

[TENTATIVE] RULINGS/ORDERS RE: MOTION FOR APPROVAL OF PAGA SETTLEMENT

Salcedo et al. v. Dhillon Foods, Inc., Case No.: 20STCV42750

The Parties' Motion for Approval of PAGA Settlement is **GRANTED** as the settlement is fair, adequate, and reasonable on the condition that Plaintiff's counsel file and serve a Request to Dismiss Class Claims, without prejudice, pursuant to CRC 3.770 and a [Proposed] Order by August 9, 2022.

Non-Appearance Case Review is set for August 16, 2022, 8:30 a.m., Department 9.

The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$350,000;
B. The Net Settlement Amount ("Net") (\$51,882.77) is the GSA minus the following:

\$116,667 (33%) for attorney fees to PAGA Counsel, Capstone Law APC;

\$15,301.92 for litigation costs to PAGA Counsel;
\$5,500 for settlement administration costs to CPT Group, Inc;
\$5,000 for service award to named Plaintiff, Angel Salcedo;
\$155,648.31 (75% PAGA penalty) to the LWDA; and

C. Plaintiffs' release of Defendants from claims described herein.

By August 9, 2022, Plaintiff's counsel must:

a. serve this Order on the LWDA pursuant to Labor Code section 2699 (1)(3);

b. file and serve a [Proposed] Judgment consistent with this ruling containing among other things, the PAGA aggrieved employee definition; PAGA period; and full release language;¹ and

c. email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

Non-Appearance Case Review is set for August 16, 2022, 8:30 a.m., Department 9.

¹ The submitted Proposed Judgment lacks language stating that aggrieved employees are not releasing their individual claims.

By **April 10, 2023**, Plaintiffs must file and serve a final accounting.

Non-Appearance Case Review is set for April 17, 2023, 8:30 a.m., Department 9.

I.
INTRODUCTION

A. Background

This is a putative wage and hour class action. Plaintiff Angel Salcedo alleges that he and the putative class members are and were non-exempt employees of Defendants Dhillon Foods, Inc.; Dhillon & Hurtado Enterprises, LLC; Enchant Foods, Inc.; Jushen Restaurants, Inc.; Kahani Restaurants, LLC; and Sage Restaurants, LLC. Plaintiff also alleges that Defendants violated the Labor Code, Industrial Welfare Commission wage orders, and the Business and Professions Code.

On September 4, 2020, Plaintiff sent a letter to the Labor and Workforce Development Agency (LWDA) pursuant to Labor Code § 2699.3(a)(1), giving notice of Defendant's various Labor Code violations. The LWDA declined to investigate the alleged violations.

On November 9, 2020, Plaintiff filed a class action complaint. In the complaint, Plaintiff asserts the following causes of action: (1) unpaid overtime; (2) unpaid minimum wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) non-compliant wage statements and failure to maintain payroll records; (6) wages not timely paid upon termination; (7) failure to timely pay wages during employment; (8) failure to provide reporting time pay; (9) civil penalties under the Private Attorneys General Act (PAGA); (10) unlawful business practices; and (11) unfair business practices.

On January 10, 2022, Plaintiff filed the pending motion to approve PAGA settlement. On April 22, 2022, Plaintiff filed supplemental papers in support of his motion.

B. Terms of Settlement Agreement

The essential terms of the PAGA settlement are as follows:

