

**Tentative Rulings for March 27, 2025**  
**Department 502**

**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)**

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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.*

23CECG03156      *Dora Lerma v. Savemore* (Dept. 502)

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

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(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 502**

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(03)

**Tentative Ruling**

Re: **Robert Shank v. Ono Hawaiian BBQ, Inc.**  
Superior Court Case No. 24CECG01869

Hearing Date: March 27, 2025 (Dept. 502)

Motion: Plaintiff's Motion for Preliminary Approval of Class Settlement

**Tentative Ruling:**

To grant plaintiff's motion for preliminary approval of class settlement.

**Explanation:**

**1. Class Certification**  
**a. Standards**

"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.)

**b. Numerosity and Ascertainability**

"Ascertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary. While often it is said that class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records, that statement must be considered in light of the purpose of the ascertainability requirement. Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Nicodemus v. Saint Francis Memorial Hospital* (2016) 3 Cal.App.5th 1200, 1212, internal citations and quote marks omitted.)

Here, plaintiff seeks to certify a class consisting of all consumers in California who possess or possessed an Ono Hawaiian gift card with a balance of less than \$10.00. Plaintiff estimates that there are approximately 8,533 customers with gift cards that have a value of less than \$10.00, and that the class is ascertainable as the class members can be identified by the class members themselves or through defendant's records.

It does appear that the proposed class is sufficiently numerous to warrant certification, as there are approximately 8,533 people in the class. Therefore, the numerosity requirement has been satisfied.

With regard to the ascertainability requirement, in *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, the California Supreme Court held that the plaintiff in a class action does not necessarily have to provide evidence showing how class members might be individually identified in order to establish ascertainability. "We conclude that the trial court erred in demanding that plaintiff offer such evidence to satisfy the ascertainability requirement. Plaintiff's proposed class definition articulates an ascertainable class, in that it defines the class 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' As we will explain, the ascertainability requirement does not incorporate the additional evidentiary burden that the courts below would have imposed." (*Id.* at p. 961, internal citation omitted.)

Thus, the fact that the defendant in the present case does not have records showing who purchased gift cards does not necessarily mean that the class is not ascertainable. The class definition itself provides objective characteristics and common transactional facts that are necessary to meet the ascertainability requirement. The proposed class members are all holders of Ono gift cards which have a value of less than \$10.00. A consumer can determine if they are part of the class by finding their gift card and bringing it to an Ono restaurant to have the balance checked, or by entering their card number on Ono's website. If their card is worth less than \$10, then they are a member of the class. Thus, they can readily self-identify whether they belong in the class.

Therefore, the court intends to find that the proposed class is sufficiently ascertainable.

### **c. Community of Interest**

"[T]he '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.' " (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, internal citations omitted.) "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.) "[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.)

Here, it does appear that there are common questions of law and fact, as each class member has an Ono gift card worth less than \$10, and each class member has a right to receive cash back for their card. Defendant has a common practice of not giving cash back for cards worth less than \$10.

Plaintiff's counsel states that the class representative has claims typical of the class, as he has a gift card worth less than \$10 that Ono refused to cash out. Plaintiff's counsel also claims that the named plaintiff will be able to adequately represent the class, that he does not have any conflicts that would make him unable to represent the

class, and he has experienced and qualified counsel who are representing him and the rest of the class.

There is sufficient evidence to establish that class counsel are experienced and qualified to represent the class based on the declarations of counsel.

Also, the named plaintiff has provided a declaration in support of the motion, in which he states that he has no adverse interests to the other class members, and that his claims are typical of the rest of the class. (Shank decl., ¶¶ 8-9.) Therefore, plaintiff has met the community of interest requirement. As a result, the plaintiff has met his burden of showing that the proposed class should be certified for the purpose of settlement.

## **2. Settlement**

### **a. Legal Standards**

“When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court’s approval as fair.” (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

“[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 . . . The courts are supposed to be the guardians of the class.” (*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.) The court must be leery of a situation where “there was nothing before the court to establish the sufficiency of class counsel’s investigation other than their assurance that they had seen what they needed to see.” (*Id.* at p. 129.)

### **b. Fairness and Reasonableness of the Settlement**

“In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as ‘the strength of 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.’ The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.”

(*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–245, internal citations omitted, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

Here, it does appear that the settlement is fair and reasonable. Plaintiff has a strong case that defendant's policy of refusing to cash out gift cards with a value of less than \$10 is illegal, as Civil Code section 1749.5 requires stores to offer cash back where a customer has a gift card with a value of less than \$10. Plaintiff has sent investigators to several of defendant's restaurants, the investigators have not been able to cash out gift cards worth less than \$10. Therefore, plaintiff's chances of prevailing at trial are good.

