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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF TULARE

DON M. VASQUEZ, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

SAPUTO CHEESE USA INC., a Delaware
corporation; and DOES 1 through 25,
inclusive

Defendants.

Case No. VCU282978

Consolidated with Case No. VCU283853

ASSIGNED FOR ALL PURPOSES TO:

The Honorable John P. Bianco

Department 2

CLASS ACTION

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION AND PAGA SETTLEMENT**

Continued Hearing Information

Hearing: January 8, 2024

Time: 8:30 a.m.

Dept.: 2

Judge: Hon. John P. Bianco

Complaint filed: May 27, 2020

Trial date: Not set

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I. INTRODUCTION

On December 1, 2023, the Court issued a Tentative Ruling on Plaintiff's Motion for Order Granting Preliminary Approval of Class Action and PAGA Settlement, ("Tentative Ruling"), continuing the hearing to January 8, 2024, to allow the Parties to address the opt-out/objection notice period, and for Plaintiff to provide supplemental filings supporting the request for attorneys' fees and costs, and the class representative enhancement award.

II. CLASS NOTICE

Pursuant to the Tentative Ruling, the Class Notice has been revised to allow putative class members 60 days to Opt-Out or submit a written Objection. Supplemental Declaration of Jeff Geraci, ("Supp. Geraci Decl."), ¶3, Exhs. 1 & 2 – Class Notice.

III. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Class Counsel requests attorneys' fees of \$800,000, one-third of the \$2,400,000 Gross Settlement Amount ("GSA"). Through final approval, Class Counsel will have expended 547.4 hours [527.4 current and 20.0 future], for a lodestar of \$400,905 [current, \$390,905]; future \$10,000]. Supp. Geraci Decl. ¶4, Exh. 3 – Consolidated Summary of Time & Costs; Exh. 4 – Costs; Supplemental Declaration of Jonathan M. Lebe, ("Supp. Lebe Decl."), ¶¶11-13.

Counsel will submit a supplemental request for fees and costs incurred preparing a final approval motion, attending the final approval hearing, and related tasks.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). In the face of the uncertainties of continued litigation of these claims, and Defendant's strong factual and legal defenses and its ability and willingness to defend as long as necessary, there is no question the results achieved are excellent.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement,

known as the “common fund” method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts look to federal courts analyzing class issues. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001)).

“[T]he lodestar method is not necessarily utilized in common fund cases.” *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27. (attorneys’ fees may be calculated as percentage of common fund where settlement amount is certain).

A common fund fee award is especially appropriate here as it spreads the attorneys’ fees among all beneficiaries of the fund; aligns incentives between counsel and the class; better approximates market conditions in a contingency case; and encourages class counsel to seek early settlement and avoid unnecessarily prolonging litigation, which prevents unnecessary use of judicial and party resources, delay in correcting alleged unlawful practices, and delay in compensating the class. *Laffitte, supra*, at 503.

With the guiding principle that early class action settlements are favored and may not diminish attorneys’ fees awards, Class Counsel submits the request should be awarded based on risks and complexities of prosecuting the action, the contingent nature of the fee, experience in handling similar cases, fees commonly awarded, and vindication of the Class’ rights.

The purpose of the common fund approach is to “spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent, supra*, at 769. [one who expends attorneys’ fees to creates a fund others derive benefits from “may require those passive beneficiaries to bear a fair share of the litigation costs.”] *Quinn v. State of California* (1995) 15 Cal.3d 162, 167; *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110. [common fund applied “consistently in California when an action brought by one party creates a fund in which other persons are entitled to share.”]

Class Counsel undertook representation at their own expense, with compensation wholly contingent upon providing a Class benefit. Class Members will receive substantial benefits from the proposed Settlement. Based on the defined and clearly traceable Class benefit, the Court may award a percentage of the common fund as attorneys’ fees.

C. One-Third of the Common Fund is a Reasonable Fee

“California courts routinely award attorneys’ fees of one-third of the common fund.” *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017). Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) (“fee awards in class actions average around one-third of the recovery.”); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel’s Response*, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (attorneys’ fees in class litigation “were generally in the traditional range of approximately one-third of the total settlement”).

Counsel’s request for one-third of the common fund is in the mid-range of awards which commonly range from 20% to 50%, and is fair compensation for undertaking complex, risky, litigation on a contingent basis, and for the result achieved for the Class. Supp. Geraci Decl. ¶5.

Some courts have found an award of 33% of a common fund is the “benchmark” in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) (“These percentages compare favorably with” the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013).

Class Counsel’s fee request is consistent with market rates, awards in similar California cases, including to Class Counsel, is reasonable, and should be awarded. Supp. Geraci Decl. ¶6.

