

[TENTATIVE] RULING/ORDERS

FILED
Superior Court of California
County of Los Angeles

NOV 02 2020

Sherri R. Carter, Executive Officer/Clerk
By Pedro Martinez, Deputy

Rubi v. Bergen Shippers Corp., Case No.: BC715077

The Parties' Motion for Preliminary Approval of class action settlement is GRANTED as fair, adequate, and reasonable on the condition that counsel provide declarations disclosing the interest or involvement by any counsel or party in the governance or work of the cy pres recipient of Excluded Class Member funds, Jewish Free Loan Association. (See ¶54).

The Parties' supplemental paperwork must be filed by November 23, 2020.

Nonappearance case management review is set for December 2, 2020, 8:30 a.m., Dept. 9.

The essential terms are, among other things:

A. The Gross Settlement Amount ("GSA") is \$375,000;
B. The Net Settlement Amount ("Net") (\$213,250) is the GSA minus the following:

Up to \$124,998.75 (33 1/3%) for attorney fees;
Up to \$14,000 for litigation costs;
Up to \$10,000 for a service award to proposed class representative(s);
Estimated \$10,000 for settlement administration costs;
Payment of \$3,750 (75% of \$5,000 PAGA penalty) to the LWDA;
and

C. Plaintiffs release of Defendants from claims described herein.

I.
BACKGROUND

Plaintiff Laura Rubi sues her former employer, Defendant Bergen Shippers Corp., dba Bergen Logistics ("Defendant") for alleged wage and hour violations. Defendant is a New Jersey corporation focused on logistics and operates a facility in Los Angeles, California. Plaintiff seeks to represent a class of Defendant's current and former non-exempt employees who were misclassified as exempt employees.

Plaintiff filed the initial class action complaint on July 30, 2018. Plaintiff filed the First Amended Complaint on November 7, 2018, alleging causes of action for: (1) Misclassification of Exempt Employee Status; (2) Failure to Pay Wages, including Minimum Wages and Overtime; (3) Failure to Provide Rest Periods; (4) Failure to Provide Meal Periods; (5) Failure to pay Reporting Time and Other Wages; (6) Failure to Timely Pay Compensation Due and Owing; (7) Failure to Provide Accurate Itemized Wage Statements; (8) Unfair Business Practices; and (9) Penalties Pursuant to Labor Code § 2699 (Private Attorney General Act).

The parties engaged in a full-day mediation on September 12, 2019 before mediator Jeffrey Krivis, Esq. On November 22, 2019, with the assistance of the mediator, the parties reached an agreement in principle to resolve all claims asserted or that Plaintiff could have asserted.

Plaintiffs filed the instant motion for preliminary approval on February 7, 2020, with a copy of the Joint Stipulation of Class Action Settlement and Release ("Settlement Agreement") attached.

On September 2, 2020, the Court issued a checklist as to deficiencies in the motion and continued the hearing on the matter. In response, the parties filed supplemental briefing, including a First Amended Settlement Agreement.

The Parties now move for preliminary approval of the proposed class action settlement.

II.
SETTLEMENT AGREEMENT

A. Settlement Class Definition

Settlement Class: all individuals who were employed in California as exempt employees by Defendant Bergen Shippers Corp. at any time between July 30, 2014 and the date of the order granting Preliminary Approval of the Settlement. (Settlement Agreement ¶5)

Class Period: July 30, 2014 to the date of the order granting Preliminary Approval of the Settlement for individuals who were employed in California as exempt employees by Defendant Bergen Shippers Corp. (¶6).

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The Parties stipulate to class certification for settlement purposes only. (¶1)

B. Terms of Settlement Agreement

The essential terms are as follows:

