

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>Kimberlee Faciane Plaintiff/Petitioner(s) VS. Safeway, Inc. et al Defendant/Respondent(s)</p>	<p>No. RG18913668 Date: 06/15/2022 Time: 10:00 AM Dept: 21 Judge: Evelio Grillo</p>
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ORDER re: Hearing on Motion - Other
Final Approval

The Motion for Final Approval of Settlement filed by Kimberlee Faciane on 05/24/2022 is Granted in Part.

The motion of plaintiffs for final approval of class action and PAGA settlement is GRANTED.

APPROVAL OF THE SETTLEMENT

The complaint alleges claims on behalf of hourly employees and asserts that defendant failed to pay them overtime wages for all overtime hours worked in violation of Labor Code §§ 510, 1194, and 1198 as a result of not correctly calculating their regular rate of pay to include all applicable remuneration, including, but not limited to, shift differential pay. (2AC, para 19.) There are approximately 95208 members of the class.

The case preliminarily settled for a total of \$4,975,000. The settlement agreement states there will be attorneys' fees of up to \$1,656,675 (33%), costs of up to \$35,000, a service award of \$5,000 the class representative, a gross PAGA payment of \$75,000 and a net PAGA payment of \$56,250, and settlement administration costs of up to \$300,000. After these expenses, the class would get \$2,870,825. The average payout per class member would be \$46.

The proposed class notice form and procedure are adequate. There were 474 opt outs and 1 objection. (Howard Dec., Exh C.) The objector's primary concern was that it is difficult to know whether the settlement fair and that a trial is needed to determine Safeway's liability. This is a legitimate concern, but it is a concern in all settlements.

The proposed class is appropriate for class certification.

The motion makes an adequate analysis as required by Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116. The court credits counsel for agreeing to sample payroll data from employees in four stores as a way to exchange meaningful information without undue burden or expense. (Age, para II.4.)

The scope of the release for the class is appropriate as construed in light of the law. (Agt para 67) The scope of the class release is limited to the claims arising out the failure to pay overtime

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wages as a result of not correctly calculating their regular rate of pay to include all applicable remuneration, including, but not limited to, shift differential pay. (2AC, para 19; Agt para II.3.) The release of claims by the class is limited by the "factual predicate rule" to those claims. (Hesse v. Sprint Corp. (9th Cir. 2010) 598 F.3d 581, 590.) (See also Hendricks v. Starkist Co (N.D. Cal. 2016) 2016 WL 692739 at * 2-4 [Denying motion for final approval of class settlement because scope of release overbroad].)

The scope of the release for the LWDA's claims that the named plaintiff asserted on behalf of the LWDA is now appropriate and consistent with the law that claims asserted under the PAGA are asserted on as agent or proxy for the LWDA and not on behalf of the aggrieved or affected employees. (Kim v. Reins International California (2020) 9 Cal.5th 73, 81; Z.B. N.A. v. Superior Court (2019) 8 Cal.5th 175, 185; Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 381.)

The scope of the release for the named plaintiffs is broader, which is permissible. (Agt para 69)

The court notes and approves of the plan to distribute the settlement funds with no claims process.

The settlement states that unclaimed funds are paid to the Alameda County Community Food Bank. (Agt para 66) Counsel has provided a declaration in support of the motion that provides the information regarding the Alameda County Community Food Bank required by CCP 382.4.

APPROVAL OF FEES, COSTS, AND SERVICE AWARD

"Because absent class members are not directly involved in the proceedings, oversight to ensure settlements are fair and untainted by conflict is the responsibility of both the class representative and the court." (Mark v. Spencer (2008) 166 Cal.App.4th 219, 227.)

"In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. ... [T]horough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms.' ... " 'The evil feared in some settlements-unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client-can best be met by a careful ... judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee....' " (Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 555-556.)

The court awards fees of \$1,243,750, which is 25% of the total fund.

The Ninth Circuit's benchmark is 25%. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 495.)

When using the percentage of recovery approach, this court's benchmark for fees is 30% of a total fund. Courts have benchmarks ranging from 25% to 33%. Laffitte v. Robert Half Internat.

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Inc. (2016) 1 Cal.5th 480, 495; Schulz v. Jeppesen Sanderson, Inc. (2018) 27 Cal.App.5th 1167, 1175; Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 557 fn 13; Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 66 fn 11; Schulz v. Jeppesen Sanderson, Inc. (2018) 27 Cal.App.5th 1167, 1175.) The benchmarks suggests fees of \$1,492,000.

When cross-checking with the lodestar/multiplier, the court will evaluate the lodestar based on reasonable fees that would have been charged at hourly rates and then apply a multiplier. The multiplier includes contingent fee risk and other factors.

Counsel spent 502.15 hours on the case. This is reasonable. (Setareh Dec. para 33)

The court finds that a blended rate of \$600 is appropriate for the case. (Meridian Financial Services, Inc. v. Phan (2021) 67 Cal.App.5th 657, 708-709 [blended rate of \$550]; Espejo v. Copley Press, Inc. (2017) 13 Cal.App.5th 329, 337 [blended rate of \$500/hour]; 569 East County Boulevard LLC v. Backcountry Against the Dump, Inc. (2016) 6 Cal.App.5th 426, 438-440 fn 14, fn 16 [blended rate of \$275].) Regarding the amount of the blended rate, the court considers the evidence and its own knowledge and familiarity with the legal market. (Meridian Financial Services, Inc. v. Phan (2021) 67 Cal.App.5th 657, 709.) The court also takes judicial notice of the rates for counsel in the USAO Attorney's Fees Matrix (<https://www.justice.gov/file/1461316/download>). This results in a lodestar of \$301,290.

When considering risk, the court considers there is less risk in a case with fee shifting statutes because counsel's potential fees are not limited by and coupled to the monetary recovery. With a fee shifting statute, counsel has the risk of proving liability but if counsel proves liability, then the fees shift to the defendant with little to no consideration of the amount of the client's monetary recovery. For example, a nominal damage recovery will result in counsel recovering "reasonable attorneys' fees" that could far exceed the award of damages. (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 419 [jury awarded plaintiff \$30,300, counsel recovered \$1,113,905.40 in fee-shifted fees]; Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007 [client recovered \$1, counsel recovered \$87,525 in fee-shifted fees].) This results in a multiplier adjusted lodestar of \$361,548.

Considering the percentage analysis fees of \$1,492,000 and the multiplier adjusted lodestar fees of \$361,548, the court will award fees of \$1,243,750. This is the Ninth Circuit's benchmark. This is a multiplier of 3.3 on counsel's asserted lodestar of \$376,592. This is a multiplier of 4.1 on the court's calculated reasonable lodestar of \$301,290. This is appropriate to compensate counsel in this case, to incentivize the prosecution of meritorious cases, and does not result in an unreasonable windfall to counsel at the expense of their clients.

The court approves costs of \$20,047.57.

The court approves settlement administration costs of \$315,000.

The court approves a service award of \$7,500 to plaintiff. Plaintiff provided evidence regarding the nature of participation in the action, including a description of specific actions and the amount to time committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.)

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The Court ORDERS that 10% of any fee award to be kept in the administrator's trust fund until the completion of the distribution process and Court approval of a final accounting.

The Court will set a compliance hearing after the completion of the distribution process and the expiration of the time to cash checks for counsel for plaintiff and the Administrator to comply with CCP 384(b) and to submit a summary accounting how the funds have been distributed to the class members and the status of any unresolved issues. If the distribution is completed, the Court will at that time release any hold-back of attorney fees.

The court will sign the proposed order, which is modified by this order.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 06/15/2022



Evelio Grillo / Judge