“Aggrieved Employees” definition	“Aggrieved Employees” are defined as all non-exempt employees of Dhillon Foods, Inc. (Defendant) who have worked in California from September 4, 2019 to the date of entry of the order approving settlement and judgment. Settlement Agreement, ¶ 2. - There are approximately 400 Aggrieved Employees. <u>Id.</u>, ¶ 16; Perez Decl., ¶ 11.																				
Maximum Settlement Amount (MSA)	\$350,000. Settlement Agreement, ¶ 11.																				
Escalator Clause	If the number of pay periods worked by all Aggrieved Employees during the Settlement Period is greater than 14,300, then Defendant will proportionally increase the Maximum Settlement Amount according to the following formula: Proportionally Increased Maximum Settlement Amount = Total Number of pay periods ÷ 14,300 × \$350,000. <u>Id.</u> , ¶ 12.																				
MSA allocation	<table><tr><td></td><td>Maximum</td><td>Requested</td></tr><tr><td>PAGA counsel fees</td><td>\$116,667.00</td><td>\$116,667.00</td></tr><tr><td>Reasonable litigation costs</td><td>\$20,000.00</td><td>\$15,301.92</td></tr><tr><td>Plaintiff’s service award</td><td>\$10,000.00</td><td>\$10,000.00</td></tr><tr><td>Settlement administration costs</td><td>\$5,500.00</td><td>\$5,500.00</td></tr><tr><td>PAGA Payment</td><td>—</td><td>\$202,531.08</td></tr></table> Settlement Agreement, ¶¶ 14–16; Perez Decl., ¶ 24. Under the Settlement Agreement, the remainder of the MSA (PAGA Payment) after deducting the requested amounts is \$207,531.08 and is the Net Settlement Amount to be allocated between the LWDA and the Aggrieved Employees pursuant to Labor Code § 2699(i), with 75% paid to the LWDA and 25% paid to the PAGA Settlement Members on a pro rata basis. Thus, the LWDA will receive \$155,648.31 and Aggrieved Employees will receive \$51,882.77. However, the amount requested for Plaintiff’s service award is excessive. The Court will award Plaintiff \$5,000. In light of this reduction, the remainder of the MSA (PAGA Payment) after deducting the requested amounts is \$207,531.08. The LWDA will receive \$155,648.31 and Aggrieved Employees will receive \$51,882.77.				Maximum	Requested	PAGA counsel fees	\$116,667.00	\$116,667.00	Reasonable litigation costs	\$20,000.00	\$15,301.92	Plaintiff’s service award	\$10,000.00	\$10,000.00	Settlement administration costs	\$5,500.00	\$5,500.00	PAGA Payment	—	\$202,531.08
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PAGA Payment	—	\$202,531.08																			
Allocation and Calculation of PAGA Penalties	The payments to the Aggrieved Employees shall be paid on a pro rata basis as calculated by Defendant. Settlement Agreement, ¶ 13.																				
Tax Treatment of PAGA Penalties	Aggrieved Employee payments shall be reported as 1099-MISC income. <u>Id.</u> , ¶ 20.																				
Payment Procedures	- Within 14 days after entry of the order and judgment, Defendant shall provide Aggrieved Employee List to Settlement Administrator. <u>Id.</u>, ¶ 18. - Within 14 days after entry of the order and judgment, Defendant shall pay \$350,000 to the Settlement Administrator. <u>Id.</u>, ¶ 19. - Within 14 days after funding of the settlement, the Settlement Administrator shall issue payments to: (a) Aggrieved Employees; (b) the LWDA; (c) Plaintiff; (d) Plaintiff’s Counsel; and (e) itself. <u>Id.</u>, ¶ 19.																				
Unclaimed Funds	- Checks will remain negotiable for 180 days. <u>Id.</u>, ¶ 20. - Any checks returned as nondeliverable on or before the check cashing deadline will be sent promptly via regular First-Class U.S. Mail to the forwarding address affixed thereto. If no forwarding address is provided, the Settlement Administrator will promptly attempt to determine the correct address using a skip-trace, or other search using the name, address, or Social Security number of the Aggrieved Employee involved, and will then perform a single re-mailing. <u>Id.</u>																				

	• After 180 days, uncashed checks shall be tendered to the LWDA. <u>Id.</u>
Settlement Administrator	CPT Group, Inc. <u>Id.</u> , ¶ 16.
Settlement Submitted to LWDA	Submitted to the LWDA at the same time as the filing of the motion for settlement approval, per Labor Code § 2699(l)(1). <u>Id.</u> , ¶ 17.

II. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. After arms-length negotiation, the Parties agreed to a settlement of Plaintiff's PAGA claim. Settlement Agreement, ¶ 33.

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Plaintiff's counsel performed a thorough investigation into the claims at issue, which included: (1) determining Plaintiff's suitability as a private attorney general through interviews, background investigations, and analyses of his employment files and related records; (2) evaluating all of Plaintiff's potential representative claims; (3) researching similar wage and hour actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing a sample of employees' time and wage records; (5) reviewing Defendant's employment policies and practices; (6) researching settlements in similar cases; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. Perez Decl., ¶¶ 5-9.

3. Is counsel experienced in similar litigation? Yes. Perez Decl., ¶¶ 13-20; Exh. 2.

4. What percentage of the class has objected? Not applicable.

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.

