

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

EDGAR HERNANDEZ, on behalf of himself and
all others similarly situated,

Plaintiff,

vs.

JOSEPH J. ALBANESE, INC., a California
Corporation; and DOES 1-50, inclusive,

Defendants.

Case No. 20CV366581

**ORDER RE: MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

The above-entitled matter came on for hearing on Wednesday, April 6, 2022, at 1:30 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and considered the written submissions filed by the parties and issued a tentative ruling on Tuesday, April 5, 2022. No party contested the tentative ruling; therefore, the court orders that the tentative ruling be adopted as the order of the court, as follows:

I. INTRODUCTION

This is a class and representative action arising out of various alleged wage and hour violations. The operative First Amended Complaint ("FAC"), filed on November 25, 2020, sets forth the following causes of action against defendant Joseph J. Albanese, Inc. ("Defendant"):

(1) Minimum Wage Violations; (2) Rest Period Violations; (3) Meal Period Violations;

(4) Failure to Indemnify All Necessary Business Expenditures; (5) Waiting Time Penalties; (6) Wage Statement Violations; (7) Unfair Competition; and (8) Civil Penalties Under the Private Attorneys General Act.¹

The parties have reached a settlement. Plaintiff David Jimenez (“Plaintiff”) moved for preliminary approval of the settlement.

On February 24, 2022, this court ordered Plaintiff to submit a supplemental declaration: (1) explaining why the class definition in the settlement is different from the description of the class in the FAC; (2) explaining why it is fair for the class to be defined as it is in the settlement; (3) explaining how the number of class members was determined from the class definition; and (4) explaining what, if any, consideration excluded class members received for the resolution of their claims and why it is fair to exclude those individuals from the settlement. The court further ordered Plaintiff to provide a new *cy pres* in compliance with Code of Civil Procedure section 384, submit counsel’s lodestar information and evidence of actual costs incurred, and submit an amended class notice.

On March 18, 2022, Plaintiff’s counsel provided some of the requested information in a supplemental declaration and briefing.

II. LEGAL STANDARD

Generally, “questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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.”

¹ The FAC also substituted David Jimenez and Karen Embry for Edgar Hernandez as plaintiffs. On December 30, 2020, at Embry’s request the court dismissed her as well as the second and third causes of action.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

“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, supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However “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, supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

The case has been settled on behalf of the following class:

[T]he named Plaintiff in this Action and any California hourly non-exempt Laborers International Union of North America (LIUNA) employee who worked for Defendant during the Settlement Class Period ... [(i.e., the period from May 15, 2016 through sixty (60) days from the date of the signing of the fully executed settlement agreement or preliminary approval of the settlement, whichever comes first)] (collectively the ‘Settlement Class’). The Settlement Class does not include any individuals who already have resolved the claims asserted in the Action, whether by settlement or adjudication.

(Declaration of Marcus J. Bradley in Support of Motion for Preliminary Approval of Class Action Settlement (“Bradley Dec.”), ¶ 2, Ex. 1 (“Settlement Agreement”), ¶¶ I.E & I.V.)

According to the terms of settlement, Defendant will pay a total non-reversionary amount of \$500,000. (Settlement Agreement, ¶¶ I.O & III.A.I.) The total settlement payment includes attorney fees up to \$166,666.67 (1/3 of the gross settlement fund), litigation costs and expenses not to exceed \$20,000, an incentive award of \$7,500 for the class representative, reasonable fees

1 of the settlement administrator, and a PAGA allocation of \$20,000 (75 percent of which will be
2 paid to the LWDA and 25 percent of which will be allocated to the net settlement fund). (*Id.* at
3 ¶¶ I.D, III.C, & III.D.)

4 The Settlement Agreement originally provided that funds from checks not cashed for 180
5 days after the final distribution would be paid to the State Controller's Office Unclaimed
6 Property Fund. (Settlement Agreement, ¶ III.F.10.) The parties have now executed a First
7 Amendment to Stipulation and Settlement Agreement that provides that designates Legal Aid at
8 Work as the *cy pres* recipient in compliance with Code of Civil Procedure section 384.
9 (Supplemental Declaration of Marcus J. Bradley in Further Support of Motion for Preliminary
10 Approval of Class Action Settlement ("Supp. Bradley Dec."), Ex., 3, p. 2:10-20.)

11 **B. Fairness of the Settlement**

12 Plaintiff contends that the settlement is fair, reasonable, and adequate in view of the
13 amount of the settlement as well as the risks inherent in continued litigation. Plaintiff states that
14 the settlement was reached following discovery and a full day of mediation with Michael
15 Dickstein. Plaintiff calculates Defendant's overall potential exposure to be as high as
16 \$55,027,799 for the class claims and \$32,000,000 for the PAGA claim. (Bradley Dec., ¶¶ 48,
17 59-60, 62, 64, 66, & 69-70.) Plaintiff states that the action faced substantial risks given that
18 Defendant intended to leverage the participation of putative class members to support its defense
19 of the action. (*Ibid.*) Plaintiff further advises that putative class members did not respond and
20 were unwilling to participate in the prosecution of the action, possibly due to fear of retaliation.
21 (*Id.* at ¶¶ 50 & 57.) In addition, Plaintiff notes that Defendant disputed liability, asserted that the
22 claims were inappropriate for class certification, argued that its written policies complied with
23 California law, and asserted that Plaintiff's damages estimates were grossly inflated. (*Id.* at
24 ¶¶ 51, 61, 63, 65-66, 68, & 70.) Plaintiff states that Defendant identified approximately 626
25 employees who are eligible to participate in the settlement. (Bradley Dec., ¶¶ 26 & 58.) Plaintiff
26 estimates that the average individual settlement award will be approximately \$440.63 and the net
27 recovery per workweek is approximately \$4.28. (*Id.* at ¶¶ 29-30 & 55.)

