

Flores et al. v. Cambrian Homecare
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date of Hearing: September 27, 2019 c/f August 27, 2019

Department: 11 (Spring Street)

Case No.: BC544612

TENTATIVE:

Grant Preliminary Approval. The Court finds:

- (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 the Mahoney Law Group, APC as Class Counsel;
- (4) Appoint Plaintiffs Delia Flores and Rhonda Ciavardini as the Class Representatives;
- (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 _____.

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. (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.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 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.4th 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 [“[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

Settlement Classes:

- **24-Hour Shift Class:** All current and former Caregivers who worked for Cambrian Homecare in California as a Caregiver and worked 24-hour shifts at any time from May 5, 2010, to the date of preliminary approval (the “24-Hour Shift Class”). (Settlement Agreement, ¶1.)
 - **24-Hour Shift Class Period:** May 5, 2010, to the date of preliminary approval. (*Ibid.*)
 - Cambrian has represented there were approximately 1,003 24-hour shifts worked by 24-Hour Shift Class Members during the relevant period. If the actual total number of collective shifts for the 24-Hour Shift Class increases by more than 10%, Cambrian will increase the Gross Settlement Fund in an amount equal to the settlement payments due to the additional 24-Hour Shift Class Members under the formula established by this Settlement Agreement. (¶13.B)
- **Non-Respite Class:** All current and former hourly Non-Respite Caregivers for Cambrian any time on or after January 1, 2014, to the date of preliminary approval (the “Non-Respite Class”). (*Ibid.*)
 - **Non-Respite Class Period:** January 1, 2014, to the date of preliminary approval. (*Ibid.*)
 - Cambrian has represented that there are 462 Non-Respite Caregivers who worked for Cambrian from January 1, 2014, to September 1, 2018, who will be subject to this Settlement. If the total number of Non-Respite Class Members who worked for Cambrian from January 1, 2014 to the present who Cambrian claims will recover under this Settlement increases by 10% or more than estimated at mediation (i.e., increases by more than 46 people), then Cambrian will increase the Gross Settlement Amount in an amount equal to the settlement

payments due to the additional Non-Respite Class Members under the formula established by this Settlement Agreement. (¶3.B)

The parties agree to conditional certification for the purposes of settlement. (¶1)

The Settlement Payment ("SP") is **\$250,000, non-reversionary**. (¶3)

The Net Settlement Amount ("NSA") of **\$109,675** is the SP minus:

- Up to **\$83,325** (1/3) for attorney's fees (¶3.C.4);
- Up to **\$32,000** for attorneys' costs (*Ibid.*);
- Up to **\$15,000** for incentive awards to the class representatives (\$7,500 x 2) (¶3.C.3); and
- Estimated **\$10,000** for costs of claim administration (¶3.C.2).

Cambrian's required FICA, FUTA, and other payroll tax payments resulting from payment of the settlement payments to Settlement Class Members shall be paid separate and apart from the Gross Settlement Amount. (¶3.C.5)

This is not a claims made settlement. (¶3.C)

Settlement Payment Procedures: From the Net Settlement Fund, the Settlement Administrator will calculate the individual settlement payments for each Class as follows based on Cambrian's records:

- **Non-Respite Caregiver Class:** After January 1, 2014. Cambrian was only required to pay overtime wages to non-respite caregivers after they worked in excess of 9 hours in a workday or 45 hours in a workweek. Plaintiffs conducted an analysis of a sample of time and pay records. The records themselves show very little overtime worked and if time was recorded in excess of 9 hours in a workday or 45 hours in a workweek, the employee appears to have been paid at the overtime rate. The Parties agree that the overtime claim for this Class based on the time and pay records is minimal. Therefore, a fair and reasonable distribution to this Class provides for a set sum payment determined by the total amount of time each Non-Respite Caregiver worked for Cambrian during the Class Period as follows:

(1) Worked in 2014 only (107):	\$50.00
(2) Worked in 2014-2015 (127):	\$100.00
(3) Worked in 2014-2016 (92):	\$150.00
(4) Worked in 2014-2017 (47):	\$200.00
(5) Worked in 2014-Preliminary Approval (89):	<u>\$250.00</u>
	\$63,500.00
	(¶4.B.a)

- **24-Hour Shift Class:** The 24-Hour Shift Class shall be paid a set dollar amount for every 24-hour shift worked during the Class Period. Cambrian has represented there were

approximately 1,003 24-hour shifts worked by Class Members during the Class Period. After deducting the Non-Respite Caregiver Class payment from the Net, the estimated remaining Net Settlement Amount is \$46,175.00; when this remainder of the Net Settlement Fund is divided by the total 24-hour shifts (1,003), the amount payable per shift to 24-Hour Shift Class Members estimated to be is \$46.04. (¶4.B.b)

Net Settlement Allocation: 25% as wages; 75% as penalties and interest. (¶4.D)

