Tentative Rulings for January 28, 2025
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).) ***The above rule also applies to cases listed in this "must appear" section.***

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(03)

Tentative Ruling

Re: ***Harper v. San Mar Properties***
Case No. 21CECG03563

Hearing Date: January 28, 2025 (Dept. 403)

Motion: Class Action Compliance Hearing

Tentative Ruling:

To find that the settlement administrator has carried out the terms of the settlement as ordered by the court.

Explanation:

Based on the declaration submitted by ILYM Group, it appears that the settlement administrator has complied with the terms of the court's order approving the settlement, including payment of the attorney's fees, court costs, class representative service award, and settlement administrator fees, as well as the payments to all class members. The administrator has also paid all payroll taxes.

$24,627.19 in settlement checks remain uncashed. The settlement administrator will send these funds to the State Controller's Office unclaimed property fund as required by the settlement. The administrator has submitted a request to deposit the funds with the Controller's Office, but it will take about a year to place the money into the fund, as the State typically takes about a year to process the request. Therefore, the court finds that the settlement funds are being paid out as required by the court's order approving the settlement.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 1/15/2025.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Sunset Landscapes, Inc. v. Bay Pro Property Solutions, Inc.***
Superior Court Case No. 23CECG03049

Hearing Date: January 28, 2025 (Dept. 403)

Motion: By Plaintiff for Default Judgment

Tentative Ruling:

To deny without prejudice.

Explanation:

The application for default judgment appears in order. However, DOE defendants remain at issue as unserved, not defaulted, and not dismissed. Applications for default judgment must dismiss all parties against whom judgment is not sought prior to the entry of judgment, or, if separate judgments are sought, the moving party must support the request. (Cal. Rules of Ct., rule 3.1800(a)(7).) The application is denied, without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS (Judge's initials) on 1/23/2025 (Date).

(35)

Tentative Ruling

Re: ***Giumarra Brothers Fruit Co. v. Mora***
Superior Court Case No. 23CECG03466

Hearing Date: January 28, 2025 (Dept. 403)

Motion: By Plaintiff Giumarra Brothers Fruit Company on Application for a Preliminary Injunction

Tentative Ruling:

To deny.

Explanation:

Plaintiff Giumarra Brothers Fruit Company ("Plaintiff") seeks a preliminary injunction against defendant Cesar Mora ("Defendant"). Plaintiff seeks to preclude Defendant from growing, delivering, consigning, marketing or selling a specialty variety of white nectarine; and to allow Plaintiff to remove the trees growing the specialty variety on Defendant's property, with no compensation, and preclude Defendant from interfering with the removal. Pursuant to the allegations of the Complaint, Defendant was granted a sub-license from Plaintiff, who has a license, to handle the specialty variety, the Monalise.[1]

A preliminary injunction may be granted any time before judgment upon affidavits that show sufficient grounds exist, demonstrating, among other reasons, that great or irreparable injury would occur. (Code Civ. Proc. § 527, subd. (a); *id.* § 526, subd. (a)(2).) A preliminary injunction is warranted on a showing that (1) the interim harm that the applicant will sustain if the injunction is denied as compared to the harm to the defendant if the injunction issues; and (2) the likelihood of success on the merits at trial. (*Choice-in-Education League* v. *Los Angeles Unified School District* (1993) 17 Cal.App.4th 415, 422.) The applicant must demonstrate a real threat of immediate and irreparable injury due to the inadequacy of legal remedies. (*Triple A Machine Shop, Inc.* v. *State of Cal.* (1989) 213 Cal.App.3d 131, 138.)

Here, in addition to the above, Plaintiff does not seek to maintain the status quo. Accordingly, the injunction sought is not prohibitory, but mandatory. (*Davenport* v. *Blue Cross of Cal.* (1997) 52 Cal.App.4th 435, 446-448.) The orders sought do not leave the parties in the same position, and requires Defendant to surrender property, either through crop loss, or tree removal. (*See id.* at p. 447 ["It has been held that an injunction which compels a party to perform some physical act or surrender property is mandatory."]) While the first request appears to seek to restrict Defendant from action, the prohibition of the existing state of growing, delivering, consigning, marketing and selling of the Monalise is the current status quo, which is not materially contested. Despite seeking to restrict Defendant from action, in so doing, the request is for a mandatory injunction.

[1] Plaintiff's Request for Judicial Notice is granted.

(*Agricultural Labor Relations Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 713.) Mandatory injunctions are not permitted except in extreme cases where the right thereto is clearly established. (*Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.)

Plaintiff submits that it will suffer irreparable harm if the injunction does not issue because Plaintiff itself is beholden to a contract with the owner of the Monalise that Plaintiff itself also licenses from Star Fruits SAS.

The court initially notes the following. Plaintiff submits that it is obligated to pay production fees to Star Fruits regardless of whether Defendant pays Plaintiff. This is a monetary damage, with adequate legal remedy. Plaintiff also submits that Defendant will otherwise continue to have unfettered access to the Monalise without further compensation to Plaintiff. This is a monetary damage, with adequate legal remedy.