D. Optional Lodestar Cross-Check Confirms Reasonableness of Fee

Counsel seeks approval of attorneys’ fees based on a percentage of the recovery, not a lodestar. While a percentage fee may be cross-checked against a lodestar and multiplier, courts are not required to engage in this exercise, and many California courts decline to. See, e.g. *Glass v. UBS Fin. Servs.*, No. C-06-4068 MMC, (N.D. Cal. Jan. 26, 2007) 2007 U.S. Dist. LEXIS 8476, *49 (finding “no need to conduct a lodestar cross-check [as] Class counsel’s prompt action in negotiating a settlement while the state of the law remained uncertain should

1 be fully rewarded”); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, (E.D. Cal. Sep. 1, 2011)
2 2011 U.S. Dist. LEXIS 99289, *39 (“[I]n a case such as this, [a lodestar cross-check] is not a
3 useful reference.”).

4 A cross-check is not a “full-blown lodestar inquiry,” does not entail “mathematical
5 precision nor bean-counting,” and “can be performed with a less exhaustive cataloguing and
6 review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. July 2, 2013)
7 297 F.R.D. 431, 451.

8 The lodestar is calculated by multiplying hours reasonably expended on the litigation by
9 a reasonable hourly rate. *Serrano*, 20 Cal. 3d at 48. A reasonable hourly rate is the prevailing
10 rate charged by attorneys of similar skill and experience in the relevant community. *PLCM*
11 *Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095.

12 The hours expended and to be expended to bring this matter to final approval are
13 reasonable in light of the complexity and duration of the litigation, and Counsel’s fees, if the
14 lodestar method were used, represent less than a 2.0 multiplier. [$\$800,000/\$400,905 = 1.99$]
15 Supp. Geraci Decl. ¶12.

16 **E. Counsel’s Hourly Rates Are Reasonable**

17 Counsel is entitled to hourly rates charged by attorneys of comparable experience,
18 reputation, and ability for similar litigation. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133.
19 When determining reasonable hourly rates, Courts may consider the attorney’s skill and
20 experience, nature of the work performed, relevant area of expertise, and customary billing
21 rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632. Prior awards of
22 counsel’s rates are strong evidence of reasonableness. *Margolin v. Regional Planning*
23 *Commission* (1982) 134 Cal.App.3d 999, 1005.

24 Class Counsel’s skill and experience support their hourly rates and are in line with rates
25 typically approved in California wage and hour class actions and previously awarded to Class
26 Counsel in many courts, including this one. Cohelan Khoury & Singer’s practice is limited to
27 litigating class and representative actions on behalf of employees and consumers, and the firm
28 has been appointed Class Counsel or co-Class Counsel in over 300 such cases. Supp. Geraci

Decl. ¶¶9, 10. Lebe Law, APLC has been appointed Class Counsel in multiple proceedings in connection with approvals of wage and hour class action and Private Attorney General Act settlements. Supp. Lebe Decl. ¶14.

Class Counsel's skill and experience support their hourly rates: **Cohelan Khoury & Singer**: Founding Partner Isam C. Khoury - \$925; Managing Partner, Michael D. Singer - \$925; Partner, Jeff Geraci - \$850; Associate, Marta Manus - \$700; Associate, Rosemary C. Khoury - \$500. **Lebe Law, APLC**: Founding Attorney, Jonathan M. Lebe - \$800, Associate, Zachary Gershman - \$475. These rates are in line with those typically approved in California wage-and-hour class action litigation. Indeed, the Laffey Matrix would actually provide for a rate increase. Supp. Geraci Decl. ¶11, Exh. 5 - Laffey Matrix; Supp. Lebe Decl. ¶¶11-14, Exh. A.

F. Class Counsel's Total Hours are Reasonable

Hours are reasonable if, "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

G. A Multiplier of the Lodestar Would Be Awarded

A lodestar may be enhanced by a multiplier for an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. Factors determining level of enhancement include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Lealao* at 49. The list is not exhaustive and the Court may consider other factors it deems important in setting the multiplier. *Id.* at 40; *Ketchum*, *supra* at 1139. "Multipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied." (Newberg on Class Actions §14.03 (4th ed. 2009)). Counsel pursued difficult claims, presented them with skill based on experience prosecuting employment class actions, and achieved an excellent result, on a contingent basis.

1 A 1.99 multiplier is reasonable and in line with those used in other cases, which may
2 range “from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal. App. at
3 255; *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, *16 (E.D.
4 Pa. June 2, 2004) (finding the average multiplier awarded in common fund cases from 2001 to
5 200, was 4.35). Class Counsel has been awarded a greater multiplier in other cases. Supp.
6 Geraci Decl. ¶¶12, 13.

7 In *Lealao*, the Court held a trial court’s refusal to enhance the lodestar was an abuse of
8 discretion, opining a multiplier more than 3.5 was reasonable and not ruling out the original
9 request for 8.0. *Lealao*, *supra*, 82 Cal. App. 4th at 24, 52. See *SternwestCorp. v. Ash*, 183
10 Cal.App.3d 74, 76 (1986) (remanded with directions “to enhance the lodestar award by such
11 factor (two, three, four or otherwise) that the court, in its discretion shall deem proper”);
12 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (multiplier of 3.65); *Keith v.*
13 *Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

14 Although not required, if a lodestar could be used to calculate the fee award, a multiplier
15 is supported by the difficulty of the questions involved, Class Counsel’s skill in addressing
16 them, statutory employee protections enforced, and contingent nature of any recovery.

