

09/06/2023

David W. Stanton, Executive Officer / Clerk of Court

By: R. Araiga Deputy

FINAL RULINGS/ORDERS RE: MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Christian Cruz v. Charles E. Thomas Company, Inc., Case No.: 22STCV37722

The Parties' Motion for Preliminary Approval of Class Action Settlement is **GRANTED** as the settlement is fair, adequate, and reasonable on the **condition** that counsel files the Second Amended Complaint (SAC).

The Parties' must file the SAC by **September 18, 2023**.

Non-Appearance Case Review is set for September 25, 2023, 8:30 a.m., Department 9.

The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$357,600, non-reversionary. (¶3.1)

B. The Net Settlement Amount is the GSA minus the following:

- Up to \$119,200 (33 1/3%) for attorney fees (¶3.2.2);
- Up to \$18,000 for litigation costs (Ibid.);
- Up to \$10,000 for a Service Payment to the Named Plaintiff (¶3.2.1);
- Up to \$4,899 for settlement administration costs (¶3.2.3);
- \$18,750 (75% of \$25,000 PAGA penalty) to the LWDA. (¶3.2.5)

C. Employer share of the payroll taxes on the taxable portion of the settlement payments shall be paid separately from the GSA by Defendant.

D. Plaintiffs release of Defendants from claims described herein.

The Parties' Motion for Final Approval of Class Action Settlement must be filed by **March 6, 2024**. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed]

Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

Non-Appearance Case Review is set for March 13, 2024, 8:30 a.m., Department 9.

I.
BACKGROUND

This is a wage and hour class action. Defendants Charles E. Thomas Company, Inc. is full service general engineering contractor in the city of Gardena, CA, employing individuals to perform construction jobs for various retail and commercial businesses in California, namely gas stations.

Plaintiff filed a class action complaint against Defendant on December 2, 2022, which alleges class wide causes of action for: (1) minimum wage violations (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) waiting time penalties; (6) wage statement violations; and (7) unfair competition. On March 14, 2023, Plaintiff amended his complaint as a matter of right pursuant to Labor Code Section 2699.3(a)(2)(c) to add an additional cause of action (8) for civil penalties under the Private Attorneys General Act pursuant to Labor Code Sections 2698 et seq.

Counsel represent that prior to mediation, Defendant informally produced all of its relevant time and pay records as well as its wage and hour policies and other documents and information relevant to the claims alleged in advance of mediation. Counsel represents that they transmitted Defendant's mediation production to expert, Bennett Berger, a Partner and Senior Data Analyst at Berger Consulting Group to perform a damages analysis.

On May 3, 2023, a full-day in-person mediation was held with the Hon. Leo Wagner (ret.), where the Parties ultimately accepted a mediator's proposal for a class and representative wide settlement. A fully executed copy of the Settlement Agreement was filed with the Court on July 25, 2023, attached to the Declaration of Daniel J. Brown, ("Brown Decl."), as Exhibit 1.

Now before the Court is Plaintiff's motion for preliminary approval of the settlement agreement.

II.

SETTLEMENT AGREEMENT

A. Definitions.

"Class": all non-exempt employees who worked for Defendant at any time during the Class Period and held the job title of: (i) Construction Technician; (ii) Service Technician; (iii) Construction Technician Trainee; (iv) Service Technician Trainee; and/or (v) Superintendent (if such Superintendent was paid on an hourly basis). (§1.5)

"Class Period": December 2, 2018 to November 1, 2023. (§1.12)

"Aggrieved Employee": all non-exempt employees who worked for Defendant at any time during the PAGA Period and held the job title of: (i) Construction Technician; (ii) Service Technician; (iii) Construction Technician Trainee; (iv) Service Technician Trainee; and/or (v) Superintendent (if such Superintendent was paid on an hourly basis). (§1.4)

"PAGA Period": December 2, 2021 to November 1, 2023. (§1.31)

Based on a review of its records to date, Defendant estimates there are 62 Class Members who collectively worked a total of 7,450 Workweeks, and 40 Aggrieved Employees who worked a total of 1,450 PAGA Pay Periods. (§4.1)

This Settlement Agreement is based on an estimated total of 7,450 Workweeks for the Class Period. If the actual number of Workweeks for the Class Period exceeds 8,195 (representing an increase of 745, or 10%, over the 7,450 estimate), then the GSA shall automatically increase by \$48 for each Workweek that exceeds 8,195. Because the amount of \$25,000 allocated to PAGA Penalties is based on a reasonable compromise under Labor Code section 2699(1)(2), there shall be no adjustment to the LWDA PAGA Payment or Individual PAGA Payments. (§8)

The parties stipulate to class certification for settlement purposes only. (§12.1.)