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1 Additionally, Plaintiff has now provided supplemental information regarding the class.
2 Plaintiff states that he was a member of the Labors International Union of North America during
3 his employment with Defendant and he can represent only other union employees in the same
4 bargaining unit. Plaintiff advises that after plaintiff Karen Embry, a non-union employee of
5 Defendant, dismissed her claims, the class definition in the FAC was not revised to reflect that
6 Plaintiff was only representing union employees. Plaintiff asserts that it is fair for the class
7 definition to be limited to union employees because the non-union employees are not included in
8 the release of claims. Plaintiff further explains that the only class member excluded from the
9 settlement is plaintiff Edgar Hernandez, who executed a settlement agreement whereby he
10 received \$1,500 in exchange for a general release of claims. Lastly, Plaintiff advises that the
11 number of class members was determined from reviewing Defendant's records and creating a list
12 of all union employees who worked for Defendant during the class period.

13 The supplemental information provided by Plaintiff addresses the court's concerns. The
14 court finds that the settlement is fair as it provides for some recovery for each class member and
15 eliminates the risk and expense of further litigation.

16 **C. Incentive Award, Fees, and Costs**

17 Plaintiff requests an incentive award of \$7,500 for the class representative.

18 The rationale for making enhancement or incentive awards to named plaintiffs is
19 that they should be compensated for the expense or risk they have incurred in
20 conferring a benefit on other members of the class. An incentive award is
21 appropriate if it is necessary to induce an individual to participate in the suit.
22 Criteria courts may consider in determining whether to make an incentive award
23 include: 1) the risk to the class representative in commencing suit, both financial
24 and otherwise; 2) the notoriety and personal difficulties encountered by the class
25 representative; 3) the amount of time and effort spent by the class representative;
26 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
27 enjoyed by the class representative as a result of the litigation. These "incentive
28 awards" to class representatives must not be disproportionate to the amount of
time and energy expended in pursuit of the lawsuit.

25 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks,
26 brackets, ellipses, and citations omitted.)

27 The court approved the incentive award in connection with its prior order on Plaintiff's
28 motion for preliminary approval.

1 The court also has an independent right and responsibility to review the requested
2 attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
3 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will
4 seek attorney fees of \$166,666.67 (1/3 of the total settlement fund). Plaintiff's counsel did not
5 submit the requested lodestar information (including hourly rates and hours worked) or evidence
6 of actual costs incurred. Plaintiff's counsel is order to provide that information to the court prior
7 to the final approval hearing.

8 **D. Conditional Certification of Class**

9 Plaintiff requests that the putative class be conditionally certified for purposes of the
10 settlement.

11 Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order
12 approving or denying certification of a provisional settlement class after [a] preliminary
13 settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a
14 class "when the question is one of a common or general interest, of many persons, or when the
15 parties are numerous, and it is impracticable to bring them all before the court" As
16 interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and
17 (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v.*
18 *Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).

19 The "community-of-interest" requirement encompasses three factors: (1) predominant
20 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
21 and, (3) class representatives who can adequately represent the class. (*Sav-On, supra*, 34 Cal.4th
22 at p. 326.) "Other relevant considerations include the probability that each class member will
23 come forward ultimately to prove his or her separate claim to a portion of the total recovery and
24 whether the class approach would actually serve to deter and redress alleged wrongdoing."
25 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of
26 establishing that class treatment will yield "substantial benefits" to both "the litigants and to the
27 court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

28 As explained by the California Supreme Court:

1 The certification question is essentially a procedural one that does not ask whether an
2 action is legally or factually meritorious. A trial court ruling on a certification motion
3 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.

4 (*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

5 Plaintiff estimates there are approximately 626 class members. The supplemental
6 information provide by Plaintiff demonstrates that the class members can be determined from
7 Defendant's records. There are common issues regarding Defendant's wage and hour policies
8 and practices. No issue has been raised regarding the typicality of adequacy of Plaintiff as class
9 representative. In sum, the court finds that the proposed class should be conditionally certified.

10 **E. Class Notice**

11 The content of a class notice is subject to court approval. "If the court has certified the
12 action as a class action, notice of the final approval hearing must be given to the class members
13 in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

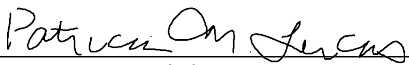
14 The amended notice generally complies with the requirements for class notice and
15 complies with the court's prior order. (Supp. Bradley Dec., Ex. 2.) However, the amended
16 notice still stated that funds from uncashed checks will be sent to the California State
17 Controller's Unclaimed Property Fund. After the tentative ruling issued on April 5, Plaintiff
18 submitted s further amended notice to reflect the new *cy pres* recipient, Legal Aid at Work. The
19 further amended notice is approved.

20 **IV. CONCLUSION**

21 The motion for preliminary approval of the class action settlement is GRANTED, subject
22 to the modification to the class notice. The final approval hearing is set for December 7, 2022, at
23 1:30 p.m. in Department 3.

24 The Case Management Conference set for April 6, 2022 is vacated.

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26 Dated: April 6, 2022

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28 Patricia M. Lucas
Judge of the Superior Court

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