17 **IV. LITIGATION EXPENSES ARE REASONABLE**

18 The Settlement allows Class Counsel to recover up to \$35,000 in costs. Actual costs
19 incurred to date are \$32,752.18, and anticipated future costs are \$94.54. These costs are
20 reasonable and necessary. Supp. Geraci Decl. ¶14, Exh. 4 – Costs.

21 **V. THE CLASS REPRESENTATIVE ENHANCEMENT AWARD IS REASONABLE**

22 Service awards “are fairly typical in class action[s]” and “compensate class
23 representatives for work done on behalf of the class, to make up for financial or reputational
24 risk undertaken in bringing the action.” *Cellphone Termination Fee Cases* (2010) 186
25 Cal.App.4th 1380, 1394.

26 “Modern society seems increasingly to expose men to . . . group injuries for which
27 individually they are in a poor position to seek legal redress, either because they do not know
28 enough or because such redress is disproportionately expensive. If each is left to assert his

1 rights alone if and when he can, there will at best be a random and fragmentary enforcement, if
2 there is any at all. This result is not only unfortunate in the particular case, but it will operate
3 seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.
4 The problem of fashioning an effective and inclusive group remedy is thus a major one.”
5 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971).

6 Enforcement of laws protecting California employees would be “random and
7 fragmentary,” or non-existent, if no one came forward and spent time working on behalf of
8 others, and perhaps most importantly, took risks those others are not willing to bear.

9 Class action plaintiffs, not class members, take the risk of a judgment for defendant’s
10 costs. “Those who choose to take the risks of litigation should be the ones who bear the cost
11 when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). The
12 *Early* court acknowledged placing the risk on plaintiffs for what would an enormous sum of
13 money to an individual might appear unfair risk, but determined the risk was balanced by
14 potential reward.

15 “While imposition of the entire cost burden on the named plaintiffs may have a chilling
16 effect on the willingness of plaintiffs to bring class action suits, this effect easily may be
17 outweighed by the potential recovery.” *Id.* Plaintiff’s recovery in a class action will always be
18 less than an individual action, take longer to obtain, and have no potential for early settlement.

19 If “[t]hose who choose to take the risks of litigation should be the ones who bear the cost
20 when they are unsuccessful,” how can that risk be offset? **An adequate Enhancement Award.**

21 More important than when *Early* was decided, is the reputational risk class action
22 plaintiffs are forced to accept. They will look for work many times in their careers, and when
23 they do, it is more likely, if not certain, a prospective employer will take the few seconds
24 needed to see if these candidates have sued a company before, alleging it failed to pay its
25 employees properly.

26 It is impossible to know, or intervene, each time a class action plaintiff loses an
27 employment opportunity, making it essential to compensate them at final approval, the only
28 time that the risk they took can be at least slightly offset and they can be adequately rewarded.

Accepting the risk of a cost judgment, potential loss of employment, and receiving nothing unless the Class was compensated, are each sufficient to support an Enhancement Award of \$10,000. Together, they are more than sufficient.

The Class will receive notice Plaintiff requests \$10,000 for class representative services. The Class response and objection to this request cannot be known until the Class has an opportunity to respond. The proposed request is entitled to a presumption of fairness until then.

Plaintiff more than satisfied his obligation to protect the interests of the Class and place them above his own. Plaintiff had individual claims which he did not pursue, or abandoned, to serve only as a representative of other employees, although, unlike those employees, Plaintiff was required to give a general release of all claims of any kind, including a section 1542 waiver. And he agreed to that to ensure the Class would receive the benefits of settlement.

VI. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS

1. Class Data provided to Administrator: Within 21 calendar days of Preliminary Approval
2. Mail Settlement Notice to the Class: Within 10 business days of receipt of Class Data
3. Notice Response Deadline: 60 calendar days from Mailing
4. File Motion for Final Approval: 21 days after Notice Response Date
5. Final Approval Hearing: A date convenient on the Court's calendar

VII. CONCLUSION

Plaintiff requests preliminary approval of the Settlement and Notice to the Class, and appointment of CPT Group as Settlement Administrator, Cohelan Khoury & Singer and Lebe Law, APLC as Class Counsel, Don Vasquez as Class Representative, and that a Final Approval Hearing date be set.

Respectfully submitted,
LEBE LAW, APLC
COHELAN KHOURY & SINGER



Dated: December 22, 2023

By: _____

Michael D. Singer/Jeff Geraci
Attorneys for Plaintiff Don Vasquez, individually
and on behalf of all others similarly situated