

**MERIDA v. ALL-PRO ENTERPRISES, INC.**

**MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Date of Hearing: January 16, 2019

Department: SSC-11

Case No.: BC667384

CONFORMED COPY  
ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

JAN 30 2019

Sherri R. Carter, Executive Officer/Clerk of Court

By: Dejane Wortham, Deputy  
Dejane Wortham

RULING:

GRANT preliminary approval of the Settlement Agreement and find 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 Mahoney Law Group, APC, as Class Counsel;
- (4) Appoint Plaintiff Leonel Merida as Class Representative;
- (5) Approve the notice;
- (6) Set the scheduled matters as indicated below; and
- (7) Plaintiffs' counsel shall file a proposed Order, consistent with this ruling by February 8, 2019.

That order shall include two distinct procedures by which the parties and court will comply with CCP Section 384's amended provisions with regards to cy pres recipients.

Thirty (30) days after the final report is filed with the Court, the parties shall prepare and file a stipulation and proposed order and Proposed Amended Judgment.

The stipulation and proposed order shall include, *inter alia*, the amount of the distribution of unpaid cash residue, and unclaimed or abandoned funds to the non-party, the accrued interest on that sum and any other information required to be set forth pursuant to Section 68520 of the Government Code, as incorporated into CCP Section 384.5.

The stipulation shall be signed by counsel for the class, defendant's counsel and counsel for (or an authorized representative of) the non-party ("cy pres") recipient. The stipulation shall include a statement to the effect that all interested persons are in accord with the amended judgment and have no objection to the entry of an amended judgment. If there are objections by any party, class counsel shall immediately notify the court and the matter will be set for further hearing.

Pursuant to Section CCP 384.5, a conformed copy of the stipulation and order and amended Judgement (once signed by the Court) shall be forwarded by class counsel to the Judicial Council.

#### 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.4<sup>th</sup> 1135, 1151 [citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4<sup>th</sup> 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. (Cal. 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.4<sup>th</sup> 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.4<sup>th</sup> 224, 244-245 (“*Wershba*”), discusses factors 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, supra* at p. 245 [citing *Dunk, supra* at p. 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, supra* at p. 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.4<sup>th</sup> 116, 128 (“*Kullar*”) [citing *Dunk, supra* at p. 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 [“It 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

The Settlement Class is defined as all persons who are employed or have been employed by Defendant as an hourly employee in the State of California at any time within four (4) years prior to the filing of the Action and continuing through March 8, 2018. ("Settlement Class"). (Settlement Agreement, ¶I.S)

- “Settlement Period” means the period from July 3, 2013 to March 8, 2018. (¶I.T)
- The parties stipulate to provisional certification of the Class for purposes of settlement only. (¶IV)
- There are approximately 402 putative class members. (¶I.R.)

The Gross Settlement Fund (“GSF”) is **\$290,000, non-reversionary** (¶I.R)

- Should the class size increase by more than 10%, i.e. forty (40) as the Defendant represented the Class size to consist of 402 class members, then the Settlement Amount shall increase proportionately, i.e. \$29,000.00. (*ibid.*)

The Net Settlement Amount (“NSA”) of **\$151,333.34** is the GSA minus:

- Up to **\$96,666.66** (33 1/3%) for attorneys’ fees (¶XIII);
- Up to **\$12,000** for attorneys’ costs (*ibid.*);
- Up to **\$7,500** for an incentive award to the class representative (¶XIV);
- Estimated **\$15,000** for costs of claim administration (¶VIII); and
- Payment of **\$7,500** (75% of \$10,000 PAGA penalty) to the LWDA (¶XVI).