Response Deadline: Class Members have 45 calendar days from the initial mailing of the Class Notice by the Settlement Administrator to submit requests for exclusion, objections, or disputes. (¶¶10.E, 10.F, 10.G) Settlement Class members to whom Notice Packets are re-sent after having been returned as undeliverable to the Settlement Administrator shall have 14 days from the date of re-mailing, or until the Response Deadline has expired, whichever is later to mail a Request for Exclusion or objection. (¶10.D)

- **Right to Revoke:** Cambrian shall have the right at its sole discretion to revoke this Settlement Agreement and stipulation to class certification for settlement purposes if Class Members holding 20% or more of the amount to be actually distributed to the class timely request exclusion from the settlement. (¶11)

Uncashed Settlement Share Checks: Settlement payment checks issued to Settlement Class Members that remain uncashed 180 calendar days after such checks are mailed by the Settlement Administrator ("Check Expiration Date") shall become void, and the funds associated with such voided checks, plus any accrued interest that has not otherwise been distributed (together, "Unused Funds"), shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code section 1500 et seq., for the benefit of those Settlement Class members who did not cash their checks until such time that they claim their property. The settling Parties agree that this disposition results in no "unpaid cash residue," or "unclaimed or abandoned funds" under California Civil Procedure Code section 384, as amended effective June 27, 2018, as the entire Net Settlement Amount will be paid out to the Settlement Class Members, whether or not they all cash their payment checks. Therefore, Defendant will not be required to pay any interest on said amount. (¶4.E)

The claims administrator is Phoenix Class Action Administrator ("PSA"). (¶8)

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. The Parties have participated in two mediation sessions with different private mediators. On June 16, 2016, prior to the hearing on class certification, the Parties participated in mediation with retired Judge Peter Lichtman. The matter did not resolve. On January 15, 2019, the Parties participated in a

second mediation with retired Judge Thierry Colaw. Following a full day of mediation, the Parties reached a settlement. (Motion, 2:15-19.)

2. Were investigation and discovery sufficient to allow counsel and the Court to act intelligently? Yes. It is represented that class counsel communicated with dozens of class members in order to investigate the claims of the Plaintiffs in this case and in support of class certification. (Declaration of Katherine J. Odenbreit ("Odenbreit Decl."), ¶15.) Counsel further represents that formal discovery was conducted which yielded information and documentation concerning the claims set forth in the litigation, such as Defendant's time and pay records for approximately 1/3 of putative class members and the mix of current versus former employees. (*Id.* at ¶¶6, 14.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in complex litigation, including wage and hour class action cases. (*Id.* at ¶¶23-31.)

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.)

Counsel provided the following exposure analysis in this matter:

CLAIM	EXPOSURE
Overtime/ Minimum Wage	\$113,768.00
Rest Breaks	\$115,915.40
Wage Statement Claim	\$94,200.00
Waiting Time Penalties	\$210,784.00
TOTAL	\$534,667.40

(Motion, 7:9-8:13; Odenbreit Supp. Decl., ¶16)

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. Based on the calculations above, the Settlement amount of \$250,000 therefore represents approximately 47% of the maximum recovery in this matter. This percentage is 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.

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

In exchange for the consideration set forth in this Settlement Agreement, each Settlement Class Member who does not validly opt- out, on behalf of themselves, and on behalf of all those who claim by and through them, or in their stead, including, but not limited to agents, representatives, predecessors, successors and assigns does hereby and forever release, acquit, and discharge, and covenant not to sue, Cambrian, including its past and present divisions, affiliates, affiliated entities, related entities, parents, subsidiaries, predecessors, successors, assigns, and their respective shareholders, owners, officers, directors, employees, agents, trustees, attorneys, insurers, representatives, administrators, fiduciaries, beneficiaries, subrogees, executors, partners, and privies (collectively the "Released Parties" and each a "Released Party" or "Releasee") from liability for the following claims, which are being released for the time period May 5, 2010 to the Effective Date: All claims and causes of action alleged or that could have been alleged based on the facts set forth in the operative Complaint on file in this Action against Defendant. These claims include but are not limited to: (1) Any claims for unpaid wages-minimum wage and overtime wages, and claims for interest, penalties (including, but not limited to, waiting time penalties), or premiums in connection therewith. as well as any claims under the California Labor Code, California Wage Orders, or the Fair Labor Standards Act, alleged or which could have been alleged under the facts pleaded in the operative Complaint; (2) Any claims for Failure to comply with the employee itemized wage statement provision under California Labor Code section 226; (3) Any claims for failure to keep accurate payroll records; (4) Any claims for failure to provide or make available rest periods as required under California Labor Code section 512 and applicable IWC Wage Orders; (5) Any claims under California Business and Professions Code section 17200, et seq.; (6) Any and all other claims under California common law, the California Labor Code, California Wage Orders, the California Business and Professions Code, asserted in or that could have been asserted based on the facts set forth in the operative Complaint. (¶2.1) Class Members must expressly opt into the settlement to release any and all FLSA Claims. (¶2.1.B) Class Members expressly opt-in for FLSA purposes by endorsing their checks. (Notice, pgs. 4-5.)