Plaintiff's counsel provides a detailed factual basis for the claims asserted in the complaint. Perez Decl., ¶¶ 2-5.

Here, the maximum exposure in this case appears to be \$7,837,500, but Plaintiff concedes that this outcome is unlikely given Defendant's defenses, the risk of losing at trial, and the risk that the Court would reduce the amount of civil penalties, the risk of reversal on appeal, and the difficulty of collecting on any judgment. After discounting for such defenses, Plaintiff provides the following risk-adjusted exposure analysis:

PAGA Section 2699(f)		
Meal Period Claim	• 13,000 total pay periods × 26% estimated violation rate × \$100 penalty = \$338,000	\$338,000
Rest Period Claim	• 13,000 total pay periods × 14% estimated violation rate × \$100 penalty = \$182,000	\$182,000
Off-the-Clock Work Claim	• 13,000 pay periods × 50% estimated violation rate × \$100 penalty = \$650,000	\$650,000
Reporting-Time Pay Claim	• 13,000 pay periods × 10% estimated violation rate × \$100 penalty = \$130,000	\$130,000
Seating Claim	• 13,000 pay periods × 10% estimated violation rate × \$100 penalty = \$130,000	\$130,000
Wage Statement Claim	• 13,000 pay periods × 50% estimated violation rate × \$100 penalty = \$650,000	\$650,000
Final Pay Claim	• 375 former employees × \$100 = \$37,500	\$37,500
Grand Total		\$2,117,500

Motion at 14-17. The PAGA Payment of \$202,531.08 [\$207,531.08] represents approximately 9.56% [9.8%] of the maximum risk-adjusted PAGA exposure of \$2,117,500. Thus, the PAGA settlement amount compares reasonably to the realistic, risk-adjusted potential recovery in this case.

2. Risk, expense, complexity, and likely duration of further litigation. The discounted settlement takes into consideration the significant risks inherent in moving forward, such as the possibility that the Court would refuse to award significant penalties, or any penalties at all, for many of the alleged violations, as well as the delay occasioned by continuing with the litigation. Motion at 14-17.

3. Risk of maintaining class action status through trial. Not applicable.

4. Amount offered in settlement. Defendant will pay a maximum settlement amount of \$350,000. This amounts to approximately 16.5% of Defendant's risk-adjusted maximum exposure of \$2,117,500 for the claims alleged. Given the

uncertain outcomes, and the discretionary nature of PAGA penalties, this settlement appears to be within the "ballpark of reasonableness."

Assuming the requested deductions are taken in full, \$51,882.77 will remain for distribution to Aggrieved Employees. The payments to Aggrieved Employees will average \$129.71 ($\$51,882.77 / 400$ Aggrieved Employees = \$129.71).

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Plaintiff's Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Plaintiff's Counsel who, as indicated above, is experienced in PAGA litigation.

The Court concludes that the settlement is fair, adequate, and reasonable.

C. Scope of the Release

"Settled Claims" means any and all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations, and/or other provisions of law alleged or could have been alleged to have been violated in the Actions with respect to Aggrieved Employees based on the facts alleged in the Action during the Settlement Period. Settlement Agreement, ¶ 9. Upon entry of the Order and Judgment, Plaintiff and all Aggrieved Employees will be forever barred from pursuing against Defendant any and all Settled Claims during the Settlement Period. Aggrieved Employees, other than Plaintiff, will not be deemed to have released any individual wage and hour claims by virtue of this Settlement. Id., ¶ 21.

D. Is the Notice Proper?

PAGA has no notice requirements for unnamed aggrieved employee members, nor may such employees opt out of a PAGA action. Hernandez v. DMSI Staffing, LLC. (N.D. Cal. 2015) 79 F.Supp.3d 1054, 1063, aff'd sub nom. Hernandez v. DMSI Staffing, LLC (9th Cir. 2017) 677 Fed.Appx. 359.

A letter to aggrieved employees will accompany settlement checks. Settlement Agreement, ¶ 20. A copy of the proposed letter is attached to the Perez Supplemental Declaration as Exhibit 1. Its content appears to be acceptable.