- The Maximum Settlement Amount (MSA) is \$375,000 non-reversionary. (¶18)
- The Net Settlement Amount ("Net") (\$213,250) is the MSA minus the following:
 - Up to \$124,998.75 (33 1/3%) for attorney fees (¶49.c);
 - Up to \$14,000 for costs of litigation (Ibid.);
 - Up to \$10,000 for Class Representative Service Award (¶49.b);
 - Payment of \$3,750 (75% of \$5,000 PAGA penalty) to the LWDA (¶49.d); and
 - Up to \$10,000 for settlement administration costs (¶49.e).
- Defendants will be responsible for paying their share of the Payroll Taxes separate and apart from the Maximum Settlement Amount. (¶49.a.iv)
- No Claim Form. There is no claim requirement. All Class Members who do not opt out will receive an Individual Settlement Award. (¶49.a)
- Response Deadline. "Response Deadline" means the deadline by which Class Members must postmark or fax to the Settlement Administrator a valid Request for Exclusion or objection. The Response Deadline will be sixty (60) calendar days from the initial mailing of the Settlement Notices by the Settlement Administrator unless the 60th day falls on a Sunday or Federal holiday, in which case the Response Deadline will be extended to the next day on which the U.S. Postal Service is open. (¶29)
 - Dispute Process. Any Workweek Dispute must be faxed or mailed to the Settlement Administrator by the Response Deadline. (¶35)
- Revocation of Settlement. If five percent (5%) or more of the total Class Members timely exclude themselves from the Settlement and/or if the combined Workweeks worked by Class Members who timely exclude themselves amounts to five percent (5%) or more of the total Workweeks worked by all Class Members, either Defendant may, at its election and in its sole discretion, rescind the Settlement and all actions taken in furtherance of it will thereby be null and void. (¶55)
- Funding of Settlement. The Maximum Settlement Amount shall be paid by Defendants in one lump sum payment within fourteen (14) days after the Effective Date. (¶49)

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- Individual Settlement Awards: Each Participating Class Member's Individual Settlement Award shall be calculated solely by the Settlement Administrator as follows:
 - o The Settlement Administrator will calculate the Workweek Value by dividing the Net Settlement Amount by the total number of Workweeks for the entire Settlement Class during the Class Period; (§49.a.i.1)
 - o To determine each Class Member's estimated Individual Settlement Award, the Settlement Administrator will multiply the Workweek Value by the number of Workweeks worked by each Class Member. All Class Members will be entitled to payment for at least one Workweek. (§49.a.i.2)
 - o Should any of the following occur, the Settlement Administrator will proportionately increase the estimated Individual Settlement Award of each Participating Class Member to ensure that the entire Net Settlement Amount is distributed to Participating Class Members: (i) any Class Members submit timely and valid, or otherwise accepted, Requests for Exclusion following the provision of Settlement Notices and expiration of the Response Deadline; (ii) the Court approves Class Representative Service Awards in amounts less than those requested by Plaintiffs, as detailed herein; (iii) [sic] the Court approves a Class Counsel Award in an amount less than that requested by Plaintiffs, as detailed herein; and/or (iv) [sic] the Court approves Settlement Administration Costs in an amount less than that requested by Plaintiffs, as detailed herein. (§49.a.i.3)
- Tax Allocation: Individual Settlement Awards shall be allocated as follows: fifteen percent (15%) as wages; forty percent (40%) as interest; and forty-five percent (45%) as penalties. (§49.a.iii)
- Handling of Unclaimed Funds. Any Individual Settlement Award check issued by the Settlement Administrator to Participating Class Members will be valid and negotiable for at least one hundred eighty (180) calendar days from the date they are issued. After the expiration of the 180-day period, the Settlement Administrator will prepare the Final Report regarding the distribution of the Maximum Settlement Amount, including the total amount that was cashed/deposited by Participating Class Members and the total amount of any unpaid residue or unclaimed or abandoned funds pursuant to California Code of Civil Procedure section 384. After the Final Report is filed, any uncashed Individual Settlement Award checks will be reissued, maintained in the name of the Participating Settlement Member, and deposited in the California State Controller's Unclaimed Property Fund, in said Participating Settlement Member's name. (§49.a.v)

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- Phoenix Settlement Administrators will act as administrator for the settlement. (¶31)
 - The proposed settlement was submitted to the LWDA on September 21, 2020. (Amended Cantor Decl. Exhibit 4)
 - Notice of entry of final judgment will be available on the Settlement Administrator's website. (Notice pg. 2)
- Participating class members and the named Plaintiff will release certain claims against Defendants. (See further discussion below)

III. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. Class Counsel represents that the parties participated a full-day mediation on September 12, 2019 with mediator Jeffrey Krivis, Esq. On November 22, 2019, the parties reached an agreement in principle to resolve the claims asserted or that could have been asserted by Plaintiffs in the action, and subsequently finalized the terms in the Settlement Agreement and Notice. (Cantor Decl. ¶¶5-7.)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Plaintiff contends that her counsel undertook an investigation to evaluate the merits of the claims at issue in this lawsuit and their amenability to class treatment. Prior to class certification, Plaintiff served interrogatories and document requests. Plaintiff also obtained information through informal discovery prior to the parties' mediation. Plaintiff reviewed all of Defendant's employment policies during the class period. Plaintiff also hired an expert to analyze the data and compile an Excel spreadsheet to assist in the damages analysis. (Motion at 8:21-27.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in class action litigation, including wage and hour class actions. (Cantor Decl. ¶26; Declaration of Rodney Mesriani ¶5)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 14:139.18, ["Should the court receive

objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

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

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

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

Counsel has provided the following exposure analysis:

Violation	Maximum Exposure
Meal Period Violation	\$207,000.00
Rest Period Violation	\$207,000.00
Overtime and Off the Clock Damages	\$869,211.00
Pay Stub Violation	\$78,700.00
Waiting Time Penalties	\$93,634.00
PAGA Penalties	\$629,600.00
Total	\$2,085,145.00

(Cantor Decl. ¶25)

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

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

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4. Amount offered in settlement. Plaintiff's counsel obtained a \$375,000 non-reversionary settlement. The \$375,000 Maximum Settlement Amount constitutes roughly 18% of Defendants' maximum exposure. Given the uncertain outcomes, the settlement appears to be within the "ballpark of reasonableness." The \$375,000 settlement amount, if reduced by the requested deductions, will leave \$213,250 to be divided among approximately 50 class members. The resulting payments will average \$4,265 per class member. [$\$213,250 / 50 = \$4,265$].

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

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

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

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

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

C. Scope of the Release

1. Releases by All Participating Class Members. Upon the date on which Defendants fully fund the Maximum Settlement Amount, Plaintiffs and each Class Member who has not submitted a valid Request for Exclusion (i.e., Participating Class Members) shall be deemed to have fully, finally and forever released, settled, compromised, relinquished, and discharged, with respect to all of the Released Parties, all of their Released Claims. (¶46).

"Released Claims" includes all claims under state, federal or local law, whether statutory, common law or administrative law, arising out of or related to allegations set forth in the operative Complaint, including but not limited to claims for failure to pay minimum wages, failure to pay overtime wages,

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failure to provide meal breaks, failure to provide rest periods, failure to pay timely wages upon termination, failure to provide and maintain accurate itemized wage statements and maintain records, failure to pay timely wages during employment, and alleged violations of the California Business and Professions Code section 17200, et seq., including, but not limited to, injunctive relief, liquidated damages, penalties of any nature, interest, fees, including fees under California Code of Civil Procedure section 1021.5; costs; and all other claims and allegations made or which could have been made in the Action based on the facts and allegations pled in the operative Complaint which includes alleged violations of and claims for penalties under the PAGA during the Class Period. Further, those Participating Class Members who cash, deposit, or otherwise negotiate their Individual Settlement Award checks will be deemed to have opted in for purposes of the Fair Labor Standards Act ("FLSA") and to have, thereby, released all of the Released Parties of all minimum wage and overtime claims which arose from July 30, 2014 through the date of the order granting Preliminary Approval of the Settlement for individuals employed as exempt employees in California by Bergen Shippers Corp. (§26).

Individual Settlement Award checks will contain the following printed notice advising Participating Class Members that they are opting in to the FLSA collective action by cashing, depositing or otherwise negotiating their Individual Settlement Award checks: "BY CASHING THIS CHECK YOU ARE AGREEING TO THE TERMS OF THE SETTLEMENT REACHED IN RUBI V. BERGEN SHIPPERS CORP ET AL, CASE NO. BC715077, AND AGREE TO OPT-IN TO THE SETTLEMENT AND TO RELEASE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT PURSUANT TO THE SETTLEMENT." (§26).

"Released Parties" means Defendant and all its present and former parent companies, subsidiaries, divisions, related or affiliated companies, shareholders, officers, directors, employees, agents, attorneys, insurers, successors and assigns, and any individual or entity which could be liable for any of the Released Claims, and Defense counsel of record in the Action. (§27)

2. Releases by Named Plaintiffs

Plaintiff, in her individual capacity, does not release the Released Parties from any and all claims, known and unknown, under federal, state and/or local law, statute, ordinance, regulation, common law, or other source of law, arising as of the date of execution of this Agreement. (§47)

D. May Conditional Class Certification Be Granted?

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

1. Numerosity. There are approximately 50 class members. (Cantor Decl. ¶18) This element is met.

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.) The proposed class is defined above. Here, Class Counsel represents that the proposed class is ascertainable through Defendants' records. (Ibid.)

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, regarding commonality, Class Counsel represents that each claim challenges a common policy that Plaintiff contends violates California's wage and hour laws. (Id. at ¶20.) Regarding typicality, Class Counsel asserts that Plaintiffs' claims are typical of the claims of the class because Plaintiff was subject to the same policies that are challenged in this lawsuit. (Id. at ¶21.) Regarding adequacy, Class Counsel represents that there is no indication that there are any conflicts between Plaintiff or counsel and the class members. (Id. at ¶23.)

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

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

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

E. Is the Notice Proper?

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

2. Method of class notice. Within twenty-one (21) calendar days of entry of the Preliminary Approval Order, Defendants shall provide the Settlement Administrator with the Class List for purposes of mailing the Settlement Notices to Class Members. The Settlement Administrator shall not be permitted to share any Class Information included in the Class List with Plaintiffs or Class Counsel absent express approval by Defendants or Defense Counsel. (Settlement Agreement ¶48). Upon receipt of the Class List, the Settlement Administrator shall perform a search based on the National Change of Address Database maintained by the United States Postal Service to update and correct any known or identifiable address changes. Within twenty-one (21) calendar days after receiving the Class List from Defendants as provided herein, the Settlement Administrator shall mail copies of the Settlement Notice to all Class Members via regular First-Class U.S. Mail. (¶48.a.i).

Any Settlement Notice returned to the Settlement Administrator as non-deliverable on or before the Response Deadline shall be re-mailed to the forwarding address affixed thereto within five (5) calendar days of receipt of the returned

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Settlement Notice by the Settlement Administrator. If no forwarding address is provided, the Settlement Administrator shall attempt to determine a correct address by the use of skip-tracing, or other type of automated search, using the name, address and/or Social Security number of the Class Member involved, and shall then perform a re-mailing to the Class Member whose Settlement Notice was returned as non-deliverable within five (5) calendar days of receipt of the returned Settlement Notice by the Settlement Administrator, assuming another mailing address is identified by the Settlement Administrator. Class Members who are sent a re-mailed Settlement Notice shall have their Response Deadline extended by ten (10) calendar days from the date the Settlement Administrator re-mails the Settlement Notice. If these procedures are followed, notice to Class Members shall be deemed to have been fully satisfied, and if the intended recipient of the Settlement Notice does not receive the Settlement Notice, the intended recipient shall nevertheless remain a Class Member and shall be bound by all terms of the Settlement and the Final Order and Judgment. (§48.a.ii)

3. Cost of class notice. As indicated above, claims administration costs are estimated not to exceed \$10,000. (§49.e) 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.

F. Attorney Fees and Costs

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

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

reasonable." (Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th 123, 128.)

The question of whether Class Counsel is entitled to \$124,998.75 in attorney fees and up to \$14,000 in costs will be addressed at the final fairness hearing when class counsel brings a noticed motion for attorney fees. Fee Split: 60% to Cantor Law and 40% Mesriani Law Group. Plaintiff has approved the fee split in writing. (Amended Cantor Decl. ¶30). Class counsel must provide the court with billing information so that it can properly apply the lodestar method, and must indicate what multiplier (if applicable) is being sought as to each counsel.

G. Incentive Award to Class Representative

Plaintiff Laura Rubi requests an enhancement award of \$10,000. (¶49.b) In connection with the final fairness hearing, the named Plaintiffs must submit a declaration attesting to why s/he should be entitled to an enhancement award in the proposed amount. The named Plaintiffs must explain why s/he "should be compensated for the expense or risk she has incurred in conferring a benefit on other members of the class." (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than pro forma claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.'" Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit'" (Id. at 806-807, italics and ellipsis in original.)

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

IV.
CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Preliminary Approval of class action settlement is GRANTED as fair, adequate, and reasonable on the condition that counsel provide declarations disclosing the interest or involvement by any counsel or party in the

governance or work of the cy pres recipient of Excluded Class Member funds, Jewish Free Loan Association. (See ¶54).

2) The Parties' supplemental paperwork must be filed by November 23, 2020.

3) Nonappearance case management review is set for December 2, 2020, 8:30 a.m., Dept. 9.

4) The essential terms are, among other things:

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Up to \$10,000 for a service award to proposed class representative(s);

Estimated \$10,000 for settlement administration costs;

Payment of \$3,750 (75% of \$5,000 PAGA penalty) to the LWDA;
and

C. Plaintiffs release of Defendants from claims described herein.

CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.

DATED:

NOV 02 2020



YVETTE M. PALAZUELOS

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT

11/04/2020