Defendant’s share of payroll taxes will be paid separate and apart from the GSF. (¶I.H)

Response Deadline: Class Members have 30 days from the initial notice mailing to dispute workweeks, opt-out, and/or object to the settlement. (¶¶ I.O)

- Class Members may object in writing and/or may appear personally at the Final Approval Hearing and ask to speak to the Court. (¶IX.B)
- If 10% or more of Class Members validly opt out, Defendant may void the Settlement. (¶IX.E)

Individual Settlement Payment Calculation: Individual Settlement Shares will be calculated and apportioned to Participating Class Members from the Net Settlement Amount on a pro rata basis, based on the Participating Class Members' respective number of Workweeks during the Class Period. Specific calculations of the Individual Settlement Shares and Individual Settlement Payments will be made as follows:

- The Settlement Administrator will determine the total number of Workweeks worked by each Settlement Class Member, as reflected on the Class List provided by Defendants.

- The Settlement Administrator will determine the aggregate number of Workweeks worked by all Settlement Class Members during the Class Period ("Workweeks").
- To determine each Settlement Class Member's Individual Settlement Share, the Settlement Administrator will use the following formula: Individual Settlement Share = (Settlement Class Member's Workweeks ÷ Class Workweeks) x Net Settlement Amount.
- The Individual Settlement Share will be reduced by any required employee's share of taxes and withholdings with respect to the wage-portion of the Individual Settlement Share as set forth in this Agreement, to yield the Individual Settlement Payment.
- Participating Class Members (i.e. Settlement Class Members who do not submit a timely and valid Request for Exclusion) will be entitled to payment of their Individual Settlement Share as calculated on a pro rata basis based on the Participating Class Members' respective individual Workweeks as compared to the aggregate total Workweeks of all Participating Class Members. No portion of the Net Settlement Amount will revert to Defendants. (§§ X.A-E)

Allocation. Each Participating Class Member's gross settlement award will be apportioned as follows: 20% wages; 40% penalties; and 40% interest. (§XV)

Uncashed Settlement Share Checks: Individual Settlement Payment checks shall remain valid and negotiable for 180 calendar days after the date of their issuance. Within 10 calendar days after the expiration of the 180 day period, the Settlement Administrator will cancel all Individual Settlement Payment checks that have not been negotiated.

The parties, however, cannot agree to avoid the application of accrued interest (see conditional grant). (See §XI.A) The uncashed checks shall be handled as discussed in the first section and shall be agreed to by the parties, and by the cy pres recipient -- Legal Aid Foundation of Los Angeles ("LAFLA").

"Final" and "Final Effective Date" The terms "Final" and "Final Effective Date" shall mean the first business day upon which the last of the following have occurred:

- If Class Members have not filed objections, or if they have filed objections, said objections have been withdrawn, entry of the Final Judgment in this Action after the Court has granted final approval of the Settlement, and a file stamped copy of the Final Judgment with a proof of service has been served on all parties by Class Counsel, or (§I.E.a)
- If Class Members have filed objections that have not been withdrawn, either (1) the time to appeal, object or attack the Court's entry of Final Judgment has expired and there has been no appeal, objection or attack; or (2) The court of last resort to which any appeal is taken has affirmed its entry of Final Judgment in its entirety or the Class Member has presented a petition for review and the affirmance is no longer subject to further appeal or review, and no further challenge to the entry of Final Judgment is possible. (§I.E.b)

The claims administrator is Phoenix Settlement Administrators, Inc. (¶VIII)

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 March 8, 2018, Class Counsel participated in private mediation with wage and hour mediator and retired Judge Hon. Carl J. West (Ret.). The Parties reached a settlement that ultimately resulted in a comprehensive settlement agreement embodied in a Class Action Settlement Agreement and Release (the "Settlement"), for which the Parties now seek preliminary approval. (Declaration of Kevin Mahoney ¶14.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. Class Counsel represents that Defendants provided the following data: (1) demographic data on all class members ; (2) total number of class members including: number of former and currently employed class members; (3) wage statements (exemplar) of all versions used during the class period; (4) Defendants' policies on: Meal and Rest Breaks, Bonus pay, Incentives and reimbursement; (5) all applicable Employee Handbooks used during the liability period; and (6) Plaintiff's entire personnel file including all pay stubs and wage statements. (*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 ¶¶ 27-28.)