B. Terms of Settlement Agreement

The essential terms are:

- The Gross Settlement Amount ("GSA") is \$357,600, non-reversionary. (¶3.1)
- The Net Settlement Amount ("Net") (\$186,751) is the GSA minus the following:
 - o Up to \$119,200 (33 1/3%) for attorney fees (¶3.2.2);
 - o Up to \$18,000 for litigation costs (Ibid.);
 - o Up to \$10,000 for a Service Payment to the Named Plaintiff (¶3.2.1);
 - o Up to \$4,899 for settlement administration costs (¶3.2.3); and
 - o Payment of \$18,750 (75% of \$25,000 PAGA penalty) to the LWDA. (¶3.2.5)
- Defendants will pay their share of taxes separate from the GSA. (¶3.1)
- Funding of Settlement: Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the Administrator no later than 30 days after the Effective Date. (¶4.3)
- There is no claim form requirement. (¶3.1)
- Individual Settlement Payment Calculation: An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks. (¶3.2.4)
 - o Tax Allocation: 20% as wages and 80% as interest and penalties. (¶3.2.4.1)
- PAGA Payments: The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties (\$6,250.00) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. (¶3.2.5.1.)
- "Response Deadline" means 60 days after the Administrator mails Notice to Class Members and Aggrieved Employees, and shall be the last date on which Class Members may: (a) fax, email or mail Requests for Exclusion from the Settlement, or (b) fax, email or mail his, her, or their Objection to the Settlement. Class Members to whom Notice Packets are resent after having been returned undeliverable to the Administrator shall have an additional 14 calendar days beyond the Response Deadline has expired. (¶1.43) The same deadline and extension applies to

challenges to the number of Class Workweeks and PAGA Pay Periods. (§7.6)

- If the number of valid Requests for Exclusion identified in the Exclusion List exceeds 10% of the total of all Class Members, Defendant may, but is not obligated to, elect to withdraw from the Settlement. (§9)
- **Uncashed Settlement Checks:** For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of Code of Civil Procedure section 384, subdivision (b). (§4.4.3)
- The settlement administrator will be Apex Class Action LLC. (§1.2)
- Notice of Final Judgment will be posted on the Settlement Administrator's website. (§7.8.1)
- The proposed settlement was submitted to the LWDA on July 24, 2023. (Brown Decl., Exhibit 4.)
- 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. On May 3, 2023, a full-day in-person mediation was held with the Hon. Leo Wagner (ret.), where the Parties ultimately accepted a mediator's proposal for a class and representative wide settlement. (Brown Decl., §11.)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Counsel represent that prior to mediation, Defendant informally produced all of its relevant time and pay records as well as its wage and hour policies and other documents and information relevant to the claims alleged in advance of mediation. (Id. at §8.) Counsel represents that they transmitted Defendant's mediation production to expert, Bennett Berger, a Partner and Senior Data Analyst at Berger Consulting Group to perform a damages analysis. (Id. at §9.)

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in class action litigation, including wage and hour class actions. (Id. at ¶¶2-5; Surls Decl., passim.)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (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.)

Class Counsel has provided information, summarized below, regarding the estimated exposure for each of the claims alleged:

Violation	Maximum Exposure	Risk-Adjusted Exposure
Off-The-Clock/Overtime Violations	\$888,372.66	\$144,259.00
First & Second Meal Period Violations	\$228,716.04	\$40,025.00
Rest Period Violations	\$673,188.00	\$106,027.00
Regular Rate Claim	\$49,306.00	\$25,885.00
Wage Statement Violations	\$204,000.00	\$28,560.00
Waiting Time Penalties	\$263,088.00	\$41,436.00
PAGA	\$114,500.00	\$20,037.00
TOTAL	\$2,421,170.70	\$406,229.00

(Brown Decl. ¶¶ 15-22.)

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. (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.").)

4. Amount offered in settlement. Plaintiff's counsel obtained a \$357,600 non-reversionary settlement. The \$357,600 settlement amount constitutes approximately 14.77% to 88.03% of Defendant's maximum and risk-adjusted exposure. Given the uncertain outcomes, the settlement appears to be within the "ballpark of reasonableness."

The \$357,600 settlement amount, if reduced by the requested deductions, will leave \$186,751 to be divided among approximately 62 class members. The resulting payments will average \$3,012.11 per class member. [$\$186,751 / 62 = \$3,012.11$].

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

Effective on the date when Defendant fully funds the entire Gross Settlement Amount and funds all employer payroll taxes

owed on the Wage Portion of the Individual Class Payments, Plaintiff, Class Members, and Class Counsel will release claims against all Released Parties as follows: (¶5)

Release by Participating Class Members: All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, release Released Parties from (i) all claims that were alleged, or reasonably could have been alleged in the Class Period based on the facts stated in the Operative Complaint and ascertained in the course of the Action. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation or claims based on facts occurring outside the Class Period. (¶5.2)

Release by Non-Participating Class Members Who Are Aggrieved Employees: All Participating Class Members who are Aggrieved Employees and Non-Participating Class Members who are Aggrieved Employees are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, the Released Parties from all claims for PAGA penalties that were alleged, or reasonably could have been alleged, during the PAGA Period based on the facts stated in the Operative Complaint and the PAGA Notice. (¶5.3)

Released Parties: "Released Parties" means Defendant and each of its former and present directors, officers, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns, subsidiaries, and affiliates. (¶1.41)

Named Plaintiff will also provide a general release and CC § 1542 waiver. (¶5.1)

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. Windsor (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard

of scrutiny is used for settlement cases. (Dunk at 1807, fn 19.) 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 v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240, disapproved on another ground in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.)