Plaintiff next submits that it is obligated to comply with the terms of the license by ensuring "best practices".[2] Defendant opposes, arguing, among other things, that this is conclusory. It is conclusory. There is no evidence to suggest what constitutes "best practices", or how Defendant is failing to adhere to such a standard. Nor is there evidence to suggest that Defendant is refusing access to inspection. At best, Plaintiff reports that following a text message from July 8, 2023, Defendant "made no other representations that he intended to comply with either the Sublicense or Marketing Agreement and stopped communicating with me." (Martin Decl., ¶¶ 7, 8; *see also* Thiesen Decl., ¶¶ 20 ["Leading up to the 2023 harvest and thereafter, I never had additional contact with Mora, including no contact as to whether he intended to comply with the Sublicense for the 2024 crop."], 21 ["As recently as December 26, 2024, I observed the field in which Mora was growing the Monalise Fruit."]) This is not a clear demonstration of refusal of access, but merely a lack of communication.

Finally, Plaintiff submits that it is required to monitor its sublicenses to detect variation and mutation and that Defendant is refusing access. As above, the evidence submitted is inconclusive that Defendant is refusing access. To the extent that Plaintiff suggests on reply that its license rights might be implicated by the allegations of the Complaint, Plaintiff fails to demonstrate as much. The only provision in evidence regarding variations and mutations is one between Plaintiff and Defendant. (Thiesen Decl., Ex. 1, p. 4, Testing Agreement and Sublicense Terms, Part 1(C)(a)(ii).) This does not support a conclusion that Plaintiff is otherwise jeopardizing its license with Star Fruit. Accordingly, this basis is also conclusory.

In opposition, Defendant submits that he would suffer harm if the injunction were to issue because it takes four years to replace any existing tree before crop is produced. (Mora Decl., ¶ 9.)[3]

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[2] References are made to paragraph 25 of the Declaration of John Thiesen. However, the declaration submitted with the moving papers ends at paragraph 24. As subparts are referenced, the court assumes reference is made to paragraph 23, which appears consistent with the points raised.

[3] Plaintiff's Objection to the Declaration of Cesar Mora, No. 11, is overruled. All other objections were immaterial to the disposition of the motion. The court issues no rulings as to the remainder.

In considering the above, the court finds Plaintiff fails to clearly establish interim irreparable harm, and as compared to Defendant, upon which a mandatory preliminary injunction may issue. The motion is denied.[4]

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 1/24/2025.
(Judge's initials) (Date)

[4] The court did not consider the contents of Defendant's Request for Judicial Notice, which is denied as immaterial to the disposition of the motion.

(37)

Tentative Ruling

Re: ***Roger Hernandez v. Western Power Sports, Inc.***
Superior Court Case No. 22CECG02123

Hearing Date: January 28, 2025 (Dept. 403)

Motion: For Preliminary Approval of Class Settlement

Tentative Ruling:

To deny, without prejudice.

Explanation:

1. Class Certification

Settlements preceding class certification are scrutinized more carefully to make sure that absent class members' rights are adequately protected, although there is less scrutiny of manageability issues. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240; see *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1803, fn. 9.) The trial court has a "fiduciary responsibility" as the guardian of the absentee class members' rights to decide whether to approve a settlement of a class action. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.)

A precertification settlement may stipulate that a defined class be conditionally certified for settlement purposes. The court may make an order approving or denying certification of a provisional settlement class after the preliminary settlement hearing. (Cal. Rules of Court, rule 3.769(d).) Before the court may approve the settlement, however, the settlement class must satisfy the normal prerequisites for a class action. (*Amchem Products, Inc. v. Windsor* (1997) 521 US 591, 625-627.)

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. In turn, the community of interest requirement embodies 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." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 313.)

Plaintiffs bear the burden of establishing the propriety of class treatment *with* admissible evidence. (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470 [trial court's ruling on certification supported by substantial evidence generally not disturbed on appeal]; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1107-1108 [plaintiff's burden to produce substantial evidence].)

Here, the putative class members are current and former non-exempt employees who worked for Western Power Sports from July 12, 2018 to February 3, 2024. Class members can be ascertained from defendants' records. The putative class consists of an estimated 239 members. (Loos Decl., ¶ 9.) The numerosity and ascertainability criteria are satisfied.

Under the community of interest requirement, the class representative must be able to represent the class adequately. (*Caro v. Procter & Gamble* (1993) 18 Cal.App.4th 644, 669.) "[I]t has never been the law in California that the class representative must have identical interests with the class members . . . The focus of the typicality requirement entails inquiry as to whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differ from that upon which the claims of the other class members will be based." (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.)

Usually, in wage and hour class actions or PAGA class claims, the distinctive feature that permits class certification is that the employees have the same job title or perform similar jobs, and the employer treats all in that discrete group in the same allegedly unlawful fashion. In *Brinker Restaurant v. Superior Court* (2012) 53 Cal.4th 1004, 1017, "no evidence of common policies or means of proof was supplied, and the trial court therefore erred in certifying a subclass."

