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(SPACE BELOW RESERVED FOR FILE STAMP ONLY)

CONFIRMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

APR 17 2006

John A. Clarke, Executive Officer/Clerk
By C. Mitchell, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ALAN D. MCNAMARA, an individual; on his
own behalf and on behalf of all others similarly
situated, and as a private attorney general on
behalf of the general public,

Plaintiff,

vs.

ANSCHUTZ ENTERTAINMENT GROUP,
INC., a California corporation; and DOES 1
through 100, inclusive,

Defendants.

CASE NO. BC322755

Honorable Carolyn Kuhl
Department 323

CLASS ACTION

**NOTICE OF MOTION AND MOTION
FOR PRELIMINARY APPROVAL OF
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF MIKE ARIAS IN
SUPPORT THEREOF**

Date: April 26, 2006
Time: 10:30 a.m.
Dept: 323

Date Action Filed: October 8, 2004
Trial Date: None

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on April 26, 2006 at 10:30 a.m. or as soon thereafter as the matter may be heard in Department 323 of the above referenced Court, Class Plaintiff, shall move this Court, pursuant to Rule 1859(c) of the CAL. R. COURT, for an order:

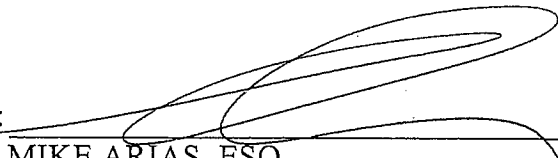
- (1) Granting Preliminary Approval to the Proposed Class Action Settlement in this action (the "Settlement");
- (2) Confirming the Class Representative
- (3) Confirming Arias, Ozzello & Gignac, LLP as class counsel
- (4) Establishing a schedule for the provision of Notice of the Settlement to the members of the Settlement Class; and
- (5) For the Setting of a Final Approval Hearing.

This Motion is based on this Notice, the Memorandum of Points and Authorities filed in support thereof, the Settlement Agreement filed concurrently herewith, the pleadings and records on file in this action, of which the Court is requested to take judicial notice pursuant to CAL. EVIDENCE CODE §§ 452 and 453, and such oral argument as may be permitted at the hearing on the Motion.

Dated: April 14, 2006

ARIAS, OZZELLO & GIGNAC, LLP

By:



MIKE ARIAS, ESQ.
 MARK A. OZZELLO, ESQ.
 MIKAEL H. STAHLÉ, ESQ.
 LOUIS PACELLA, ESQ.
 Attorneys for Class Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

By this Motion, plaintiff Alan D. McNamara (“Plaintiff”), on behalf of himself and the Class, seeks and order of this Court:

- (1) Granting Preliminary Approval to the Proposed Class Action Settlement in this action (the “Settlement”);
- (2) Confirming the Class Representative
- (3) Confirming Arias, Ozzello & Gignac, LLP as Class Counsel
- (4) Establishing a schedule for the provision of Notice of the Settlement to the members of the Settlement Class; and
- (5) For the Setting of a Final Approval Hearing.

The motion by Plaintiffs is made pursuant to Rule 1859 (c) of the CALIFORNIA RULES OF COURT. For the reasons set forth below, the Court should grant Plaintiff’s motion and enter an order in the form proposed.

II.

FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

A. Factual Summary of the Issues Involved

On October 8, 2004, Plaintiff filed a Complaint in the Superior Court of California, Case No. BC 322755 against Anschutz Entertainment Group, Inc. (“AEG”) on behalf of himself and current and former Team Leaders and Security Officers employed at various entertainment venues owned by Defendant throughout southern California.

The lawsuit alleged that AEG unlawfully failed to aggregate all hours worked by Team Leaders and Security Officers at its venues for the purposes of determining overtime compensation. The essence of the lawsuit is that the Team Leaders and Security Officers, employed by AEG, worked uncompensated overtime hours and were denied rest breaks at the various venues. The class consists of approximately three hundred (300) Team Leaders

1 and Security Officers who worked overtime hours without receiving compensation and
2 were deprived of rest breaks during their employment with AEG.

