

LOS ANGELES SUPERIOR COURT, COMPLEX CIVIL DEPARTMENT

CHECKLIST FOR

PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

This checklist provides direction on what information and argument the court requires to grant a motion for preliminary approval of a class action settlement. All parties are urged to carefully review the checklist and fully comply with each item that applies to the case in order that the motion may be promptly ruled upon. The content of the motion should follow the same order as this checklist, as that is how the judge and research attorney review the motion.

I. MOVING PAPERS (Motion and Declarations)

All facts submitted for the court to consider must be provided in the form of a declaration or other admissible evidence. The court will not consider facts stated only in the motion.

A. Introductory Information

Summary of the litigation, including identity of the parties, brief procedural history, claims asserted, and general factual basis for the claims.

B. Dunk/Kullar Analysis

Summary of the case, including the legal and factual basis for each claim. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133 (*Kullar*); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409.)

Summary of the investigation and discovery conducted, including the specific documents reviewed prior to agreeing to settle the case. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802, as modified Sept. 30, 1996 (*Dunk*). If counsel's analysis was informed by a data sample, show that the sample is statistically reliable.

Summary of settlement negotiations, including when the settlement was reached, and whether the parties were assisted by a mediator. (*Dunk, supra*, 48 Cal.App.4th at p. 1802.)

A summary of the risks, expenses, complexity, and duration of further litigation if the settlement is not approved.

- A summary of the risks of achieving and maintaining class action status.
- Specific information sufficient for the court to make an independent determination that the consideration being received for the release of class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. (*Kullar, supra*, 168 Cal.App.4th at 129.) This discussion should specify the maximum realistic recovery of each claim asserted in the operative complaint, defenses asserted by Defendant, and any other relevant factors justifying the amount offered in settlement. If the settlement is predicated on a payment plan or is predicated on defendant's financial situation, admissible evidence of Defendant's financial situation should be provided, including appropriate financial documents such as a balance sheet, statement of cash flows, profit and loss statement, and the like.
- If approval of the settlement of class claims is requested together with approval of non-class claims (such as claims under the Labor Code's Private Attorney General Act (PAGA)) discuss why the amount allocated to the non-class claims is fair to those affected. See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 (*Moniz*).

C. Class Certification

- Numerosity: Total number of members in the settlement class and number of members in each sub-class (if applicable).
- Ascertainability: The manner by which members of the class will be identified and when. (*Noel v. Thrifty Payless* (2019) 7 Cal.5th 955.)
- Community of Interest: Discuss specific facts showing that the proposed class representatives have claims or defenses typical of the class and can adequately represent the class. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
- Adequacy:

Class Counsel: A summary of Class Counsels' experience and a listing of all prior cases in which each named Class Counsel has been approved by a court to act as lead or co-counsel. (See *Dunk, supra*, 48 Cal.App.4th at 1802.)

Class Representative(s); Provide evidence that each proposed class representative has agreed to act as same and understands his or her responsibilities. (See *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 155-156; *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 998-999.)

D. Claim Requirement (if applicable)

- If class members are required to submit a claim to receive compensation, explain why a claim form is necessary and either 1) provide an estimate of the anticipated claims rate or 2) provide an explanation why a claims rate cannot be provided.
- Provide a detailed explanation why a “claims made” settlement is appropriate.
- Indicate what actions class counsel will take to encourage claim submission.
- Explain why the claims process is not so burdensome that relief would be inaccessible to class members (if applicable).

