

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Carlos Aguilar

Plaintiff/Petitioner(s)

VS.

Farmgirl Flowers, Inc. et al

Defendant/Respondent(s)

No. RG21107981

Date: 09/15/2023

Time: 9:00 AM

Dept: 21

Judge: Evelio Grillo

ORDER re: Hearing on Motion - Other
Motion for Preliminary
Approval of Class Action
Settlement; filed by Carlos
Aguilar (Plaintiff) filed by
Carlos Aguilar (Plaintiff) on
07/18/2023

The Motion for Preliminary Approval of Class Action Settlement is continued to 10/27/23.

Any supplemental amendments to the settlement agreement shall be filed at least 7 days prior to the hearing.

The Hearing on Motion - Other Motion for Preliminary Approval of Class Action Settlement; filed by Carlos Aguilar (Plaintiff) scheduled for 08/11/2023 is continued to 10/27/2023 at 09:00 AM in Department 21 at Rene C. Davidson Courthouse.

The motion of plaintiffs for preliminary approval of class action settlement and PAGA settlement is CONTINUED.

The order of 8/18/23 identified concerns with the proposed settlement. The filing on 9/8/23 addressed the concerns but raised new concerns. The parties must file a memorandum, potentially with an amended settlement agreement, at least 7 court days before the hearing.

The court ORDERS that plaintiff must send a copy of this order and a copy of the order of 8/18/23 to the LWDA when plaintiff sends a copy of any proposed amended settlement to the LWDA. (Labor Code 2669.3(b)(4).

The court ALERTS the LWDA to the proposed amendment in section 3.06 that is discussed in ISSUE #6 below. This is a novel proposal that merits the LWDA's attention.

ISSUE #1 – RELEASE OF LWDA'S CLAIMS BY PLAINTIFF UNDER PAGA.

ORDER re: Hearing on Motion - Other Motion for Preliminary Approval of
Class Action Settlement; filed by Carlos Aguilar (Plaintiff)
filed by Carlos Aguilar (Plaintiff) on 07/18/2023

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The Amended Agreement clarifies that “Plaintiffs, on behalf of themselves and as agents and proxies on behalf of the LWDA, shall be deemed to have released the Released Parties from any and all claims and/or causes of action under the PAGA.” (Agt 4.02) This is consistent with the law that under the PAGA, a private plaintiff brings an action as proxy or agent of the LWDA. (Kim v. Reins International California, Inc. (2020) 9 Cal.5th 73, 81; ZB, N.A. v. Superior Court of San Diego County (2019) 8 Cal.5th 175, 185.) This is adequate.

ISSUE #2 - RELEASE OF LWDA’S CLAIMS BY AGGRIEVED EMPLOYEES.

The Amended Agreement clarifies that “Plaintiffs, on behalf of themselves and as agents and proxies on behalf of the LWDA, shall be deemed to have released the Released Parties from any and all claims and/or causes of action under the PAGA.” (Agt 4.02) The named plaintiff does not represent the aggrieved employees in the claims under PAGA and therefore cannot release PAGA claims on their behalf. This is adequate.

ISSUE #3 - RELEASE OF CLAIMS BY MEMBERS OF THE CLASS.

The members of the class release claims arising out of the claims in the complaint where the named plaintiffs are typical and can adequately represent the class. (Agt, para 2.31, 50.) (Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521, 537-538.)

The release by the members of the class is a release of the class claims. (Para 4.01.) The release by the members of the class cannot include a release of the claims of the LWDA. This is adequate.

ISSUE #4 - RELEASE OF CLAIMS BY NAMED PLAINTIFF

The Agreement properly releases the claims of the named plaintiff, which can include a Civil Code 1542 waiver. (Agt para 4.03) Plaintiff as an individual is presumably releasing his “individual PAGA claims.” (Adolph v. Uber.) This is adequate.

ISSUE #5. RESIDUAL BENEFICIARY

The agreement states that that the residual will go to Bay Area Legal Aid. (Agt para 3.03.) This is consistent with CCP 384. Counsel has provided a declaration with the CCP 382.4 information. This is adequate.

ISSUE #6. REDECUCTION IN SETTLEMENT BASED ON PAGA NOTICE OR CIVIL ACTION.

The agreement at para 3.06 states “in the event that on or before July 18, 2024 an Aggrieved Employee submits a PAGA notice to the LWDA or files a claim or lawsuit for individual PAGA claims during the PAGA Period for the claims released herein, the Settlement will be reduced \$15,000 per filed PAGA notice or lawsuit.” The court has several concerns with this provision.

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First, the LWDA has no control over whether a person submits a PAGA notice, but the LWDA does have control over whether a person is permitted to file a civil action as agent or proxy of the LWDA. The court will not approve a settlement that decreases the settlement if a person sends a PAGA notice. The court might approve a settlement that decreases the LWDA's settlement if the LWDA permits a person to file a new civil action asserting claims that are barred by the settlement in this case.

Second, the proposed para 3.06 would decrease the total settlement by \$15,000 for each PAGA notice or PAGA civil action. The LWDA is recovering penalties of only \$50,000 in the settlement. (Agt para 3.06(f).) Therefore, any reduction in the settlement due to the filing of barred claims on behalf of the LWDA must be limited to the total of \$50,000. The uncapped reductions of \$15,000 means that the absent class members would be punished for the LDWA's failure to prevent meritless civil actions.