3 The Complaint asserts causes of action for:

- 4 (1) Failure to pay Overtime compensation in violation of CAL. LAB. CODE §§
5 1194 and 1198;
- 6 (2) Failure to provide rest periods in violation of CAL. LAB. CODE section 226.7;
7 and;
- 8 (3) Unlawful business practices in violation of CAL. BUS. & PROF. CODE §§
9 17200, *et seq*; and
- 10 (4) Conversion.

11 Subsequent to the commencement of this action, the California Division of Labor
12 Standards and Enforcement ("DLSE") began its own investigation into the non-payment of
13 overtime compensation by AEG. However, after multiple telephone conferences with Class
14 Counsel the DLSE agreed to allow the Plaintiff to proceed with this action under CAL.
15 LABOR CODE section 2699, providing for the recovery of specific penalties which are
16 normally only recoverable in an action brought by the state.¹

17 Consequently, two separate audits were performed on AEG's Team Leader and
18 Security Officer payroll information. First, AEG performed an internal audit to determine
19 the amount of overtime compensation Class Members would be entitled to upon an
20 aggregation of all hours worked at the multiple venues. Second, Class Counsel retained the
21 services of a forensic accounting firm to perform their own audit of raw payroll information
22 of randomly selected Class Members, to determine amounts of overtime compensation
23 owed. Comparing the results, both Class Counsel, and counsel for AEG agreed that an
24 early mediation would likely prove successful.

25 Two separate and formal mediation sessions were conducted with the supervision
26 and assistance of the Honorable Carolyn B. Kuhl of this Court, on July 14, 2005, and

27 ¹ The only such penalty recovered in this Settlement is for a violation of LABOR CODE §
28 558; under LABOR CODE § 2699, seventy five percent (75%) of the total recovery stemming
from this penalty will be paid to the state of California.

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August 23, 2005. The Parties reached a Settlement in principle at the second mediation session.

III.

DEFINITION OF THE SETTLEMENT CLASS

For purposes of the Settlement, the Parties have agreed to define a Settlement Class which consists of the following Sub-Classes:

This Settlement encompasses the following two (2) alleged subclasses:

Subclass I (“Overtime Class”): All current and/or former Team Leaders/Security Officers employed by AEG who worked more than eight (8) hours in any given day during the period October 6, 2000, to the present and who were not paid overtime compensation pursuant to applicable *California Labor Code* requirements.

Subclass II (“Rest Break Class”): All current and/or former Team Leaders/Security Officers employed by AEG who worked more than four (4) hours in any given day during the period October 6, 2003, to the present and who were not given rest periods in accordance with an applicable order of the Industrial Welfare Commission and *California Labor Code* requirements.

The Settlement disposes of all causes of action advanced by the Settlement Class, or which could have been brought against AEG during the Class Period of October 8, 2000 through the date of Preliminary Approval.

IV.

RECOMMENDATION OF CLASS COUNSEL

Class Counsel, with the cooperation of counsel for AEG, has conducted pretrial investigation; legal research into the issues in contention; and informal discovery involving an extensive audit of the payroll records of AEG’s Team Leaders and Security Officers. Class Counsel has analyzed the facts, as well as the law, relevant to the merits of the claims asserted in this action. Based upon the investigation, discovery and analysis, Class Counsel has determined that a settlement on the terms and conditions explained herein and embodied in the Settlement Agreement is in the best interests of the members of the

1 Settlement Class.

2 The Settlement was reached after multiple arm's-length negotiations between Class
3 Counsel and counsel for AEG, assisted in large part by this Court. Class Counsel
4 recommends the Settlement based upon their determination that the Settlement will confer
5 substantial benefits on the members of the Settlement Class, such as a dollar for dollar
6 payment of all overtime compensation owed. In determining to recommend the Settlement,
7 Class Counsel has considered, among other things:

- 8 (1) The benefits that the members of the Settlement Class will receive under the
9 Settlement;
- 10 (2) The attendant risks of continued litigation of this action;
- 11 (3) The uncertainties relating to the proof of the claims alleged in this action;
- 12 and,
- 13 (4) The Settlement is fair, reasonable and adequate, and in the best interests of
14 the members of the Settlement Class under the circumstances.

15
16 V.