E. Miscellaneous

- If appropriate, explain why the settlement includes terms that are outside the scope of the operative complaint. (*Trotsky v. Los Angeles Fed. Savings & Loan Assn.* (1975) 48 Cal.App.3d 134, 148.) If approval of settlement of a PAGA claim is requested provide a copy of Plaintiff’s notice letter to the LWDA.
- If notice will be given in English only, explain why this is sufficient.
- A statement of any affirmative obligations to be undertaken by the class member or class counsel and the reason for such obligations.
- Provide information regarding any fee splitting agreement and whether the client has given written approval. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219; Rules Prof. Conduct, rule 1.5.1; Cal. Rules of Court, rule 3.769.)
- Any agreement that has injunctive relief against a class representative or absent class member generally is not appropriate in a class action case. Provide the authority and factual reasons why this case is an exception. See *Moniz, supra*, 72 Cal.App.5th at 84. (“[T]he preclusive effect of a prior judgment is determined by the court in which it is asserted, not the court that rendered it.” (*Fireside Bank Cases* (2010) 187 Cal.App.4th 1120, 1131 [115 Cal. Rptr. 3d 80].))
- Explain why any proposed class representative enhancement is reasonable, including what the class representative did beyond the expected services of any class representative. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412; *Radcliffe v. Experian Information Solutions Inc.* (9th Cir. 2013) 715 F.3d 1157, 1165.) In PAGA settlements explanation should be provided as to why an incentive award is appropriate.

II. SETTLEMENT AGREEMENT

The settlement agreement should address the following:

A. The Basics

Class definition. If a PAGA representative action is settled with a proposed Class Settlement consider whether there should be separate definitions for Class Members and Aggrieved Employees.

Class and Release Period: If the class and release periods extend beyond the date of preliminary approval explain why this is appropriate.

B. Release of Claims

Scope: The scope of any release given by class members must be defined with precision and clarity. Any released claims not presented directly in the operative complaint should be based on the facts alleged in the operative complaint. (See *Amaro v. Anaheim Arena Mgmt.* (2021) 69 Cal. App. 5th 521, 537 and FN. 5; *Uribe v. Crown Building Maintenance Co.* 70 Cal. App. 5th 986, 1005.)

Class cases which include a PAGA claim should have a separate release for the PAGA claim tied to the facts alleged in the notice given to the LWDA. *Id.*

If PAGA and Class Settlement: The Release should provide an explanation that released claims include all PAGA claims that could have been premised on the facts alleged in the Plaintiff's Notice and aggrieved employees will release PAGA claims even if class members request exclusion from the class. See *Robinson v. Southern Counties Oil Co.* (2020) 53 Cal.App.5th 476.)

A Civil Code section 1542 waiver is generally not appropriate in a class action case as to the putative class members (if applicable). Provide the authority and factual reasons why this case is an exception. (*Israel-Curley v. California Fair Plan* (2005) 126 Cal.App.4th 123, 129; *Salehi v. Surfside III Condominium Owners' Assn.* (2011) 200 Cal.App.4th 1146, 1159–1161.)

Release Effective Date: Indicate the point in time at which the release will be deemed effective as to the absent class members. If the release will be effective before settlement funds are paid, explain why this is in the best interest of the class.

Class Data: If there are confidentiality provisions, explain why they are in the best interest of the Class and whether they will impede Class Counsel's ability to discharge fiduciary duties.

C. Monetary Terms of Settlement

- Settlement Amount: Indicate the amount of the gross settlement, how and when the settlement will be paid, and information regarding payment plan, if any. If a class claim is being settled with a PAGA claim the amounts allocated should be separated and paid only to the aggrieved employees.
- Deductions from the settlement fund: Indicate the amounts to be deducted from the gross settlement for attorneys' fees and costs, plaintiff incentive awards, administrative costs, PAGA payment and allocation of award to LWDA and the parties, and any other existing deductions.
- If there are subclasses, explain why the monetary distribution is fair to each subclass. Insure there is a class representative who fits the definition of each subclass.
- Information about how attorney fees will be calculated. The percentage method, with or without a lodestar cross-check, may be used in common fund cases. (*Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 503.) In other cases, counsel should fully brief how the fees are calculated.
- If wages are involved, explain how Defendant's share of taxes will be paid.
- Whether, and under what circumstances, amounts may revert to Defendant, and a justification for such reversion (if applicable). (*Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 728–729.)
- Payment Formula: Amount and manner of distribution of the compensation to each class member, including the estimated amount each class member will receive and the timeline on which payments will be issued.
- Tax allocation of settlement payments.
- Nature of injunctive relief (if any), and valuation of such relief.

D. Notice Administration

The following issues regarding notice administration should be addressed in the settlement agreement. A copy of the proposed notice must be attached to the settlement agreement as an exhibit.