Common questions in this class include whether defendant failed to provide meal and rest breaks, failed to pay wages for all time worked including minimum wage and overtime, failed to provide accurate wage statements, failed to reimburse employees for necessary business expenses, and derivative claims for waiting time penalties, violation of the California Business & Professions Code, and PAGA claims. (Loos Decl., ¶¶ 10-11.) The motion is not supported by a declaration from plaintiff, but only by a declaration by counsel. As such, the court has insufficient evidence and information regarding this issue.

The adequacy of representation component of the community of interest requirement for class certification comes into play when the party opposing certification brings forth evidence indicating widespread antagonism to the class suit. "'The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '… To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class. [Citation.]' [Citation.]" (*J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212.) Here, plaintiff has not provided his declaration. Therefore, the court has insufficient information to assess whether plaintiff can adequately represent his fellow employees.

"[T]he adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 669.) Counsel has shown that the law firm is experienced and that the firm has successfully litigated other class actions. (Loos Decl., ¶¶ 23-35.) Therefore, it does appear that class counsel has

shown that the firm is adequate to represent the interests of the class. However, there is no declaration from plaintiff from which to assess whether he has a conflict of interest.

As such, the court has insufficient information to determine whether there is a community of interest.

2. Settlement Approval

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129.) "[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished … [therefore] the factual record must be before the … court must be sufficiently developed." (*Id.* at p. 130.)

In support of the proposed settlement amounts, counsel has provided counsel's declaration. The declaration states that counsel reviewed the records and received input from an unnamed expert. (Loos Decl., ¶ 11.) It is unclear whether defendants produced all relevant records for all class members or if it was a sampling. (See Loos Decl.) A declaration by an expert is required to rely on a sample to determine damages issues such as those before the Court here. **"**When using surveys or other forms of random sampling, it is crucial to utilize a properly credentialed expert who will be able to explain to the court the methods used to arrive at his or her conclusions and persuade the court concerning the soundness of the methodology." (Chin, Wiseman et al. Employment Litigation (TRG, 2017) section 19:975.3.)

> "The essence of the science of inferential statistics is that one may confidently draw inferences about the whole from a representative sample of the whole. Whether such inferences are supportable, however, depends on how representative the sample is. Inferences from the part to the whole are justified [only] when the sample is representative. Several considerations determine whether a sample is sufficiently representative to fairly support inferences about the underlying population."

(*Duran v. U.S. Bank National Ass'n.* (2014) 59 Cal.4th 1, 38.)

Those considerations include variability in the population, whether size of the sample is appropriate, whether the sample is random or infected by selection bias, and whether the margin of error in the statistical analysis is reasonable. (*Id*. at pp. 38–46.)

In the case at bench the declaration provides only an approximation that there are 239 class members. There is no discussion of the average hours worked, hourly wages of the class members and limited discussion of the evidence supporting the figures used

by the parties to arrive at the settlement before the court. Plaintiff has not submitted an expert declaration or provided any discussion or analysis as to how the information submitted supports plaintiff's counsel's damages estimates. Additionally, while counsel indicates that an expert was consulted, no information is provided about this unnamed expert's qualifications.

Plaintiffs' counsel seeks a fee award based on 1/3 of the gross settlement. While it is true that courts have found fee awards based on a percentage of the common fund are reasonable, the California Supreme Court has also found that the trial court has discretion to conduct a lodestar "cross-check" to double check the reasonableness of the requested fees. (*Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480, 503-504 [although class counsel may obtain fees based on a percentage of the class settlement, courts may also perform a lodestar cross-check to ensure that the fees are reasonable in light of the number of hours worked and the attorneys' reasonable hourly rates].) Here, plaintiff's counsel has not provided any information about the amount of work done on the case, the hourly rates charged, or whether a lodestar multiplier is sought. Plaintiff's counsel simply seeks a percentage of the total gross settlement as fees without any evidence linking that number to the actual work done in the case. Failure to provide such information makes it impossible for the court to double check the requested fees against some objective evidence of the work done in the case. With any final approval motion, counsel shall submit a full lodestar analysis, supported by full and complete billing records and evidence supporting the hourly rates claimed.

The motion seeks preliminary approval of a $10,000 "service award" to the plaintiff. This award is in addition to plaintiff's share of the settlement fund as a class member. There is no "presumption of fairness" in review of an incentive fee award. (*Clark v. Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.) Preliminary approval may be granted at this time, though a lower amount may be awarded at final approval, as there is limited evidence indicating any substantive contributions by the plaintiff during the period of time between the case being filed and ultimately settled, neither is there evidence of any real risk to plaintiff in being named in a representative action apart from the theoretical.

The parties agreed to use Phoenix Class Action Administration Solutions as settlement administrator. The motion represents that the cost of administration will not exceed $6,900. A declaration from a representative at Phoenix Class Action Administration Solutions was not included to address what costs are anticipated by the settlement administrator. Therefore, the court has insufficient information to assess the appropriateness of the proposed amount.

In addition to the issue of a failure to sufficiently demonstrate a community of interest, plaintiff's counsel has not presented sufficient evidence for the determination of whether the settlement agreement is fair or for the settlement administrator's fees. Therefore, the court denies the motion for preliminary approval of the class action settlement agreement, without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 1/24/2025.
(Judge's initials) (Date)