Third, the court questions the reference to "individual PAGA claims" in section 3.06. Claims under the PAGA are claims on behalf of the LWDA (*Adolph v. Uber*, *Kim v. Reins*, *ZB v. Superior Court*) and the Agreement will release the claim of the LWDA (para 4.02), which means that the agreement releases all the Labor Code claims for civil penalties that the LWDA could assert whether through its own attorneys or through a private party acting on behalf of the LWDA. There is simply nothing left.

Regarding the concept of "individual PAGA claims," the court thinks that *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83 Cal.App.5th 595, 605, got it right when the California Court of Appeal rejected the Viking River concept of "individual PAGA claims," and stated "This is mere wordplay. What the Supreme Court called, as shorthand, an "individual PAGA claim" is not actually a PAGA claim at all. It would exist even if PAGA had never been enacted. It is what we are calling, more accurately, an individual Labor Code claim."

Fourth, if what the parties intend to do in para 3.06 is to penalize the members of the class the amount of \$15,000 if any one of them files a released individual claim for a Labor Code violation, then the court would not be inclined to approve that term in an agreement.

The court's PRE-TENTATIVE order is as follows:

The motion of plaintiffs for preliminary approval of class action settlement and PAGA settlement is _____.

The complaint alleges various Labor Code claims.

The case preliminarily settled for a total of \$1,000,000.

The settlement agreement states there will be attorneys' fees of up to \$333,333 (33%), costs of up to \$50,000, service award of \$10,000 to plaintiff, settlement administration costs of up to \$20,000, and a PAGA payment of \$50,000 (net of \$37,500). After these expenses, the amount

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available to be distributed to the Class would be \$ 506,666.67. Assuming that there are an estimated 354 Class Members, the average payment per Class Member would be \$720.

The total settlement amount is [NOT] reduced if aggrieved employees serve PAGA notices but [IS] reduced if the LWDA permits aggrieved employees to file claims on its behalf that are barred by the agreement.

The proposed class notice form and procedure are adequate. [TO BE AMENDED IF SETTLEMENT TERMS ARE CHANGED]

The proposed class is appropriate for class certification.

The scope of the class release is appropriate. The scope of the class release must be limited to the claims arising out of the claims in the complaint where the named plaintiffs are typical and can adequately represent the class. (Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521, 537-538.) The release of claims by the class is limited by the "factual predicate rule." (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 PAGA release is appropriate. The agreement does not include a release by the named plaintiff of the LWDA's claims. The agreement improperly includes a release of claims by the Aggrieved Employees.

The scope of the named plaintiff release is appropriate. The agreement for the named plaintiff may include a Civil Code 1542 waiver and a release of "individual PAGA claims."

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

The unclaimed funds will be distributed to Bay Area Legal Aid. (Agt, para 3.03.) This is consistent with CCP 384. Counsel has provided a declaration in support of the motion that provides the information required by CCP 382.4.

The Court will not approve the amount of attorneys' fees and costs until the final approval hearing. The Court cannot award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case. This is the law even if the parties have agreed that Defendants will not oppose the motion for fees. (Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 450-451.)

"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. ...

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[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 sets out its standard analysis below. Counsel may address that analysis in the fee application.

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

This court's benchmark for fees is 30% of the total fund. (Laffitte v. Robert Half Internat. 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.)

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.

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. "The law does not mandate ... that attorney fees bear a percentage relationship to the ultimate recovery of damages in a civil rights case." (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 419.) (See also Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007.)

The Court will not decide the amount of any service award until the final approval hearing. Plaintiff must provide evidence regarding the nature of his participation in the action, including a description of his specific actions and the amount of time he committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.) The court's standard service award is \$7,500.

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.

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The court will sign the proposed order, which is modified by this order. Plaintiff must reserve a hearing for the motion for final approval.

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 09/15/2023



Evelio Grillo / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 09/27/2023
PLAINTIFF/PETITIONER: Carlos Aguilar	Chad Finke, Executive Officer / Clerk of the Court By: <u>Nicole Hall</u> Deputy
DEFENDANT/RESPONDENT: Farmgirl Flowers, Inc. et al	N. Hall
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: RG21107981

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the Order re: Hearing on Motion - Other Motion for Preliminary Approval of Class Action Settlement; filed by Carlos Aguilar (Plaintiff) filed by Carlos Aguilar (Plaintiff) on 07/18/2023 entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

Alison L. L. Tsao
CDF LABOR LAW LLP
atsao@cdflaborlaw.com

Dated: 09/27/2023

Chad Finke, Executive Officer / Clerk of the Court

By:

Nicole Hall

N. Hall, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 09/27/2023
PLAINTIFF/PETITIONER: Carlos Aguilar	Chad Finke, Executive Officer / Clerk of the Court By: <u>Nicole Hall</u> Deputy
DEFENDANT/RESPONDENT: Farmgirl Flowers, Inc. et al	N. Hall
CERTIFICATE OF MAILING	CASE NUMBER: RG21107981

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the attached document upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Brian D. Chase
Bisnar & Chase, LLP
One Newport Place
1301 Dove St., Suite 120
Newport Beach, CA 92660-

Chad Finke, Executive Officer / Clerk of the Court

Dated: 09/27/2023

By:

Nicole Hall

N. Hall, Deputy Clerk

CERTIFICATE OF MAILING