17 **DEFENDANT'S POSITION ON SETTLEMENT**

18 Defendant AEG continues to deny all wrongdoing of any kind whatsoever and
19 denies any liability to Plaintiffs or the members of the Settlement Class. Defendant AEG
20 however, considers it desirable to settle this action on the terms set forth in the Settlement
21 Agreement to avoid further expense, to enable AEG to pursue its business endeavors
22 unhindered by further litigation. The Settlement brings finality to the potential exposure
23 for the payment of damages to the Settlement Class, and concludes all controversies
24 surrounding the merits of the claims asserted in this action.

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VI.

BENEFITS TO THE SETTLEMENT CLASS UNDER THE SETTLEMENT

The parties agree that the total value of the Settlement Fund shall be two hundred seventy five thousand one hundred seventeen dollars and zero cents (\$275,117.00), not including attorneys' fees and costs, incentive payments, and the cost of claims administration. (The Settlement Agreement is attached hereto as Exhibit "A".)

As the resulting Settlement is the product of serious, informed, and arms-length negotiations and contains no deficiencies, it is worthy of Preliminary Approval by this Court under the operative standards of CALIFORNIA RULES OF COURT, RULE 1859 and applicable state law. Two separate and formal mediation sessions were conducted with the supervision and assistance of the Honorable Carolyn B. Kuhl of this Court, on July 14, 2005 and August 23, 2005. The Settlement is fair, adequate, and reasonable and provides relief consistent with the claims asserted. Accordingly, Preliminary Approval of the Settlement at this time is appropriate.

VII.

GENERAL TERMS AND CONDITIONS OF THE SETTLEMENT

The terms and conditions of the settlement provide or require that:

1. The Subclasses are defined as described above.
2. The Class Representative is Alan D. McNamara.
3. The Settling Plaintiff is the Class Representative.
4. Class Counsel is Arias, Ozzello & Gignac, LLP.
5. The total amount of the Settlement Fund is two hundred seventy five thousand one hundred seventeen dollars and zero cents (\$275,117.00).
6. Any Settlement Class Member who objects to any aspect of the settlement may appear and be heard at the Final Approval Hearing. Any such person must submit a written notice of objection prior to the Settlement hearing upon the Court and the Class Counsel.

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7. Settling Class Plaintiff will release all claims that have or could have been asserted in the matters against the Settling Defendant. Class Plaintiff will, upon Final Approval, also provide for dismissal of this action, with prejudice, as to the Settling Defendant.

8. Class Counsel will request the Court to award, in excess of the Settlement Fund, attorneys' fees in an amount not exceeding eighty two thousand five hundred thirty five dollars and ten cents (\$82,535.10), along with costs and expenses not to exceed seven thousand two hundred thirty four dollars and thirty four cents (\$7,234.34). Additionally, Class Counsel will also seek an incentive award, not to exceed an aggregate total of five thousand dollars (\$5,000.00), for the Class Representative, for his efforts on behalf of the Settlement Class.

9. The reasonable cost of administration of the Settlement Fund will be paid by Defendant.

VIII.

OTHER SIGNIFICANT TERMS OF THE SETTLEMENT

The other significant terms of the Settlement are as follows:

A. General Releases Of All Claims, Known And Unknown

If the Settlement is granted final approval by the Court, all members of the Settlement Class will release and forever discharge the Released Parties (as defined in the Settlement Agreement) from any and all claims, rights, demands, suits, actions or causes of action, losses, costs, obligations, liabilities, expenses, debts and duties of every kind or nature, known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, at law or in equity, arising out of their employment with the Released Parties in connection with the claims asserted in this action. This release will bind all members of the Settlement Class regardless, except those who file a timely Request for Exclusion with this Court. In connection with the release and discharge of the Released Parties, each member of the Settlement Class who has not filed a timely Request for Exclusion with this Court

1 shall be deemed to have expressly waived all rights under CALIFORNIA CIVIL CODE section
2 1542.