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 analyzed the data provided by Defendant and calculated Defendant's maximum and reasonable exposure on each of the alleged claims as follows:

<b>Violation</b>	<b>Maximum Exposure</b>	<b>Realistic Exposure</b>
Minimum/Overtime Wage Claim	\$210,000.00	\$105,000.00
Meal/Rest Period Claim	\$255,000.00	\$85,000.00
Labor Code § 203 Claim	\$160,000.00	\$80,000.00
Wage Statement Violations	\$190,000.00	\$95,000.00
PAGA Penalties	\$949,000	\$0.00
<b>Totals</b>	<b>\$1,764,000.00</b>	<b>\$365,000.00</b>

(Mahoney Decl. ¶¶ 16-23; Supp. Mahoney Decl. ¶9.)

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

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

4. Amount offered in settlement. Plaintiffs calculated Defendants' maximum exposure for the alleged violations to be approximately \$1,764,000 and the realistic exposure to be approximately \$365,000. (*Ibid.*) The Gross Settlement Fund of \$290,000 represents approximately 16% of Defendant's maximum exposure and 79% of Defendant's discounted exposure. These percentages are well within the "ballpark of reasonableness."

5. Extent of discovery completed and the stage of the proceedings. As stated above, it appears that Plaintiffs have 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 wage and hour class action cases. Class Counsel is of the opinion that the settlement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances. (Mahoney Decl., ¶126.)

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

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 Final Effective Date, Named Plaintiffs 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 wage-related claims arising during the Settlement Period against Defendant, Defendant's parents, owners, subsidiaries, affiliates, payroll providers, professional employer organizations, their insurers, attorneys and all agents thereof, that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation, including but not limited to claims during the Settlement Period for: unpaid minimum wages, unpaid overtime wages, and/or any deduction(s) from wages; meal and rest breaks; wage statement violations; failure to timely pay wages; separation pay violations (Labor Code Section 203); unfair business practices; and PAGA; and any other applicable provisions of state or federal law, including the applicable IWC wage order(s) but not including the Fair Labor Standards Act, based on the facts alleged or which could have been alleged in the Litigation. With respect to only those members of the Settlement Class who deposit or cash his/her settlement check, the released claims shall also include any and all claims under the Fair Labor Standards Act or that could have been asserted under federal law based on the facts alleged in the Litigation or that arise from the allegations pled in the Litigation. The Settlement check will include language on the back of the check that states "by depositing and/or cashing this settlement check you have affirmatively opted-in to the class and agree to release all claims for unpaid wages under federal law," or similar language upon agreement of the Parties. (¶VII.A)

- The Class Representatives will provide a general release and §1542 waiver. (¶VII.B)

The release of claims by class members is acceptable as it is limited to claims that were or could have been alleged based on the facts alleged, and which arose during the relevant period. Plaintiff's broader release is acceptable as he was represented by counsel when this term was negotiated.

## 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. 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.) 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, supra* at p. 240.)

### B. Analysis

1. Numerosity. This action involves a class of approximately 402 individuals. (Mahoney Decl. ¶8.)

2. Ascertainability. This class definition "is precise, objective and presently ascertainable." (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) Class Members are identifiable from Defendant's employee and payroll records. (Motion at 12:14-18.)

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.)

Here, for purposes of the Settlement only, the Parties agree that common factual and legal issues include, among other things: (1) whether Defendants engaged in a common course of failing to provide and/or compensate employees based on the Labor Code and applicable Wage Order requirements for meal periods; (2) whether Defendants engaged in a common course of failing to authorize and permit and/or compensate employees based on the Labor Code and applicable Wage Order requirements for rest periods; (3) whether Defendants underpaid wages to employees as a result of not compensating Plaintiff and Class Members for all time worked or for overtime; (4) whether these alleged violations resulted in ancillary violations of Labor Code § 203; and (6) whether these alleged violations are cause for civil penalties under Lab. Code, § 2699 et seq. Furthermore, all Class Members suffer from, and seek redress for, the same alleged injuries. (Motion at 13:3-12.)

