

Department 33
Tentative Rulings – March 12, 2010

#1. BC389150 – Beverly Deutsch, et.al. v. General Motors Corporation, et.al.

The motion of defendants LACMTA and Mark Donougher for determination of good faith settlement is GRANTED. CCP §877.6. The court finds that the settlement is within “the ballpark” in relation to the Tech-Bilt factors as to be consistent with the equitable objectives of the statute. Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d 488, 499- 500.

For the record, the court notes that no motion to contest has been filed.

#13. B377269 -- Roberto Martinez v. Joes Crab Shack, Inc.

The motion of plaintiff Roberto Martinez for class certification is DENIED without prejudice. On its own motion, pursuant to Code of Civil Procedure section 1008(c), the court reconsiders its February 5, 2010 order denying plaintiff’s motion to amend his complaint to add two additional plaintiffs and GRANTS leave to amend the complaint.

Class certification is appropriate when “the question is one of a common or general interest, of many persons, or when parties are numerous and it is impracticable to bring them all before the court.” CCP section 382. “To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among class members. The community of interest involves three factors: ‘[1] predominant 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. The party seeking certification has the burden of establishing the prerequisites for a class action.’ *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435. A plaintiff must present substantial evidence demonstrating that these factors have been satisfied as “a certification ruling not supported by substantial evidence cannot stand.” *Lockheed Martin Corp. v. Superior Court (Carillo)* (2003) 29 Cal.4th 319, 327.

The court has fully and carefully considered the admissible evidence submitted by the parties, as well as, their written and oral submissions. The court finds that plaintiff has failed to meet his burden of establishing (1) an ascertainable class, (2) that, as to defendant Landry’s, his claims are typical of the class, and (3) that he can adequately represent the class.

Numerosity

The uncontested evidence is that there are 182 members of the proposed class. The

court finds sufficient numerosity.

Ascertainability of the Proposed Class

With respect to ascertainability of the class, plaintiff has proposed a class consisting of “[a]ll persons employed by Defendants in California as a salaried restaurant employee in a Joe’s Crab Shack restaurant at any time since September 7, 2003 who were misclassified as exempt.”

Whether an ascertainable class exists depends upon “(1) the class definition, (2) the size of the class, and (3) the means available for identifying class members.” *Global Minerals & Metals Corp. v. Superior Court (National Metals, Inc.)* (2003) 113 Cal.App.4th 836, 849. “Class members are ‘ascertainable’ where they may be readily identified without unreasonable expense or time by reference to official records.” *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App.4th 121, 135.

In defining an ascertainable class, “the goal is to use terminology that will convey ‘sufficient meaning to enable persons hearing [the definition] to determine whether they are members of the class plaintiffs wish to represent’ ... [Ascertainability] goes to the heart of the question of class certification, which requires a class definition that is ‘precise, objective and presently ascertainable.’ Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating.” *Global Minerals, supra*, 113 Cal. App. 4th at 858.

“[A]scertainability can be better 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. The class certification order and notice to the class are the proper places to explain the relationship between the defined class and the legal claims being made in the case.” *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915. “The class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover based on the description.” *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1533 (quoting *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 14).

Under these authorities, the court finds the class proposed in the moving papers is not ascertainable. It does not convey sufficient meaning to enable potential class members to determine whether they are members of the class. It is not presently ascertainable. It does not describe a set of characteristics sufficient to allow a member of the prospective class to identify herself as having a right to recover based on the description. This is so because the phrase “who were misclassified as exempt” requires additional fact determination to be “presently ascertainable.” It does not enable a person hearing or seeing it to identify herself as a class member.

However, plaintiff in his reply papers asserts that the failure of the moving papers to "track" the definition of the proposed class in the complaint was an "oversight" on counsel's part and that the complaint's definition is "acceptable". The court finds ascertainable the definition of the class in the complaint: All persons employed by Defendants in California as a salaried restaurant employee in a Joe's Crab Shack restaurant at any time since September 7, 2003. The identity of the class members can be readily ascertained from defendants' employee records (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828) and it is sufficient to allow a member of the class to identify herself as having a right to recover based on the description. *Ghazaryan v. Diva Limousine, supra*, 169 Cal.App.4th at 1533.

Typicality of Plaintiff's Claims

The named plaintiff must be a member of the class. *Petherbridge v. Altadena Federal Savings and Loan Association* (1974) 37 Cal.App.3d 193, 200. The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.

Here, defendant Landry's Restaurants contends, named plaintiff Roberto Martinez does not have claims typical of the class of Landry's salaried employees. It asserts from the evidence that during the entire time Joe's Crab Shack was owned and operated by defendant Landry's Restaurant, plaintiff's only employment was in a non-exempt position in which he was paid on an hourly basis, was paid overtime as required by law and was provided all meal and rest breaks. However, plaintiff has submitted his deposition testimony to the effect that he was a salaried manager at the Ventura restaurant prior to the time Landry's disposed of its ownership of Joe's Crab Shack. Exhibit 2 to the Supplemental Declaration of Matthew Righetti. ("Supp. Righetti Decl."). The court finds, based on the evidence submitted, that plaintiff was a salaried manager of Landry's and that his claims are typical of the proposed class.

Predominance of Common Issues of Fact and Law

Defendants have classified all of their California salaried employees as exempt, without reference to individual work experience or requirements, relying solely on job titles alone in defining who is tax exempt and who is not. Uniform policies, procedures, and training are imposed on all California salaried employees. All salaried employees perform the same duties and responsibilities pursuant to a finite task list. The predominant dispute revealed by the evidence submitted is whether the individual duties, responsibilities, and tasks are managerial in nature or non-managerial in nature. This is quite similar to the situation in *Save-On Drug Stores v. Superior Court, supra*, 34 Cal.4th 319, 330-331, where, after noting the conflicting declarations submitted by the parties on the subject of whether the managers spent a majority of their time on managerial or non-managerial tasks (similar to those submitted here), the Court stated: "Regardless of who

is correct, the fact is the tasks discussed in both defendants' and plaintiff's submissions comprise a reasonably definite list. As plaintiffs argued to the trial court, "[t]he only difference between Defendant's declarations and Plaintiffs' evidence is that the parties disagree on whether certain identical work tasks are 'managerial' or 'non-managerial' ... This is an issue that can easily be resolved on a class-wide basis by assigning each task to one side of the 'ledger' and makes the manageability of the case not the daunting task Defendant has sought to portray." In this case, defendants have already demonstrated, and ask the court to rely upon, such a "survey" of their declarants in which they identify the hours spent each week on a list of tasks so as to ascertain whether the declarant spent a majority of their time on managerial tasks as opposed to non-managerial tasks. The court concludes that common issues of fact and law predominate.

Class Treatment is a Superior Method

As noted by the California Supreme Court in *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at 340, "[a]bsent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants."

Having considered the evidence offered here, the court finds that there are sufficient issues amenable to class treatment to make class treatment a superior method of resolving the claims presented. Among those issues are defendants' classification of employees as exempt or non-exempt, defendants' state-wide policies and procedures, defendants' training programs for class employees, whether defendants have ever trained their personnel on the difference between exempt and non-exempt positions, whether defendants have ever had a compliance program, the finite tasks performed by defendants' managers, whether defendants had a policy of restricting the labor budget for non-managerial employees to less than that required to meet a restaurant's actual needs to force salaried employees to work overtime without overtime compensation.

The court finds that class treatment would avoid the separate duplicative proceedings, potentially with divergent legal rulings, at significant expense.

Adequacy of Class Counsel

Having reviewed the evidence submitted, including the declarations of counsel, the court finds Messrs Righetti and Glugoski adequate class counsel.

Adequacy of Plaintiff's Representation of Class

In order to satisfy due process and res judicata requirements, the class representative must adequately represent and protect the class interests. *City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 463. The class representative must raise claims "reasonably expected to be raised by the members of the class." *Ibid.*,

at 464.

The court finds from the evidence that plaintiff Roberto Martinez is not an adequate class representative. Among other evidence, deposition testimony submitted by defendants reflects: (1) Plaintiff was not aware of the mediation which took place in this action, did not attend it, and does not know when it took place; (2) Plaintiff was not aware of any other depositions taken in this case other than his own; (3) Plaintiff's first meeting with one of his counsel was for thirty minutes the morning of the first session of his deposition; (4) Plaintiff, as of October 26, 2009, had not reviewed any of the 20,000 pages of documents produced by defendants in this action; (5) Plaintiff testified that he had lent his name to the case and trusted his attorneys to make decisions; and, (6) Plaintiff, as of October 26, 2009, had made no decisions in the case personally.

In light of the court's conclusions set forth above and the recent decision in *Jaimez v. Daijohs USA, Inc.* (2010) 181 Cal.App.4th 1286, the court on its own motion, pursuant to Code of Civil Procedure 1008(c), finds that its February 5, 2010 order denying plaintiff leave to amend his complaint to add two additional plaintiffs was in error and should be reconsidered. The court GRANTS plaintiff's motion for leave to file an amended complaint to add the two additional plaintiffs.

Rulings on Defendant Landry's Restaurants' Evidentiary Objections

DENIED. Defendant Landry's Restaurant has failed to comply with the mandatory provisions of California Rule of Court 3.1354 that "[E]ach written objection must be numbered consecutively. In addition, Defendant Landry's Restaurants has failed to comply with the mandatory format requirements of the same rule.

Rulings on Evidentiary Objections of Defendants Crab Addison, Inc. and Ignite Restaurant Goup

Righetti Declaration

1. SUSTAINED
2. SUSTAINED

Glugoski Declaration

1. SUSTAINED
2. SUSTAINED

Other Declarations

1. OVERRULED
2. OVERRULED
3. OVERRULED
4. SUSTAINED, except as to "I complained to my General Manager Chuck

Newman.

5. SUSTAINED, except as to "they never conveyed to me in any way that this is not what Joe's Crab Shack expected."
6. SUSTAINED
7. OVERRULED
8. OVERRULED
9. OVERRULED
10. OVERRULED
11. OVERRULED
12. OVERRULED
13. SUSTAINED
14. OVERRULED
15. SUSTAINED, as to first sentence only.
16. OVERRULED
17. OVERRULED, except as to "Joe's Crab Shack knew we were spending the vast majority of our time performing the same work and tasks as hourly employees and".
18. OVERRULED, except as to sentences reflecting witness' belief or deductions
19. OVERRULED
20. OVERRULED
21. SUSTAINED
22. OVERRULED
23. SUSTAINED
24. OVERRULED
25. OVERRULED
26. OVERRULED
27. OVERRULED
28. OVERRULED
29. SUSTAINED as to first sentence only. Otherwise, OVERRULED
30. SUSTAINED
31. OVERRULED
32. OVERRULED
33. OVERRULED
34. OVERRULED
35. OVERRULED
36. SUSTAINED
37. OVERRULED
38. SUSTAINED
39. OVERRULED
40. OVERRULED
41. OVERRULED
42. SUSTAINED
43. OVERRULED
44. OVERRULED
45. OVERRULED

46. OVERRULED
47. OVERRULED
48. OVERRULED
49. OVERRULED
50. SUSTAINED
51. OVERRULED
52. OVERRULED
53. OVERRULED
54. OVERRULED
55. OVERRULED
56. OVERRULED
57. SUSTAINED, except first sentence.
58. SUSTAINED, except "Within my own restaurant, I witnessed first hand the other salaried managers doing the same type of hourly work I was doing, the majority of their time I observed them" and "As a Manager" to end of paragraph.
59. OVERRULED
60. OVERRULED
61. OVERRULED
62. OVERRULED
63. OVERRULED
64. OVERRULED
65. OVERRULED
66. SUSTAINED, except "I worked at two Joe's Crab Shack restaurants and experience first hand that both are run in a similar manner."
67. SUSTAINED
68. OVERRULED
69. OVERRULED
70. OVERRULED
71. OVERRULED
72. OVERRULED
73. OVERRULED
74. OVERRULED
75. OVERRULED
76. OVERRULED
77. OVERRULED
78. OVERRULED
79. SUSTAINED, except as to "it was extremely hard to get days off and the majority of my time employed at Joe's Crab Shack I worked six days a week."
80. OVERRULED. Quotation of paragraph too lengthy and burdensome for court to set forth what is overruled and what is sustained.
81. OVERRULED
82. OVERRULED
83. OVERRULED
84. OVERRULED
85. OVERRULED

- 86. OVERRULED
- 87. OVERRULED. Quotation of paragraph too lengthy and burdensome for court to set forth what is overruled and what is sustained.
- 88. OVERRULED
- 89. OVERRULED
- 90. OVERRULED
- 91. OVERRULED
- 92. OVERRULED
- 93. OVERRULED
- 94. OVERRULED
- 95. SUSTAINED
- 96. SUSTAINED
- 97. OVERRULED
- 98. OVERRULED
- 99. OVERRULED
- 100. OVERRULED
- 101. OVERRULED
- 102. SUSTAINED, except for first sentence.
- 103. SUSTAINED
- 104. OVERRULED
- 105. OVERRULED
- 106. OVERRULED
- 107. OVERRULED
- 108. OVERRULED
- 109. OVERRULED
- 110. SUSTAINED, except for first sentence.
- 111. OVERRULED. Quotation too lengthy and burdensome for court to set forth which portions are overruled and which are sustained.
- 112. OVERRULED
- 113. OVERRULED
- 114. OVERRULED
- 115. OVERRULED. Quotation too lengthy and burdensome for court to set forth which portions are overruled and which are sustained.
- 116. OVERRULED
- 117. OVERRULED. Quotation too lengthy and burdensome for court to set forth which portions are overruled and which are sustained.
- 118. OVERRULED
- 119. OVERRULED
- 120. OVERRULED
- 121. OVERRULED
- 122. SUSTAINED
- 123. OVERRULED
- 124. OVERRULED
- 125. OVERRULED
- 126. OVERRULED

- 127. OVERRULED
- 128. OVERRULED
- 129. OVERRULED
- 130. OVERRULED
- 131. OVERRULED
- 132. OVERRULED
- 133. OVERRULED
- 134. OVERRULED
- 135. OVERRULED
- 136. SUSTAINED
- 137. OVERRULED
- 138. OVERRULED
- 139. OVERRULED
- 140. OVERRULED
- 141. OVERRULED
- 142. OVERRULED
- 143. OVERRULED
- 144. SUSTAINED, except as to first sentence.
- 145. OVERRULED. Quotation too lengthy and burdensome for court to set forth what portion is overruled and what portion is sustained.
- 146. OVERRULED
- 147. OVERRULED
- 148. OVERRULED
- 149. SUSTAINED

Plaintiff's Request for Judicial Notice

- 1. DENIED
- 2. DENIED
- 3. GRANTED
- 4. GRANTED
- 5. GRANTED
- 6. GRANTED
- 7. DENIED
- 8. DENIED
- 9. DENIED