E. Attorney Fees and Costs

An aggrieved employee who prevails in a PAGA action may recover reasonable attorney's fees and costs. (Labor Code §2699(g)(1)) Whether a plaintiff established entitlement to an award of fees under PAGA is a question best decided by the trial court. (San Diego Municipal Employees Association v. City of San Diego (2016) 244 Cal.App.4th 906.)

PAGA Counsel requests attorneys' fees of \$116,667 and costs of \$15,301.92. Settlement Agreement, ¶ 14; Perez Decl., ¶ 24. The Settlement Agreement provides for fees up to \$116,667 and reasonable litigation costs up to \$20,000. Settlement Agreement, ¶ 14.

"Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other grounds in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. Plaintiff's counsel requests attorney fees using the percentage method. Motion at 21.

In common fund cases, the Court may employ a percentage of the benefit method, as cross-checked against the lodestar. (Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 503.) Here, the fee request of \$116,667 represents 33% of the maximum settlement amount, which is equal to the 33% average generally awarded in class actions. See In re Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 558, fn.13 ("Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Regarding lodestar, Plaintiff's counsel has provided the following information for the attorneys in Capstone Law APC:

Attorney	Hours	Rate	Totals
Raul Perez	24.8	\$775	\$19,220.00
Mark Ozzello	23.9	\$775	\$18,522.50
Liana Carter	10.8	\$720	\$7,776.00
Brandon Brouillette	21.2	\$485	\$10,282.00
Mao Shiokura	13.1	\$485	\$6,353.50
Michelle Kennedy	35.5	\$265	\$9,407.50
Joseph Hakakian	16.8	\$265	\$4,452.00
Totals	146.1	—	\$76,013.50

Perez Decl., ¶ 21. Plaintiff's counsel's percentage-based fee request is higher than the unadjusted lodestar of \$76,013.50 and would represent application of a 1.53 multiplier. Plaintiff's counsel contends that their fee request is thus also reasonable under the lodestar method. Motion at 22.

As for costs, Plaintiff's counsel is requesting \$15,301.92. Perez Decl., ¶ 24. This is less than the \$20,000 maximum stated in the Settlement Agreement. Class counsel incurred actual costs as follows:

Cost Category	Amount
Copying, Printing & Scanning and Facsimiles	\$29.00
Court Fees, Courier Fees, Filings & Service of Process	\$2,954.97
Delivery & Messenger	\$102.40
Demond, Marcello & Amster, LLC (damages analysis)	\$762.50
Fountain Consulting (data analysis)	\$100.00
Investigation & Research (private investigators)	\$3,264.95
Legal Research Services	\$35.39
Mediation Fees	\$8,000.00
Postage & Mailings	\$52.71
Total	\$15,301.92

The costs incurred appear to be reasonable in amount and reasonably necessary to this litigation.

Based on the above, the court awards \$116,667 for attorneys' fees and \$15,301.92 for costs.

III. CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Approval of PAGA Settlement is GRANTED as the settlement is fair, adequate, and reasonable on the condition that Plaintiff's counsel file and serve a Request to Dismiss Class Claims, without prejudice, pursuant to CRC 3.770 and a [Proposed] Order by August 9, 2022.

2) Non-Appearance Case Review is set for August 16, 2022, 8:30 a.m., Department 9.

3) The essential terms are:

- A. The Gross Settlement Amount ("GSA") is \$350,000;
- B. The Net Settlement Amount ("Net") (\$51,882.77) is the GSA minus the following:

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\$15,301.92 for litigation costs to PAGA Counsel;
\$5,500 for settlement administration costs to CPT Group, Inc;
\$5,000 for service award to named Plaintiff, Angel Salcedo;
\$155,648.31 (75% PAGA penalty) to the LWDA; and

C. Plaintiffs' release of Defendants from claims described herein.

4) By August 9, 2022, Plaintiff's counsel must:

a. serve this Order on the LWDA pursuant to Labor Code section 2699 (1)(3);

b. file and serve a [Proposed] Judgment consistent with this ruling containing among other things, the PAGA aggrieved employee definition; PAGA period; and full release language; and

c. email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

5) Non-Appearance Case Review is set for August 16, 2022, 8:30 a.m., Department 9.

6) By April 10, 2023, Plaintiffs must file and serve a final accounting.

7) Non-Appearance Case Review is set for April 17, 2023, 8:30 a.m., Department 9.

CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.

DATED: July 7, 2022

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT