

BORREGO V. RALEY'S (Case No. 2015-00177687)

Motion for Order Provisionally Certifying Settlement Class and Preliminarily Approving Class Settlement

The Court issues the following tentative ruling for the hearing set for January 17, 2020 at 10:30 a.m. regarding the unopposed motion of Plaintiffs Borrego et al. for preliminary approval of class action settlement, and related relief. (Register of Actions ("ROA") 369-72.)

While the Court's ruling tentatively indicates that it will grant preliminary approval of the class action settlement as requested in general, including provisional certification, the Court must still hold a hearing on the motion as it may involve the receipt of evidence. Thus, while the Court anticipates that neither Plaintiffs nor Defendant will request oral argument, and while no putative class member indicated any intent to appear at the hearing, this does not relieve the parties from appearing at the hearing or otherwise render the instant ruling final in the event oral argument is not requested.

NOTICE

Parties requesting services of a court reporter shall advise the Court at (916) 874-7885 no later than 4:00 p.m. the court day before the hearing. Please be advised there is a \$30.00 fee for court reporting services, which must be paid at the time of the hearing, for each civil proceeding lasting less than one hour. (Gov't Code § 68086(a)(1)(A).)

The Court Reporter will not report any proceeding unless a request is made and the requisite fees are paid in advance of the hearing.

*The notice of motion does not provide notice of the Court's tentative ruling system, as required by Local Rule 1.06(D). **Counsel for the moving party is directed to contact opposing counsel forthwith to advise counsel of Local Rule 1.06 and the Court's tentative ruling procedure.***

DISCUSSION

Appearances required.

Plaintiffs Lucianna Borrego ("Borrego") and Kirsten Kelly ("Kelly") bring claims on behalf of "all others similarly situated" **and** "on behalf of themselves individually." (Register of Actions ("ROA") 281 (Second Amended Complaint ("SAC") at 1-2.)

Plaintiffs Stephanie Lester ("Lester"), Sharona Broughton ("Broughton"), Angela Mulligan ("Mulligan"), Valerie DeSimone ("DeSimone"), Heather Macias ("Macias"), Holly Maples ("Maples"), Kimberly Webb ("Webb"), and Larissa Pierce ("Pierce") bring claims on behalf of themselves individually. (SAC at 1-2 (listing these Plaintiffs as "bring[ing] this action on behalf of themselves individually.")) The Court notes that, with the exception of Borrego and Kelly, none of the other individuals appear as named plaintiffs in the actual caption of the operative

pleading, but they are referred to as “Plaintiffs” throughout that pleading. They will collectively be referred to as “Plaintiffs” herein.

This is a putative class action. In the instant Motion for Order Provisionally Certifying Settlement Class and Preliminarily Approving Class Settlement, Plaintiffs are seeking to certify a class for settlement purposes only, and are also seeking approval of the Settlement Agreement reached after private mediation.

The parties having achieved a proposed settlement of the action, Plaintiffs now move for an order:

1. Granting class certification of the Settlement Class for settlement purposes only, pursuant to Cal. Civ. Proc. Code § 382;
2. Provisionally approving the proposed class action settlement set forth in the Settlement Agreement (Exh. A to Declaration of Jennifer Liu (“Liu Decl.”));
3. Approving the proposed notice procedure and related forms;
4. Appointing Borrego, Kelly, and the eight additional plaintiffs as Settlement Class Representatives and provisionally approving representative service awards;
5. Approving a settlement Claims Administrator;
6. Appointing Class Counsel and provisionally approving attorney fees and costs awards;
7. Directing that all dates and deadlines associated with this action be stayed (other than those related to administration of the Settlement); and,
8. Setting a date for a Final Approval hearing.

Based on the evidence and papers submitted in support thereof, Plaintiffs’ Motion is GRANTED, subject to the preliminary approval hearing and, thereafter, a final fairness hearing.

Background

Plaintiffs filed the original Complaint in this action on April 9, 2015. Plaintiffs filed a First Amended Complaint (“FAC”) on July 18, 2018. The operative Second Amended Complaint (“SAC”) was filed on December 17, 2018. (ROA 281.) The SAC was later limited by Orders sustaining a demurrer in part and granting a motion to strike. (P&As at 3-4 (“These Orders had the effect of removing Ms. Maryland as a Plaintiff and limiting the statute of limitations for all remaining Plaintiffs and putative class members to allegations occurring between November 1, 2012 and July 8, 2015.”).

Plaintiffs allege that Defendant Raley’s (“Defendant”) is liable on a class-wide basis for five claims against Defendant under California’s Fair Employment and Housing Act (“FEHA”) and California’s Unfair Competition Law (the “UCL”): (1) failure to reasonably accommodate (Gov’t Code § 12945(a)(3)); (2) pregnancy discrimination (Gov’t Code § 12940(a)); (3) unfair competition (Bus. & Prof. Code §§ 17200 et seq.); (4) interference with Gov’t Code § 12945 Rights (Gov’t Code § 12945(a)(4)); and, (5) failure to prevent discrimination (Gov’t Code § 12940(k)). (SAC, ROA 281.)

“The SAC alleged that, until July 2015, Defendant had a company-wide policy, Raley’s

Workplace Injury Return-to-Work Program, that provided light duty assignments for employees who sustained occupational injuries or illnesses (regardless of gender), but did not provide similar light duty assignments to employees disabled due to pregnancy.” (P&As at 2-3.) “The SAC further alleged that Defendant’s employee handbook failed to notify employees that they were entitled to reasonable accommodation for pregnancy-related conditions, failed to provide pregnant employees with legally-required notices of their rights, and failed to provide store-level managers and supervisors with adequate training on accommodating pregnant employees.” (*Id.*)

The parties were able to agree upon a settlement after lengthy litigation involving: several iteration of the pleading, demurrers and motions to strike, production of tens of thousands of documents, multiple discovery disputes, a *Belaire-West* notice process, 29 depositions, a fully-briefed class certification motion, and finally, private mediation with employment law and class action mediator Jeffrey Ross, Esq. (Liu Decl. ¶¶ 10-17.)

Proposed Settlement Class Definition

The proposed Settlement Class (“Settlement Class”) is defined as “**all individuals employed by Defendant in the State of California in a Covered Position who began or were on a pregnancy disability leave of absence at any time between November 1, 2012 and July 8, 2015.**” (Exh. A to Liu Declaration (“Settlement Agreement”) at ¶ 45.) A “Covered Position” is defined as “any and all California store-level job positions.” (*Id.* ¶ 15.) The “Settlement Class Period” is defined as “the time period between November 1, 2012 and July 8, 2015.” (*Id.* ¶ 46.)

Plaintiffs indicate that there are “approximately 325 to 350 female store employees who were pregnant while employed” by Raley’s during the relevant time period. (P&As at 1.)

The parties participated in discovery and mediation as described in the moving papers. Prior to the hearing on Plaintiffs’ Motion for Class Certification, the parties reached a settlement in principal, and thereafter entered into the Settlement Agreement. (Exh. A to Liu Decl.) The settlement establishes a non-reversionary common fund (“Fund”) of \$2.8 million to settle all claims asserted in this action against Defendant. (Exh. A to Liu Decl. §§ 29, 53, 75.)

Proposed Allocation of Settlement Fund

According to the moving papers, the Fund covers Settlement Class Members’ payments, class representative service awards, attorneys’ fees and costs, the settlement Claims Administrator’s fees and costs, and the employee portion of payroll taxes. (Exh. A to Liu Decl. § 29.) The Fund does not include the employer’s portion of payroll taxes, which will be paid separately by Defendant. (*Id.*) All other taxes will be paid by the payment recipients. (*Id.*)

The Fund is provisionally allocated as follows: up to 33 and 1/3 percent of the Fund to reasonable attorneys’ fees (a maximum of \$933,333.33), litigation costs of up to \$90,000.00, incentive awards to Plaintiffs of up to \$185,000 total, settlement administration costs of up to \$51,520.00. By the Court’s calculation, even if these maximum amounts were awarded, this would leave approximately \$1,540,147 to be divided among the Settlement Class. The Court

does not find that the settlement disproportionately routes more fees to the attorneys than to members of the Settlement Class.

Participating Class Members do not need to take any action to participate in the settlement and will automatically receive the minimum Individual Settlement Payment if they do not opt out. If Participating Class Members do not sign and cash their checks within one hundred and twenty days from date of their issuance, the checks will become void. If after the period for cashing Individual Settlement Payments has expired and the residual funds from the uncashed checks are more than \$50,000, the Settlement Administrator (here, Settlement Services, Inc. (“Administrator” or “SSI”)) will issue a second pro rata distribution to all Participating Class Members who cashed their checks at the initial distribution. (Exh. A to Liu Decl. §§ 75-76.)

If the residual funds after the initial distribution are \$50,000 or less, the funds shall be issued to a Cy Pres Beneficiary: The Center for WorkLife Law. If a second distribution occurs, any residual funds after the second distribution shall be issued to the Cy Pres Beneficiary according to the Cy Pres Allocation. No residual funds will revert to Defendant. (Exh. A to Liu Decl. §§ 75-76.)

To calculate the amount of each Class Member’s payout from the Fund, the Settlement Administrator will “review and score” the “responses provided on the Claim Form submitted by Participating Class Members.” (Exh. A to Liu Decl. §§ 71-72.) According to the moving papers (P&As at 7-8), the scoring of the “points” shall be based on Claim Form responses as follows:

1. All Participating Class Members shall receive 10 points based on being a member of the Settlement Class, without regard to whether they submit a timely Claim Form, *id.* §71(a);
2. Each Participating Class Member shall receive an additional 5 points for each additional pregnancy that she had during the Settlement Class Period, up to a maximum of 10 additional points in the aggregate, [Participating Class Members with multiple pregnancies during the Settlement Class Period can report a maximum of three (3) pregnancies on the Claim Form.] *id.* § 71(b);
3. Each Participating Class Member shall receive 1 point for each week that the Settlement Administrator determines she went on a pregnancy disability leave of absence prior to the date she and/or her medical provider decided she should stop working, up to a maximum of 30 points per pregnancy or 90 points in the aggregate, *id.* § 71(c);
4. Each Participating Class Member shall receive 30 points per pregnancy if the Settlement Administrator determines that she experienced emotional distress as a result of beginning a pregnancy disability leave of absence prior to the date she and/or

her medical provider decided she should stop working, up to a maximum of 90 points in the aggregate, *id.* § 71(d).

A Participating Class Member may receive a theoretical maximum total of 200 points if she had three or more pregnancies during the Settlement Class Period, a theoretical maximum total of 135 points if she had two pregnancies during the Settlement Class Period, and a theoretical maximum total of 70 points if she had one pregnancy during the Settlement Class Period. *Id.* § 72. If a Participating Class Member does not submit a timely Claim Form, the Participating Class Member will still receive 10 points under the allocation formula. *Id.* § 71(a). Each Participating Class Member's Claim Form will be scored and converted to a dollar value per point by dividing the Net Settlement Fund by the aggregate total of all points awarded by the Settlement Administrator to all Participating Class Members. *Id.* § 72.

(P&As at 7-8.)

According to the moving papers, it is anticipated that the “average net settlement payment will be between \$4,400 and \$4,739.” (P&As at 22.) The average payouts will vary depending on which boxes are checked on the Claim Forms.

The Settlement Administrator will “score” the Claim Forms. “After the Settlement Administrator concludes its evaluation and grading of all Claim Forms . . . the Settlement Administrator shall calculate the Individual Settlement Payment for each participating Class Member and provide its point allocations and Individual Settlement Payment calculation for each Participating Class Member to Class Counsel and Raley’s Counsel for their approval.” (Exh. A to Liu Decl. § 73.)

“Upon receipt of the preliminary calculations and point allocations from the Settlement Administrator, the Parties shall have fifteen (15) court days to provide feedback on and/or contest the calculations or allocations. After the expiration of the period for the Parties to provide feedback to the Settlement Administrator, the Settlement Administrator shall have five (5) court days to make its final point allocations and Individual Settlement Payment calculations. The Settlement Administrator shall make the final determination on the final point allocations and Individual Settlement Payment calculation for each Participating Class Member, subject to the Court’s approval at the Final Approval Hearing.” (Exh. A to Liu Decl. § 74.)

The Court notes that the agreed-upon allocation formula gives the Administrator the authority to “score” the Claim Forms and to decide on the amount of each individual’s payment based on those Forms. (Exh. A to Liu Decl. §§ 72-74.) The Court hereby clarifies that any unresolved disputes regarding the Administrator’s scoring of any Claims Form(s), and/or the resulting individual payment amount(s) based upon such scoring, shall be raised at the Final Approval Hearing.

Preliminary Approval of Proposed Settlement

The Settlement Agreement, including all exhibits thereto, is preliminarily approved as fair, reasonable and adequate. The Court finds that (a) the Agreement resulted from arm's length negotiations, with participation of an experienced mediator, and (b) the Agreement is sufficient to warrant notice thereof to members of the Plaintiff Settlement Class.

Before approving a class action settlement, the Court must find that the settlement is "fair, adequate, and reasonable." (*Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 244, 245.) "[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1802.) The Court considers such factors 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 class members to the proposed settlement." (*Id.* at 1801.)

The Court preliminarily finds, subject to the final fairness hearing, that the settlement is entitled to a presumption of fairness and that all relevant factors presently support preliminary approval. The moving papers demonstrate that the settlement was the product of arms-length bargaining between the parties and was reached after sufficient discovery which allowed the parties, and therefore, this Court, to act intelligently with respect to the settlement. The settlement is entitled to a presumption of fairness. (*Dunk, supra*, 48 Cal.App.4th at 1802.) Moreover, there is nothing before the Court which would overcome the presumption of fairness.

Class Certification for Settlement Purposes Only

Pursuant to Code of Civil Procedure Section 382, the Court, for settlement purposes only, conditionally certifies the proposed Settlement Class.

In connection with the certification, the Court makes the following preliminary findings. The Settlement Class satisfies Code of Civil Procedure § 382 and Rule 3.769 of the California Rules of Court and applicable case law because: (1) the Settlement Class appears to be sufficiently numerous that joinder of all members is impracticable; (2) there appear to be questions of law or fact common to the Settlement Class; (3) the claims of Plaintiffs appear to be typical of the claims being resolved through the proposed settlement; (4) there is no indication that Plaintiffs are not capable of fairly and adequately protecting the interests of the above-described Settlement Class in connection with the proposed settlement and because counsel representing the Settlement Class are qualified, competent and capable of prosecuting this action on behalf of the Settlement Class; (5) for purposes of settlement approval and administration, common questions of law and fact appear to predominate over questions affecting only individual Settlement Class Members; and (6) settlement with the above-described Settlement Class appears to be superior to other available methods for the fair and efficient resolution of the claims of the Settlement Class.

Claim Form and Notice

The Court finds that the methods of giving notice prescribed in the Settlement Agreement meet the requirements of Rules 3.766 and 3.769(f) of the California Rules of Court and due process, are the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

Within 14 calendar days after an order granting preliminary approval, Raley's shall provide the Settlement Administrator with the Class Information for purposes of mailing Notice Packets to Settlement Class Members. (Exh. A to Liu Decl. § 58.)

Notice Packets will be mailed to Settlement Class Members, and the Settlement Administrator will conduct skip tracing, calling and/or emailing Settlement Class Members if necessary. (*Id.* § 57.) The Settlement Administrator will send reminder notices to Settlement Class Members who have not submitted Claim Forms or Requests for Exclusion. (*Id.*) The Settlement Administrator will also create a secure website to enable Settlement Class Members to review the Notice and submit a Claim Form or Request for Exclusion online. (*Id.*) The Settlement Administrator will use the most updated addresses for Settlement Class Members and will attempt to locate missing Settlement Class Members and to re-mail the Notice to corrected or updated addresses to ensure that the Notice Packets are received by all Settlement Class Members, "including calling and emailing" them. (*Id.* §§ 59-62.)

Settlement Class Representatives

The Court will provisionally appoint Borrego, Kelly, and the eight other plaintiffs (Lester, Broughton, Mulligan, DeSimone, Macias, Maples, Webb, and Pierce) as the Class Representatives of the Settlement Class.

Representative Service Awards

The Settlement Agreement provides for "up to" \$40,000 to Borrego and "up to" \$25,000 to Kelly. (Exh. A to Liu Decl. ¶ 77.) It provides for representative service awards of up to \$15,000 apiece for each of the other eight named plaintiffs.

The Court notes that Borrego and Kelly are the only two plaintiffs who have been bringing claims on behalf of a putative class in this action to date. As for the other eight named plaintiffs, the operative pleading expressly states that they each have been bringing claims **only** on behalf of themselves "individually." (SAC at 1-2 (ROA 281).) The instant Motion seeks to change this, acknowledging that "[i]n the SAC, only two plaintiffs, Lucianna Borrego and Kirsten Kelly, sought designation as Class Representatives; the remaining eight plaintiffs asserted claims in **their individual capacities only**. For purposes of settlement only, all ten plaintiffs seek designation as Class Representatives." (P&As at 2 n.4.)

Arguably, only Borrego and Kelly should be entitled to "representative" service awards here. According to the operative pleading, only they have been serving the interests of a putative class

throughout this litigation. Even if the other eight named plaintiffs have arguably served class-wide interests by simply waiting in the wings to step in as class or subclass representatives at some point in the future, the fact is, none have **actually served** as class representatives to date.

Nevertheless, assuming Plaintiffs can make the required showing through declarations filed prior to the Final Fairness hearing, the Court provisionally finds that Lester, Broughton, Mulligan, DeSimone, Macias, Maples, Webb, and Pierce may receive representative service awards of \$1,000 each, in addition to their individual payments as members of the Settlement Class.

Likewise, assuming Plaintiffs can make the required showing through declarations filed prior to the Final Fairness hearing, the Court will provisionally approve class representative service awards of \$20,000 to Borrego and \$12,500 to Kelly, in addition to their individual payments as members of the Settlement Class.

The Court notes that these representative service awards may also serve as consideration for the additional “separate release” that each of the named Plaintiffs will sign in their capacity as Class Representatives. (Exh. A to Liu Decl. § 77(b).) That “separate release” is broader than the release to be signed by non-representative Class Members. (*Id.* § 37.)

Class Counsel

Plaintiffs’ counsel — Jennifer Liu, Rebecca Peterson-Fisher, and Logan Talbot of the Liu Law Firm, P.C., Jennifer Reisch and Jessica Stender of Equal Rights Advocates, and Jahan C. Sagafi and Relic Sun of Outten & Golden LLP — are provisionally approved as Class Counsel.

Plaintiffs have submitted evidence that class counsel has extensive experience. Plaintiffs’ counsel has been appointed as class counsel in numerous employment class actions with successful results.

Attorney Fees and Costs

The Settlement Agreement provides that class counsel are entitled to recover up to \$933,333.33 (33 and 1/3% of the Maximum Settlement Fund). (Exh. A to Liu Decl. § 78.) It also provides that Class Counsel shall recover up to \$90,000 in litigation expenses. (*Id.* § 79.) “Plaintiffs’ Counsel’s retainers with all Plaintiffs provide” that counsel may apply for up to 33 and 1/3% of any class settlement as attorneys’ fees. (Liu Decl. ¶ 19.) Jennifer Liu represents that “the requested percentage of fees are in line with market rates.” (*Id.*) “Plaintiffs’ Counsel will further address the justification for their fee request after preliminary approval is granted when they file their motion for attorneys’ fees.” (*Id.*)

The Court notes that in determining the attorney’s fees to be awarded to class counsel, it is required to exercise its judicial function and determine the proper fee to be awarded; it should not abdicate its charge to make a decision on the basis that the parties reached their own agreement. However, that is a factor to be considered and the Court did consider it.

“The choice of a fee calculation method is generally one within the discretion of the trial court, the goal . . . being the award of a reasonable fee to compensate counsel for their efforts.” (*Laffite v. Robert Half International, Inc.* (2016) 1 Cal.5th 480, 504.) “[W]hen class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.” (*Id.* at 503.) Recognized advantages in using the percentage method “includ[e] relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging litigation.” (*Id.*) Further, trial courts “retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.” (*Id.* at 504.)

Here, counsel was capable of assessing the strengths and weaknesses of the claims against Defendant and the benefits of the proposed settlement under the circumstances of this case.

The attorney fee and cost percentage-of-the-Fund amounts are provisionally approved, subject to further consideration as part of final approval.

Settlement Administrator

The Court preliminarily approves Settlement Services, Inc. (“SSI”) as the settlement claims administrator (“Settlement Administrator”). (Liu Decl. ¶ 22.) SSI has agreed to administer the settlement for an amount not to exceed \$51,520, to be paid from the Fund. (P&As at 11; Exh. C to Liu Decl.)

Final Fairness Hearing

The Final Fairness Hearing will be held on a date to be established at the hearing on motion for preliminary approval. Counsel should be prepared to address proposed dates at that hearing.

Plaintiffs shall file their Motion for Final Approval (and accompanying Motion for Attorneys’ Fees, Costs, and Representative Service Award) no later than 16 court days before the Final Approval/Fairness Hearing.

Conclusion

The Court has reviewed the Settlement Agreement and the proposed forms attached as Exhibit A to the Liu Declaration, and finds that the settlement memorialized therein falls within the range of reasonableness and potential for final approval, thereby meeting the requirements for preliminary approval, and that the Notice should go out to the Settlement Class in the manner described in the Settlement Agreement.

It is therefore the Court’s intent to execute and issue the Proposed Order submitted with the motion. During the hearing, counsel shall be prepared with **proposed specific dates** for the

Court to write into the blanks left in the Proposed Order. Plaintiffs shall complete service of the signed Order.