3 **B. Dismissal Of This Action**

4 As part of the Final Judgment, this action will be dismissed with prejudice.
5

6 **IX.**

7 **STEPS TO BE UNDERTAKEN FOLLOWING PRELIMINARY APPROVAL**

8 Following Preliminary Approval of the Settlement, Class Counsel shall undertake
9 the following steps as part of the Final Approval process:

10 **A. Notice Of The Settlement**

11 Class Counsel propose that Notice of the Settlement be provided to the Settlement
12 Class by first-class United States mail as follows:

13 1. Mail Notice. The Claims Administrator shall mail the Settlement
14 Notices, in the forms attached as Exhibits "B" and "C" to the Preliminary Approval Order.
15 Within ten (10) business days of the date of receipt of the mailing address information from
16 AEG, The Claims Administrator shall mail the Notices via first-class regular U.S. Mail to
17 the last known address of every member of the Overtime Sub-Class and Rest Period Sub-
18 Class, respectively. Prior to mailing the Notices, the Claims Administrator shall utilize the
19 services of National Change of Address (NCOA) to correct any addresses as necessary.
20 For any Notice returned for the first time with a new address provided by the postal service,
21 The Claims Administrator shall utilize the new address and mail the Notice a second time.

22 2. Skip Tracing. For any notice returned for the first time by the postal
23 service without a new address provided by the postal service, the Claims Administrator
24 shall skip trace to obtain a current address for the Class Member in question and shall mail
25 the Notice a second time within five (5) days of receiving the notice of invalid address.
26 The Claims Administrator shall thereafter have no further obligation to seek a current
27 address.

28 3. Private Investigator. For those Class Members who cannot be located

1 through the process described above, if any, any Settlement Payments allocated to such
2 Class Members shall be applied toward the cost of a private investigator in a final effort to
3 locate such Class Members.

4 Class Counsel believe that the Notice Plan set forth above provides the best notice
5 practicable under the circumstances, constitutes due and sufficient notice to the members of
6 the Settlement Class of the terms of the Settlement Agreement, and otherwise satisfies the
7 requirements of California law.

8 **B. Motion For Final Settlement Approval**

9 Class Counsel shall file a Motion for Final Approval of the Settlement. The date,
10 time and location of the hearing on the motion shall be set forth in the Settlement Notice as
11 required by Rule 1856 of the CALIFORNIA RULES OF COURT.

12 **C. Application For Award Of Attorneys' Fees**

13 At the time of Final Approval, Class Counsel shall make an application to the Court
14 to be awarded attorneys' fees. Any award of attorney's fees granted by the Court shall be
15 payable separate and apart from the Settlement Fund, thereby not affecting the amount any
16 member of any Sub-Class shall receive. This intended application is set forth in the
17 Settlement Notice.

18 **D. Application For Reimbursement Of Litigation Expenses**

19 At the time of Final Approval, Class Counsel shall make an application to the Court
20 to be awarded reimbursement of costs for litigation expenses. Any award of reimbursement
21 of costs granted by the Court shall be in excess of the Settlement Fund and shall not affect
22 the amount of the Settlement Fund, or the amount a member of any Sub-Class will receive.
23 Any amount awarded by the Court for reimbursement of costs will not be deducted from
24 the Settlement Fund, but rather shall be paid separately by AEG. This intended application
25 is set forth in the Settlement Notice.

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X.

THE CLASS ACTION SETTLEMENT APPROVAL PROCEDURE

No action brought on behalf of a Class may be settled, compromised, or dismissed without the approval of the Court. The procedures for submission of a proposed settlement for preliminary approval are discussed at *Newberg on Class Actions* § 11.24-11.26:

“When the parties to an action reach a monetary settlement, they will usually prepare and execute a joint stipulation of settlement which is submitted to the court for preliminary approval. The stipulation should set forth the central terms of the agreement, including but not limited to, the amount of the settlement, form of payment, manner of determining the Effective date of settlement and any recapture clause.”

There are three steps to the Court’s settlement approval process:

- (1) Preliminary approval of the proposed settlement at an informal hearing;
- (2) Dissemination of notice of the settlement to all affected class members; and,
- (3) A “formal fairness hearing,” or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.

This three-step settlement approval process is prescribed by the *Manual for Complex Litigation, Third* (Federal Judicial Center 1995) §30.41, is widely followed in the federal circuits, and has also been adopted by California courts.²

Specifically, the *Manual for Complex Litigation Second* provides at § 30.41 (2002):

“Approval of Class action settlements involves a two step process. First, counsel submits the proposed terms of the settlement and the court makes a preliminary fairness evaluation.... If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of Class representatives or of segments of the Class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23 (e) be given to the Class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement. For economy, courts have in appropriate cases permitted the notice under Rule 23 (c)(2) to be combined

² See *Manual for Complex Litigation, Third* § 30.41 (2003); see also, *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1599-1602 [outlining the Class Action settlement approval process].