- Indicate the administrator for the settlement and why the bid for administration is fair.

- Provide the qualifications and experience of the Administrator, including evidence that the settlement administrator has procedures in place to protect the security of class data and adequate insurance in the event of a data breach or defalcation of funds.
- Indicate how/when the administrator will receive the class list.
- Indicate whether the list will be updated by the administrator prior to the initial mailing by use of National Change of Address Registry.
- Provide the deadline for the initial issuance of notice to class members.
- Ensure the content of the notice complies with California Rules of Court, rule 3.766(d). In wage and hour cases the notice should indicate the specific amount the class member will receive, and how that amount was calculated. A separate breakdown for PAGA payments should be provided. The terms of the release(s) should be reflected in the Notice.
- Ensure the notice accurately reflects the Court's current social distancing procedures for attendance at hearings and review of court files. (Counsel should check the Court website for most current information.)
- Indicate how and when payments will be processed.
- Indicate how notices returned to the administrator as undeliverable will be handled.
- Explain how re-mailed notices, if any, will be handled. Will class members who receive re-mailed notices be given an extended deadline to respond (i.e., opt-out, object, and dispute workweeks)?
- Explain how notice of any change of the date or location of the will hearing be given.
- Indicate whether there will be a settlement website. If so, provide the URL.
- If publication notice will be given indicate the timing, locations, and manner by which publication notice will be disseminated.
- Explain how notice of final judgment will be given to the class. (Cal. Rules of Court, rule 3.771(b)) (e.g. Posted on claims administrator's website.)

E. Responses to Notice

- Description of the procedures for submitting written objections, requests for exclusion, claim forms (if applicable) and disputes to estimated payments.
- Indicate the deadline to submit objections, requests for exclusion, claim forms (if applicable), and/or disputes to workweeks. Confirm the deadline is reasonable and that class members who receive re-mailed notices will be given an extension.
- The objection procedure the same as the opt-out procedure, with the only requirement being that objections be mailed to the settlement administrator and not filed with the court.
- Do not include language indicating that class members may only be heard at final approval if they have complied with all objection procedures or that they must use specific language to request exclusion, or, if a specific procedure is sought explain why it is necessary. In general, the court will hear from any class member who attends the final approval hearing and asks to speak regarding his or her objection. accordingly.

F. Cy Pres Distribution

- Indicate the length of time from issuance for which settlement checks will remain valid.
- Identify the fund to which uncashed checks will be directed and detail the steps that will be taken to ensure compliance with Code of Civil Procedure section 384. The Court's Omnibus Trailer Bill of 2018 replaced the language of the prior statutory distribution scheme under Code of Civil Procedure, section 384 with a requirement that the Court re-open judgments following the final distribution of funds to include the cy pres in the judgment and to include the unclaimed amount, plus an unspecified amount of interest. Such information should be actively contemplated/provided for within the current terms of the settlement.
- Explain why any cy pres distribution fills the purposes of the lawsuit or is otherwise appropriate. (*State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 722; *Nachshin v. AOL, Inc.* (9th Cir. 2011) 663 F.3d 1034, 1038–1041; *Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865; Code Civ. Proc., § 384.)
- Provide declarations disclosing the interest or involvement (or lack thereof) by any counsel or party in the governance or work of the cy pres recipient.

G. Miscellaneous

- Assure the Settlement Agreement and Notice are consistent and that the Settlement Agreement has been signed by all parties and counsel. Carefully proofread both.

- The Settlement Agreement and paperwork derivative thereof should not suggest that the end result of court approval will be dismissal of the Action with prejudice or entry of a Final Judgment and Order dismissing with prejudice all claims. See California Rules of Court, rule 3.769(h).

III. EXHIBITS TO THE MOTION

- Provide proof of submission of the proposed settlement agreement to the LWDA. (Lab. Code, § 2699, subd. (1)(2).)

- Include a proposed Judgment, which should not include a dismissal or any findings not contained in the Final Approval Order. (Cal. Rules of Court, rule 3.769(h).)

- All exhibits should be bookmarked, as set forth in the Presiding Judge's First Amended General Order of May 3, 2019 re: Electronic Filing, available on the Court website.

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