

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

**RG21114800: Ellingson VS Mueller Nicholls, Inc.
02/07/2023 Hearing on Motion - Other Motion for Final Approval of Class Action
Settlement in Department 21**

Tentative Ruling - 02/02/2023 Evelio Grillo

The Motion for Final Approval of Settlement filed by Jeffrey Ellingson on 01/11/2023 is Granted in Part.

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

APPROVAL OF THE SETTLEMENT

The complaint alleges claims for failure to provide meal period and related claims. There are approximately 98 members of the class.

The case preliminarily settled for a total of \$395,000, with \$70,000 in prior settlements, for a total effective settlement amount of \$465,000. The settlement agreement states there will be attorneys' fees of up to \$155,000, costs of up to \$15,000, a service award of \$10,000 to the class representative, settlement administration costs of up to \$6,000, and a net PAGA payment of \$18,750. After these expenses the amount available to be distributed to the Class (i.e., the Net Fund Value) would be \$187,711. Assuming that there are an estimated 98 Class Members, the average payment per Class Member would be \$1,980.

The math of the settlement is clouded by the fact that the settlement considers the individual settlements of \$70,000 previously paid to approximately 62 class members. (Agt para 47(a).) Those payments are set off against any payments due to members of the class under the terms of the settlement. (Agt para 47(d).) Counsel argue that defendant made the \$70,000 in individual settlement payments in response to the filing of this case and that for purposes of considering attorneys fees the court should consider the fees in the context of a total class and individual settlement of \$465,000.

The proposed class notice form and procedure are adequate. There were no opt outs and no objections.

The proposed class is appropriate for class certification.

The scope of the class release is appropriate. (Released Class Claims, para 4) The scope of the class release must be limited to the claims arising out of the claims in the complaint. 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. (Released PAGA claims, para 22) The agreement

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releases the claims of the LWDA.

The scope of the named plaintiff release is appropriate. The agreement for the named plaintiff may include a Civil Code 1542 waiver. (Agt para 58)

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

The unclaimed funds will be distributed to Legal Aid at Work. 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.

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 starts with its benchmark, then cross-checks with the lodestar, and makes adjustments if the benchmark is significantly different from the lodestar. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 505 ["If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted"].)

The court awards fees of \$139,500.

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. 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.

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(2008) 162 Cal.App.4th 43, 66 fn 11; Schulz v. Jeppesen Sanderson, Inc. (2018) 27 Cal.App.5th 1167, 1175.) The benchmark suggests fees of \$139,500.

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 assert they spent 215 hours on the case. This is reasonable.

The court finds that a blended rate of \$550 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 takes judicial notice of the rates for counsel in the USAO Attorney's Fees Matrix (<https://www.justice.gov/file/1461316/download>). The court takes judicial notice of the Laffey matrix. (<http://www.laffeymatrix.com/>) The court gives little weight to the anecdotal fee awards of other trial judges. Counsel can selectively present fee awards that indicate the highest hourly billing rates.

This results in a lodestar of \$118,250.

The court applies a 1.2 multiplier for risk. 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. (Weeks v. Baker & McKenzie (1998) 63 Cal.App.4th 1128, 1174.) 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].) There was a fee shifting provision. This results in a multiplier adjusted lodestar of \$141,900.

Considering the percentage analysis fees of \$139,500 and the multiplier adjusted lodestar fees of \$141,900, the court will award fees of \$139,500. This is the court's benchmark. The award of fees 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.

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The court approves costs of \$11,288.55.

The court approves actual settlement administration costs of \$6,000.

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

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.

Plaintiff may submit a proposed order if necessary. The court will sign any proposed order, which is modified by this order.

PLEASE NOTE: This tentative ruling will become the ruling of the court if uncontested by 04:00pm the day before your hearing. If you wish to contest the tentative ruling, then both notify opposing counsel directly and the court at the eCourt portal found on the court's website: www.alameda.courts.ca.gov.

If you have contested the tentative ruling or your tentative ruling reads, "parties to appear," please use the following link to access your hearing at the appropriate date and time: <https://alameda-courts-ca-gov.zoomgov.com/my/department21> . If no party has contested the tentative ruling, then no appearance is necessary.