same time period as crew members on one music video. Plaintiff contends that the only significant "individual" or "non-common" issues will be the specific dollar amount of recovery to which each Class Member is entitled. (Motion at 6:20-23.)

As to typicality, Plaintiff contends, as the putative class representative, that his claims are similar to those of absent Class members, all of whom formerly worked or currently work

for Defendants, and all of whom were subject to the same employment procedures. Plaintiff and all Class Members worked on the same Porter Video production during the Class Period, and allegedly received late payments in the same manner and received wages statements of the same format. Plaintiff contends that all members of the Settlement Class have a common interest in holding Defendants responsible for any amounts that may be owed to them under the provisions of the Labor Code. (Motion at 7:12-20.)

As to adequacy, Plaintiff represents that as class representative, he understands his duty owed to the unnamed class members and does not have interests that are in conflict with other class members. (Declaration of Eddie Martinez ¶¶ 3-7.)

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions, including cases involving wage and hour violations.

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.

Since the elements of class certification have been met, the class may be conditionally certified at this time.

NOTICE TO CLASS

A. Standard

California Rules of Court, rule 3.769(e) provides: “If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing.” Additionally, rule 3.769(f) states: “If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.”

B. Form of Notice

The proposed notice is attached to the Settlement Agreement as Exhibit 3. The information provided in the proposed notice includes: a summary of the litigation, the nature and terms of the settlement, the proposed deductions from the gross settlement amount, the procedures for participating in, opting out of, or objecting to the settlement, and the time, date, and location of the final approval hearing. It will be distributed in English.

C. Method of Notice

As soon as practicable following Preliminary Approval of the Resolution, but no later than ten (10) calendar days after the Court's Preliminary Approval order, Defendants will provide to the Settlement Administrator the Class List. The Settlement Administrator shall run all the addresses provided through the United States Postal Service NCOA database (which provides updated addresses for any individual who has moved in the previous four years who has notified the U.S. Postal Service of a forwarding address) to obtain current address information, and shall mail the Notice and Workweek Dispute Form to the members of the Settlement Class via first-class regular U.S. Mail using the most current mailing address information available within ten (10) calendar days of the receipt of the Class List from

Defendants. The Notice shall provide the members of the Settlement Class forty-five (45) days' notice of all applicable dates and deadlines. (¶IX)

If a Notice is returned from the initial notice mailing, the Settlement Administrator will submit the applicable and available information, including name, Social Security number, and original mailing address, to a company that specializes in address skip tracing in an attempt to locate a more current address. If the Settlement Administrator is successful in locating a new address, it will re-mail the Notice to the Settlement Class member. Further, any Notices returned with a forwarding address to the Settlement Administrator, as non-deliverable before the deadline date, shall be sent to the forwarding address affixed thereto. (*Ibid.*) [extended deadline for remails?]

The Settlement Administrator will mail a reminder post-card to those Settlement Class members who have not responded to the Notice fourteen (14) days before the expiration of the claim period encouraging Settlement Class members to respond before the deadline. (*Ibid.*)

D. Cost of Notice

The cost of settlement administration is estimated at \$5,000 (¶VIII). This amount appears reasonable. However, 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.

ATTORNEY FEES AND COSTS

California Rules of Court, 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.) In common fund cases, the Court may utilize the percentage method, cross-checked by the lodestar. (*Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503.) Despite any agreement by the parties to the contrary, "the court has 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 \$41,666.67 (33 1/3%) in fees will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.

Counsel should also be prepared to justify any costs sought (capped at \$12,500) by detailing how such costs were incurred.

PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is proposed by the Court:

Preliminary Approval Hearing – TBD

Deadline for Serving Notices to Class Members – (20 calendar days from preliminary approval)

Deadline for Requests for Exclusion and Objections – (45 calendar days from initial mailing)

Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees and Response to any Objections – (16 court days prior to hearing)

Final Fairness Hearing and Final Approval –