1 with the Rule 23(e) notice.”

2 Under this standard, a trial court’s preliminary approval of a Class settlement is simply a
3 conditional finding that on its face, the compromise appears to be within a range of
4 acceptable agreements. As *Newberg, supra*, comments:

5 “The strength of the findings made by a judge at a preliminary hearing or
6 conference concerning a tentative settlement proposal may vary. The court
7 may find that the settlement proposal contains some merit, is within the
range of reasonableness required for a settlement offer, or is presumptively
valid subject only to any objections that may be raised at a final hearing.”

8 This Court will also ultimately determine the reasonableness of any attorneys’ fees
9 or repayment of costs advanced by Class Counsel. These matters are solely within the
10 discretion of the Court, who must issue its determination after reviewing the appropriate
11 applications made by Class Counsel. The Court must also factor in objections raised by
12 Class members (the criteria for approval of final settlement are set forth at NEWBERG
13 commencing at § 11.41).

14 Class Representative and Class Counsel request that this Court take the initial step
15 of granting Preliminary Approval of this Settlement.

16 **A. Preliminary Approval Is Appropriate Where The Proposed Settlement Is**
17 **Within The Range of Possible Final Approval**

18 Settlements, in general, are highly favored by the courts. *Stambaugh v. Superior*
19 *Court* (1976) 62 Cal.App.3d 231, 236. In evaluating a class action settlement, this Court
20 has broad powers to determine whether a proposed settlement is fair and reasonable under
21 the circumstances of the case. *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438;
22 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 [“In general,
23 questions whether a settlement was fair and reasonable, whether notice to the class was
24 adequate ... are matters addressed to the trial court’s broad discretion.”]

25 In reaching its ultimate determination as to the fairness, adequacy and
26 reasonableness of a proposed class action settlement, the Court may consider a variety of
27 factors, including: the strength of the plaintiffs’ case; the risk, expense complexity and
28 likely duration of further litigation; the risk of maintaining the case as a class action

1 through trial; the amount offered in settlement; the extent of discovery completed and the
2 stage of the proceedings; the experience and views expressed by Class Counsel; and the
3 reaction of the class members to the proposed settlement. *7-Eleven Owners For Fair*
4 *Franchising v. The Southland Corporation* (2000) 85 Cal.App.4th 1135, 1146; *Dunk v.*
5 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Wershba*, 91 Cal.App.4th at 245.
6 However, this “list of factors is not exhaustive and should be tailored to each case”. *Dunk*,
7 48 Cal.App.4th at 1801. In this regard, the trial court is “free to engage in a balancing and
8 weighing of factors depending on the circumstances of each case”. *Wershba*, 91
9 Cal.App.4th at 245.

10 Ultimately, before granting final approval to a proposed settlement, the Court must
11 carefully scrutinize the proposed settlement “with the purpose of protecting the rights of the
12 absent class members who will be bound by the settlement”. *Wershba*, 91 Cal.App.4th at
13 245. At that time, the Court must “reach a reasoned judgment that the agreement is not the
14 product of fraud or overreaching by, or collusion between, the negotiating parties, and that
15 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned”. *Id.*,
16 quoting *Officers for Justice v. Civil Service Com’n, etc.*, 688 F. 2d 615, 625 (9th Cir. 1982).

17 For purposes of granting preliminary approval, however, this Court need only find
18 that the proposed settlement falls within the range of possible final approval. *See, Holden*
19 *v. Burlington Northern, Inc.*, 665 F.Supp. 1398, 1402 (D. Minn. 1987); *In re Montgomery*
20 *County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 313 (D. Md. 1979). As noted by
21 the court in *In re Traffic Executive Asso.--Eastern Railroads*, 627 F.2d 631, 634 (2d Cir.
22 1980), approving the dissemination of notice “is at most a determination that there is what
23 might be termed ‘probable cause’ to submit the proposal to class members and hold a full-
24 scale hearing as to its fairness.”

25 **B. The Settlement Is Within The Range of Possible Final Approval**

26 *First*, although Plaintiff believes that his claims in this action are meritorious, there
27 is no guarantee of success when those claims are subject to adjudication in a jury trial.
28 AEG categorically disputes Plaintiff’s claims, asserts that Plaintiff was paid for all time

1 worked, that the hours worked by its Team Leaders and Security Officers should not be
2 aggregated, and maintains that this action never should have been filed in the first place.
3 Moreover, even a successful result at the time of trial can be a fleeting victory when faced
4 with the prospect of a long and almost certain appeal of any jury verdict in favor of the
5 Class.

6 *Second*, the case has already been litigated for a period of nearly two years. In the
7 absence of a settlement, the parties were poised to commence a lengthy and expensive trial
8 process which, as with all trials, entailed the risk of a loss. In that case, the Class would
9 receive no compensation at all.

10 *Third*, although the Plaintiff believed that the risk of this Court not certifying at
11 least one Sub-Class was minimal, there is no guarantee as to how the Court would rule on
12 the Motion for Class Certification. Further, the Court would remain free to decertify the
13 Class at anytime during trial. Obviously, if the Court were to decertify the Class during
14 trial, the impact on the Class would be catastrophic.

15 *Fourth*, the amount obtained under the Settlement is fair and accurate. As a net
16 figure, the two hundred seventy five thousand one hundred seventeen dollars and zero cents
17 (\$275,117.00) in the Settlement Fund will compensate each Overtime Sub-Class Member
18 dollar-for-dollar for all unpaid overtime per day. Such a result is almost unprecedented in
19 the world of employment litigation where many a class member has been forced to accept
20 minutes for every overtime hour that they have worked. Additionally, members of the
21 Rest Period Sub-Class will receive a substantial recovery for rest periods allegedly not
22 provided.

23 *Fifth*, both Class Counsel and AEG conducted separate and extensive audits of
24 AEG's payroll records, and determined an accurate and true figure as to the amount of
25 overtime owed to the Class members. Plainly, the discovery conducted was sufficient for
26 the parties to make an informed decision on the issue of settlement.

27 *Sixth*, Class Counsel, who possess substantial experience in the field of class
28 actions, and employment litigation, recommend the Settlement. Where, as here, the

1 counsel recommending the proposed settlement for approval are known to the Court as
 2 competent and experienced, significant weight may be given to their opinion. *Kirkorian v.*
 3 *Borelli*, 695 F.Supp. 446, 451 (N.D. Cal. 1988). *See, also, Warren v. Tampa*, 693 F.Supp.
 4 1051, 1060 (M.D. Fla. 1988) [The Court is affording great weight to the recommendations
 5 of counsel for the parties, given their considerable experience in this type of litigation”]
 6 *aff’d.*, 893 F.2d 347 (11th Cir. 1989); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 n.14 (4th
 7 Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *In re Minolta Camera Products Antitrust*
 8 *Litigation*, 668 F.Supp. 456, 459 (D. Md. 1987); *Blank v. Talley Industries, Inc.*, 64 F.R.D.
 9 125, 132 (S.D.N.Y 1975).

10 **C. The Settlement Is Presumptively Fair**

11 Under California law, a “presumption of fairness” exists where:

- 12 (1) The settlement is reached through arm’s-length bargaining;
- 13 (2) Investigation and discovery are sufficient to allow counsel and the
 14 Court to act intelligently;
- 15 (3) Counsel is experienced in similar litigation; and,
- 16 (4) The percentage of objectors is small.

17 *7-Eleven Owners For Fair Franchising*, 85 Cal.App.4th at 1146; *Dunk*, 48
 18 Cal.App.4th at 1802.

19 Three of the four prerequisites for presumptive fairness are present in this case: (1)
 20 the Settlement is the result of arm’s-length bargaining by the parties and their counsel with
 21 the help of an accomplished and well respected neutral; (2) the parties have conducted
 22 extensive discovery as described herein; and (3) Plaintiffs have been represented by
 23 counsel with many years of experience in litigating class actions who have negotiated
 24 numerous other class settlements that have been approved by courts throughout California
 25 and the United States. Of course, the fourth prerequisite cannot be satisfied until the time
 26 of the final approval hearing.

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1 **D. The Proposed Settlement Fulfills All Criteria For Preliminary Settlement**
2 **Approval**

3 As stated *supra*, the Preliminary Approval stage is merely an “initial assessment” of
4 the fairness of the proposed agreement, which the Court must give after reviewing the
5 settlement documents provided by the parties.

6 The purpose of this preliminary evaluation is not a comprehensive review of all
7 aspects of the agreement, but rather to determine whether the proposed Settlement is within
8 a range of possible approval, thereby making notice to the Class and the scheduling of a
9 Fairness Hearing worthwhile.³ Whether the Settlement is within the range of possible
10 approval involves only an initial examination by the Court, which must determine whether
11 the proposed Settlement appears “reasonable on its face.”⁴ Notably, California courts favor
12 class action settlement.⁵

13 In reviewing a class action settlement for preliminary approval, the court has broad
14 powers to determine whether a proposed settlement is fair under the circumstances of the
15 case.⁶ To grant Preliminary Approval of any class action settlement, the court need find
16 only that the settlement falls within the range of possible final approval.⁷

17 This settlement is extremely fair in terms of its net benefits to the Settlement Class
18 members. The settlement was the result of repeated discussions and negotiations between
19 the parties, who mutually agreed to participate in multiple settlement conferences mediated
20 by the trial court judge in this matter, the Honorable Carolyn B. Kuhl. Furthermore, the
21 resolution was reached only after both Class Counsel and AEG had engaged in good faith
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23 ³ *See, Newberg on Class Actions, Settlement of Class Actions*, § 11.25; *see also, Liebman*
v. J.W. Petersen Coal & Oil Co. (N.D. Ill. 1973) 73 F.R.D. 531.

24 ⁴ *See, Magana v. Platzer Shipyard, Inc.*, (S.D. Tex. 1977) 74 F.R.D. 61, 79.

25 ⁵ *See, Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.

26 ⁶ *See, Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.

27 ⁷ *See, 2 Newberg on Class Actions, Settlement of Class Actions*, § 11.25; *see also, Holden*
28 *v. Burlington Northern, Inc.*, (D. Minn. 1987) 665 F.Supp. 1398, 1402; *In re Montgomery*
County Real Estate Antitrust Litigation (D. Md. 1979) 83 F.R.D. 305, 313.

1 discovery, involving an extensive audit of AEG's payroll records.

2 As this Court is aware, the claims against the AEG were subject to extensive
3 scrutiny and debate. AEG has been represented by extremely competent counsel, who has
4 vigorously defended its client. As such, the settlement is reasonable in light of:

- 5 (1) the guaranteed continued vigorous representation by counsel;
- 6 (2) the risks associated with issues of Class Certification;
- 7 (3) the various defenses to liability; and
- 8 (4) the overall difficulties and risks of litigation in prosecuting an action
9 of this nature; and
- 10 (5) the risks associated with any appeals taken by any party.

11 In short, the Settlement has no deficiencies that would require this Court to reject
12 the proposed settlement. Further, the Court should grant preliminary approval of a Class
13 action settlement "if the preliminary evaluation of the proposed settlement does not
14 disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly
15 preferential treatment of Class Representatives or of segments of the Class, or excessive
16 compensation for attorneys and appears to fall within the range of possible approval..."⁸

17 Preliminary Approval and certification fulfills all the due process criteria where, as
18 here, the Settlement is evaluated by an informed court, and where, as here, the court utilizes
19 a settlement approval process which includes notice to the Class and an opportunity to be
20 heard.

21 **E. Class Settlement Notice**

22 The proposed Notice meets the standards of applicable law.⁹ The method and the
23 content of the Notice to class members should be designed to fairly apprise them of the

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25 ⁸ *See, Manual for Complex Litigation*, Third, § 30.41 (2002); *see also, In re Shell Oil*
26 *Refinery*, 155 F.R.D. 552, 555 (E.D.La1993) (holding that at the preliminary approval stage,
27 the Court's only task is to determine whether 'the proposed settlement appears to be the
28 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does
not improperly grant preliminary preferential treatment to Class representatives or
segments of the Class, and falls within the range of possible [judicial] approval.')

⁹ The Notice is attached as Exhibit "B".

1 terms of the proposed settlements and the options available to them.¹⁰ An appropriate
2 notice is one that has a reasonable chance of reaching a substantial percentage of the class
3 members.¹¹

4 The proposed Notice identifies the settling Class Representative and AEG, as well
5 as a description of the lawsuit, the Settlement Classes, the settlement amounts, the
6 proposed plan of allocation and the attorneys' fees which Class Counsel may receive.
7 Furthermore, the proposed Notice contains information on objecting to the settlement, as
8 well as the schedule for the Final Approval Hearing. In short, the proposed Notice
9 describes the proposed Settlement with enough specificity to allow class members to
10 receive sufficient information to decide whether they should accept the benefits offered or
11 object to the Settlement.

12 FEDERAL RULES OF CIVIL PROCEDURE, RULE 23(c)(2) requires that all members of
13 the Class that can be identified shall receive notice of the proposed settlement.

14 Additionally, CALIFORNIA RULES OF COURT, RULE 1859(f) requires that:

15 "If the court has certified the action as a Class action, notice of the final
16 approval hearing must be given to the Class members in the manner specified
17 by the court. The Notice must contain an explanation of the proposed
18 settlement and procedures for Class members to follow in filing written
19 objections to it and in arranging to appear at the settlement hearing and state
20 any objections to the proposed settlement."

21 The proposed Notices attached as Exhibits "B" and "C" respectively, meet all
22 requirements for notices of Class Action settlement.

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28 ¹⁰ See, *Philadelphia Housing Authority v. American Radiators & Standard Sanitary Corp.*
323 F.Supp. 364, 378 (E.D. Pa. 1970).

¹¹ See, *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.

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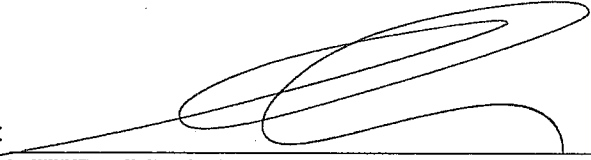
CONCLUSION

Based upon the foregoing, Class Plaintiff respectfully requests that this Court grant Preliminary Approval of the proposed Settlement between the Class and the AEG by entering an Order preliminarily approving the settlement.

Dated: April 14, 2006

ARIAS, OZZELLO & GIGNAC, LLP

By:



MIKE ARIAS, ESQ.
MARK A. OZZELLO, ESQ.
MIKAEL H. STAHLÉ, ESQ.
LOUIS PACELLA, ESQ
Attorneys for Class Plaintiff

DECLARATION OF MIKE ARIAS

I, MIKE ARIAS, declare:

1. I have personal knowledge of the matters stated herein. If called as a witness, I could and would testify truthfully and competently thereto under oath.

2. I am an attorney at law, duly licensed to practice before all courts in the States of California, New York, New Jersey and the District of Columbia. I am the managing partner in the firm of Arias, Ozzello & Gignac, LLP. I am also lead counsel for the Class. I am personally familiar with the matters stated herein, and if called upon to testify, I could and would testify accordingly.

3. I submit this Declaration in support of the motion by Plaintiffs for an order of this Court: (1) granting preliminary approval to the proposed class action settlement in this action (the "Settlement"); and (2) establishing a schedule for the provision of notice of the Settlement to the Settlement Class and for Final Approval Proceedings with respect to the Settlement.

4. My firm and I have been involved as lead counsel, liaison counsel, or co-counsel in well over 150 class actions.

5. As one of the lead attorneys in this matter, I have been actively involved in all aspects of this litigation. In addition to preparing many of the documents generated in this matter on behalf of the Class Plaintiff, I have reviewed each and every document generated by all the parties in the instant action.

6. I have also participated in most, if not all of the proceedings held in this matter, including without limitation, the multiple mediation sessions before the Honorable Carolyn B. Kuhl. In addition, I have participated in several informal settlement discussions with Defense Counsel.

7. Based upon the investigation, research, motion practice, document review, discovery and analysis, my personal knowledge and experience, I believe the Settlement terms and conditions are in the best interests of the members of the Class. I further believe the Settlement is fair, reasonable and adequate.