However, it is likely that defendant would vigorously oppose plaintiff's claims at the class certification stage and at trial. There is always a risk that plaintiff would not prevail, or would not recover enough money to make the expense of risk of trial worth the trouble. Therefore, the risk, expense, complexity and duration of further litigation weigh in favor of approving the settlement.

The amount offered in settlement is minimal here, since most of the settlement is non-monetary. Defendant is essentially agreeing to comply with the law by offering cash back to customers with gift cards worth less than \$10, as well as retraining its employees to offer cash back, post notices regarding giving cash value for gift cards, etc. Defendant will also offer restitution for customers who no longer have their gift cards by giving out new gift cards worth \$10 to the first 2,820 customers who make claims, up to a total of \$28,200.

While the amount paid in settlement here is not substantial, the class members would likely receive a real benefit, since they would be more likely to be able to cash out their low value gift cards. Any customers who lost or discarded their low value cards would receive a benefit as well, as they can receive a new card worth \$10, which is more than their old card was worth. On the other hand, it is unclear whether defendant would allow them to simply cash their card out for its full value, or whether they would have to use their card to buy defendant's food or merchandise. Potentially, the customers could still be stuck with a gift card that has no real value to them. Still, it appears that the amount paid in settlement is fair and reasonable here given the low value of each class member's claim.

The parties did conduct some discovery into their claims, as well as some pre-lawsuit investigation to determine whether defendant had a policy of refusing to cash out low value gift cards. Counsel has not given much information about the exact nature of the discovery conducted. Still, given the nature of plaintiff's claims here, it appears that there was adequate discovery conducted to determine defendant's potential liability and the strength of each party's case.

The experience and views of counsel weigh in favor of approving the settlement, as counsel is highly experienced in class litigation and has represented many consumers in class actions in the past. Counsel believe that the settlement is fair and reasonable, and is in the best interest of the class members. The settlement was also reached after an arm's length mediation with the assistance of a neutral mediator, which creates a

presumption of fairness. Therefore, plaintiff has adequately proven that the settlement is fair, adequate, and reasonable.

### **c. Proposed Class Notice**

In order to give notice to the class members of the settlement, Ono has agreed to publish, at its own cost, a ¼ page summary of the case in USA Today one time within 20 days after the preliminary hearing date. There will also be a notice published on Ono's website with more complete information about the case, as well as instructions on how to make a claim for a replacement gift card. Plaintiff contends that this is adequate notice to the class, as class members cannot be notified any other way due to the nature of gift cards, which frequently do not stay with the purchaser and whose identification is rarely recorded anyway.

It does appear that the notice here is sufficient under the circumstances. While there is a real chance that many of the proposed class members will not see the notice, the class settlement will largely provide injunctive relief with little to no monetary award, so notice by publication is adequate. (See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251 (disapproved on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260) [holding class notice by publication adequate where class size was large and money damages were minimal]; *Frazier v. City of Richmond* (1986) 184 Cal.App.3d 1491, 1501 [holding notice to class was discretionary where relief sought was primarily injunctive and declaratory relief].)

Here, the notice will be published once in USA Today before the final approval hearing, which should give a large number of potential class members a chance to learn of the proposed class settlement. Notice will also be provided on Ono's website. Under the circumstances, this appears to be sufficient to provide adequate notice to the putative class, especially since the amount of money being provided is minimal and most of the relief will be in the form of an injunction requiring Ono to comply with the law and allow card holders to cash out their cards worth less than \$10. Therefore, the court intends to approve the proposed class notice.

### **3. Attorney's Fees and Costs**

Plaintiff's counsel will receive \$62,500 for fees and costs from defendant if the settlement is approved. The amount of attorney's fees and costs does not appear on its face to be unreasonable, especially since it will not reduce the overall amount paid to the class. Also, counsel has now provided a declaration summarizing the hours worked on the case and the attorneys' hourly rates. Counsel states that they charge \$800 per hour and worked 91.8 hours on the case, so their lodestar fees are \$73,440. (Fineman decl., ¶ 12; Poliner decl., ¶¶ 6, 7.) As a result, the fees that counsel will receive through the settlement appear to be reasonable, as they are actually less than their lodestar fees. Therefore, the court intends to grant preliminary approval of the requested fees and costs.

### **4. Payment to Class Representative**