Regarding typicality, Class Counsel represents that the named Plaintiff, like all Class Members, worked for Defendant and, like all Class Members, the named Plaintiff has suffered

relatively moderate damages as a result of the alleged violations of California's wage and hour laws and regulations. (Motion at 13:19-21.)

Finally, Class Counsel represents that the adequacy requirement is met because the named Plaintiff, Leonel Merida, is eligible to receive a class representative payment of \$7,500.00 upon approval of the Court. Thus, no "settlement allocation" questions are raised. Moreover, class members are not divided into conflicting discrete categories because they all claim additional wages for work they performed in California for Defendants. Finally, any class member who wishes to "opt out" of the Settlement may do so. (Motion at 14:1-10.)

4. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class actions.

5. Superiority. Given the size of the potential individual recovery, it would be impracticable to bring each Class Member's claim as an individual claim. (Motion at 14:20-25.)

Because 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 to class members is attached to the Supplemental Declaration of Kevin Mahoney as Exhibit A. The information provided in the proposed notice includes a summary of the litigation, the nature and terms of the settlement, the procedures for participating in, opting out of, or objecting to the settlement, and the time, date, and location of the final approval hearing.

The Court finds the notice acceptable.

##### C. Method of Notice

Within 14 calendar days after the Court grants Preliminary Approval of the Settlement, Defendant shall provide to the Settlement Administrator the Class List. The Settlement Administrator shall perform an address search using the United States Postal Service National Change of Address ("NCOA") database and update the addresses contained on the Class List with the newly-found addresses, if any. Within 10 calendar days of receiving the Class List from Defendants, the Settlement Administrator shall mail the Class Notice to the Settlement Class Members via first-class regular U.S. Mail using the most current mailing address information available. (¶IX.A.) Notice will be provided to Class Members in both English and Spanish. (Supp. Mahoney Decl. ¶21.)



If a Class Notice from the initial notice mailing is returned as undeliverable, the Settlement Administrator will attempt to obtain a current address for the Settlement Class Member to whom the returned Class Notice had been mailed, within 5 business days of receipt of the returned Class Notice, by: (1) contacting the Settlement Class Member by phone (if the Class List provided by Defendants includes a last known telephone number for the Settlement Class Member), and (2) undertaking skip tracing. If the Settlement Administrator is successful in obtaining an updated address, it shall promptly re-mail the Class Notice to the Settlement Class Member. Further, any Class Notices that are returned to the Settlement Administrator with a forwarding address before the Response Deadline shall be promptly re-mailed to the forwarding address affixed thereto, within 5 business days of receipt of the returned Class Notice. (§IX.A.)

**D. Cost of Notice**

The settlement administration costs are estimated at **\$15,000** (Settlement Agreement §VIII.) This amount appears reasonable. However, prior to the time of the final fairness hearing, the Claims 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.4<sup>th</sup> 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4<sup>th</sup> 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4<sup>th</sup> 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.5<sup>th</sup> 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.4<sup>th</sup> 123, 128.)

The question of whether class counsel is entitled to **\$96,666.66** (33 1/3%) in attorneys’ 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 \$12,000**) by detailing how such costs were incurred.

**PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

The following schedule is proposed by the Court:

Preliminary Approval Hearing – January 30, 2019

Deadline for Serving Notices to Class Members – February 25, 2019.

Deadline for Objecting or Opting Out – March 27, 2019.

Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees (and respond to any objections) – April 29, 2019.

Final Fairness Hearing and Final Approval – May 21, 2019 at 11:00 a.m.