The Class Representatives will also provide general releases and CC 1542 waivers. (¶¶2.1.A-D)

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.

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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

The Court has previously certified the class in this class. On July 14, 2015, Plaintiff Delia Flores filed a Motion for Class Certification. The motion was heard on March 15, 2017. The Court initially expressed concerns about Plaintiff Delia Flores’ health and her ability to continue to vigorously litigate on behalf of the class. The Court requested Plaintiff identify new proposed class representative and submit supplemental briefing on the adequacy of the new class representative. (See Minute Order, dated March 15, 2017). Rhonda Ciavardini was proposed as a new class representative. (Motion, 1:23-28.)

On May 10, 2017, the Court held another hearing on Plaintiff’s Motion for Class Certification. The Court approved Ms. Ciavardini as the class representative. The Court granted certification as to the 24-Hour minimum wage class and overtime class to the extent it was overtime claimed for time worked after January 1, 2014 and the derivative claims. (See May 10, 2017 Order). The Court denied certification of the misclassification sub-class. (Motion, 2:1-5.)

Following the issuance of the certification order, a dispute arose between the Parties as to whether the certification order included “Respite Caregivers.” Defendant argued for the first time at the certification hearing that respite caregivers should not be included in the class because they are exempt from the Labor Code requirements at issue in this case. Respite caregivers are those who work with disabled children and are paid through state contracts with the employer. Ultimately the Court determined respite caregivers were excluded from the certified class. Therefore, the remaining certified class includes (1) caregivers who worked 24-hour shifts during the class period, and (2) non-respite caregivers who worked for Defendant after January 15, 2014. (Motion, 2:6-13)

This is the class which is subject to this settlement. (See Settlement Agreement, ¶1.)

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 as Exhibit B to the Supplemental Declaration of Katherine J. Odenbreit. 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

Notice will be by Direct Mail. Within 10 days after entry of an order preliminarily approving this Settlement Agreement, Cambrian will provide the Settlement Administrator with a class list including the names, last known addresses, and social security numbers (in electronic format) of Settlement Class Members, as well as the total workweeks worked by each member of the Settlement Class during the Class Period. (¶10.A) Within 7 days from receipt of the class list information, the Settlement Administrator shall: (i) run the names of all Settlement Class Members through the National Change of Address (“NCOA”) database to determine any updated addresses for Settlement Class Members; (ii) update the addresses of any Settlement Class Member for whom an updated address was found through the NCOA search; and (iii) mail the Notice Packet (Attached hereto as Exhibits A and B) to each Settlement Class Member at their last known address or at the updated address found through the NCOA search, and retain proof of mailing. (¶10.B) The Settlement Administrator shall use its best professional efforts, including utilizing a “skip trace,” to track any Settlement Class Member’s mailing returned as undeliverable, and will re-send the Notice Packet promptly upon identifying updated mailing addresses through such efforts. (¶10.C) Any Notice Packets returned to the Settlement Administrator as non-delivered on or before the Response Deadline shall be re-mailed to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator shall make reasonable efforts, including utilizing a “skip trace,” to obtain an updated mailing address within 5 business days of receiving the returned Notice Packet. If an updated mailing address is identified, the Settlement Administrator shall resend the Notice Packet to the Settlement Class member immediately, and in an event within 3 business days of obtaining the updated address. (¶10.D)

Counsel represents that Plaintiffs have spoken to and deposed numerous class members in this matter none of which have required an interpreter. Further, Defendant requires that all employment-related documents are in English, including all policies and procedures applicable to Plaintiffs and Class Members. (Odenbreit Supp. Decl., ¶16.a)

A dedicated web page will be established for the administration of this Settlement. The judgment will remain on the webpage available for Settlement Class Members to download for no less than 1 year. (*Id.* at ¶16.b)

D. Cost of Notice

The settlement administration costs are estimated at **\$10,000**. 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.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 **\$83,325** (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 **\$32,000**) by detailing how such costs were incurred.

PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

The following schedule is proposed by the Court:

Preliminary Approval Hearing – September 27, 2019

Deadline for Serving Notices to Class Members – October 14, 2019 (within 17 days of preliminary approval date)

Deadline for Objecting or Opting Out – December 2, 2019 (45 days from the date the Notice Packets are mailed to class members)

Deadline for Class Counsel to File Motion for Final Approval of Settlement and Motion for Attorney Fees (and respond to any objections) – 12 / 20, 2020. 2019
(16 court days prior to hearing)

Final Fairness Hearing and Final Approval – 1 / 15, 2020. at 9am

OCT. 4, 2019 - deadline to submit revised order