1. Numerosity. There are approximately 62 class members. (MPA at 6:4-6.) This element is met.

2. Ascertainability. The proposed class is defined above. The class definition is "precise, objective and presently ascertainable." (Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919.) All Class Members are identifiable through a review of Defendant's employment records. (MPA at 6:3-4).

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.)

Regarding commonality, Plaintiff contends that common questions of law and fact predominate because Plaintiff's claims are predicated on, among other issues, Defendant's alleged failure to pay for all hours worked or a proper overtime rate of pay, failure to compensate for all hours worked on-call, and its meal and rest period policies/practices. (MPA at 6:13-15.)

As to typicality, Plaintiff contends that, like other Class Members, Plaintiff was employed by Defendant as a non-exempt hourly employee and was compensated via Defendant's pay plans during the Class Period. Plaintiff alleges that he did not receive all legally compliant meal or rest periods or premium pay in lieu thereof. Moreover, Plaintiff alleges he was not paid all hours worked or always paid at a proper overtime rate of pay for overtime hours worked. Plaintiff further asserts that he did not receive all earned wages at the time of his separation of employment, received non-compliant wage statements, and was not compensated for all hours worked on-call. (MPA at 6:26-7:6.)

As to adequacy, Plaintiff represents that he was informed of the risks of serving as class representative, participated in the litigation, and does not have conflicts of interest with the class. (MPA at 7:8-18; Declaration of Plaintiff Cruz, passim.)

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 because 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. Its content appears to be acceptable. It includes information such as: a summary of the litigation; the nature of the settlement; the terms of the settlement agreement; attorney fees and costs; enhancement awards; 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. Not later than 15 days after the Court grants Preliminary Approval of the Settlement, Defendant will deliver the Class Data to the Administrator, in the form of a Microsoft Excel spreadsheet. (¶4.2) Using best efforts to perform as soon as possible, and in no event later than 14 days after receiving the Class Data, the Administrator will send to all Class Members identified in the Class Data, via first-class USPS mail, the Class Notice substantially in the form attached to this Agreement as Exhibit A. The Administrator shall perform a certified translation of the Class Notice to Spanish. (¶7.4.2) Not later than 3 business days after the Administrator's receipt of any Class Notice returned by the USPS as undelivered, the Administrator shall re-mail the Class Notice using any forwarding address provided by the USPS. If the USPS does not provide a forwarding address, the Administrator shall conduct a Class Member Address Search, and re-mail the Class Notice to the most current address obtained. The Administrator has no obligation to make further attempts to locate or send Class Notice to Class Members whose Class Notice is returned by the USPS a second time. (¶7.4.3)

3. Cost of class notice. As indicated above, settlement administration costs are estimated to be \$4,899. 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 \$119,200 (33 1/3%) in attorney fees and up to \$18,000 in costs will be addressed at the final fairness hearing when class counsel brings a noticed motion for attorney fees. 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.

Class Counsel should also be prepared to justify the costs sought (capped at \$18,000) by detailing how they were incurred.

G. Incentive Award to Class Representative

The named Plaintiff Christian Cruz will request a service award of \$10,000. (¶3.2.1)

In connection with the final fairness hearing, the named Plaintiff must submit a declaration attesting to why he should

be entitled to an enhancement award in the proposed amount. The named Plaintiff must explain why 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 award 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 the settlement is fair, adequate, and reasonable on the condition that counsel files the Second Amended Complaint (SAC).

2) The Parties' must file the SAC by September 18, 2023.

3) Non-Appearance Case Review is set for September 25, 2023, 8:30 a.m., Department 9.

4) The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$357,600, non-reversionary. (¶3.1)

B. The Net Settlement Amount is the GSA minus the following:

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\$18,750 (75% of \$25,000 PAGA penalty) to the LWDA.
(¶3.2.5)

C. Employer share of the payroll taxes on the taxable portion of the settlement payments shall be paid separately from the GSA by Defendant.

D. Plaintiffs release of Defendants from claims described herein.

5) The Parties' Motion for Final Approval of Class Action Settlement must be filed by March 6, 2024. The parties are ordered to contact the Clerk in Department 9 to obtain a hearing date for their motion.

6) The Parties' Motion for Final Approval of Class Action Settlement must include a concurrently lodged [Proposed] Judgment containing among other things, the class definition, full release language, and names of the any class members who opted out; and email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

7) Non-Appearance Case Review is set for March 13, 2024, 8:30 a.m., Department 9.

CLERK TO GIVE NOTICE TO MOVING PARTY. THE MOVING PARTY TO GIVE NOTICE TO ALL OTHER PARTIES.

IT IS SO ORDERED.

DATED: September 6, 2023



Yvette M. Palazuelos
YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT
Yvette M. Palazuelos / Judge