

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Jileea Jordan

Plaintiff/Petitioner(s)

VS.

Wax Center Partners

Intermediate Holdco LLC et al

Defendant/Respondent

(s)

No. 22CV018596

Date: 02/20/2024

Time: 1:30 PM

Dept: 21

Judge: Noël Wise

ORDER re: Hearing on Motion -

Other for Preliminary

Approval of Settlement;

filed by Jileea Jordan

(Plaintiff) filed by Jileea

Jordan (Plaintiff) on

01/24/2024

The Hearing on Motion - Other for Preliminary Approval of Settlement; filed by Jileea Jordan (Plaintiff) scheduled for 02/20/2024 is continued to 03/26/2024 at 01:30 PM in Department 21 at Rene C. Davidson Courthouse .

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

The court ORDERS that the parties must file any briefing, and perhaps an amended agreement, at least 5 court days before the continued hearing.

The law was recently clarified in Adolph v. Uber Technologies (2023) 14 Cal.5th 1104. Adolph clarified that in a case such as this there are three types of claims: (1) claims that the named plaintiff asserts on their individual behalf, including “individual PAGA claims”; (2) claims that the named plaintiff asserts as agent or proxy of the LWDA, which are described as “non-individual PAGA claims”; and (3) claims that the named plaintiff asserts as a representative of the absent class members, which are the claims that the absent class members could have asserted on their own individual selves.

The releases in a case with individual, class, and PAGA claims must be consistent with the nature of the three types of claims that the case asserts.

Plaintiff states: “The form of the Agreement is based upon the Los Angeles County Superior Court model form for a class and PAGA settlement.” (Nordrehaug Dec, para 2) That might be so, but (1) this case is filed in Alameda, (2) the Agreement does not appear to be based on the

ORDER re: Hearing on Motion - Other for Preliminary Approval of Settlement; filed by Jileea Jordan (Plaintiff) filed by Jileea Jordan (Plaintiff) on 01/24/2024

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most recent LASC model form, (3) the LASC website states the most recent model form is dated 02/23, which was before the Adolph decision on 7/17/23 and the LaCour v. Marshalls of California, LLC (2023) 94 Cal.App.5th 1172, 1192-1196, decision on 8/29/23, and (4) where a trial court form is inconsistent with California Supreme Court caselaw, the court will follow the caselaw (Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455.)

ISSUE #1 - 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 6.1) This is adequate.

The Agreement para 6.1 states that Plaintiff releases “all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the Operative Complaint and/or Plaintiff’s PAGA Notice.” Plaintiff in their individual capacity in not releasing the claims of the LWDA. The LWDA’s release is in para 6.3. In addition, the scope of the LWDA’s release is limited to the scope of the PAGA notice letter. (LaCour v. Marshalls of California, LLC (2023) 94 Cal.App.5th 1172, 1192-1196.) This is not adequate.

ISSUE #2 – RELEASE OF LWDA’S CLAIMS BY PLAINTIFF UNDER PAGA.

Under the PAGA, a private plaintiff brings an action as proxy or agent of the LWDA. “An employee plaintiff suing ... under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies.” (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; Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 381; Adolph v. Uber Technologies (2023) 14 Cal.5th 1104, 1116.)

Every PAGA action is “a dispute between an employer and the state.” Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 386; LaFace v. Ralphs Grocery Co. (2022) 75 Cal.App.5th 388, 397; Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 74.)

The Agreement para 6.3 states: “All Aggrieved Employees and the LWDA are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from the Released PAGA Claims.” The Aggrieved Employees do not release the claims of the LWDA. This is not adequate.

The Agreement para 1.41 has a broad definition of “Released PAGA Claims.” The scope of the LWDA’s release is limited to the scope of the PAGA notice letter. (LaCour v. Marshalls of California, LLC (2023) 94 Cal.App.5th 1172, 1192-1196.) The scope of the release of the LWDA’s claims is limited to and co-extensive with the scope of the PAGA notice letter. This is not adequate.

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ISSUE #3 - RELEASE OF LWDA'S CLAIMS BY AGGRIEVED EMPLOYEES.

The named plaintiff does not represent the aggrieved employees in the non-individual claims under PAGA and therefore cannot release PAGA claims on their behalf. Some settlements suggest that under the terms of the settlement the aggrieved employees are releasing the claims that they might assert as agents of the LWDA under the PAGA. That would be contrary to California law.

The harm of a misstatement that the plaintiff represents the aggrieved employees is twofold. First, the court is not inclined to approve agreements that are contrary to law. Second, as noted above, there have been many appellate decisions addressing and re-addressing the law that a PAGA claim is on behalf of the state and is not on behalf of the employees. The court is not inclined to perpetuate any confusion by approving a settlement that inaccurately states that a PAGA plaintiff represents the aggrieved employees.

Defendant can assert the settlement as a defense to any future claims for penalties brought by the LWDA or any claims brought on behalf of the LWDA under PAGA. A PAGA settlement on behalf of the LWDA might preclude the LWDA from asserting the same claim for a second time. Any such defense would exist because the LWDA is bound by the terms of the settlement agreement.

This is similar to the situation where a District Attorney recovers restitution on behalf of a victim of a crime. (Penal Code 1202.4(f)(3), (i).) The District Attorney does not represent the victim. (People v. Seumanu (2015) 61 Cal.4th 1293, 1344-1345; People v. Eubanks (1996) 14 Cal.4th 580, 589-590.) A settlement by the District Attorney of the claims of The People is not a settlement of the potential civil claims of the victims. (Vigilant Ins. Co. v. Chiu (2009) 175 Cal.App.4th 438, 442-443.) If the victim files a civil case against the defendant, then the defendant can assert that any victim compensation payment in the criminal case is an offset in the civil case. (Penal Code 1202.4(j).)

If an "aggrieved employee" in the future files a case under the PAGA asserting claims on behalf of the LWDA that have been settled in this case, then the settlement in this case might preclude the LWDA from asserting the same claims in a later case. The legal effect of the settlement in this case will likely be that neither the LWDA directly and acting through its attorneys or the LWDA indirectly acting through the PAGA can assert the claims that the LWDA is releasing in the settlement. The court uses the word "might" because the judge in the second case will determine the preclusive effect of the settlement agreement. (In re Fireside Bank Cases (2010) 187 Cal.App.4th 1120, 1131 ["the preclusive effect of a prior judgment is determined by the court in which it is asserted, not the court that rendered it"].)

The court notes that although it is legally significant that that a claim under the PAGA is on behalf of the LWDA, that issue has no practical effect in the context of a settlement. If any aggrieved employee were to assert a subsequent claim on behalf of the LWDA then the employer could assert the settlement agreement as a defense to the LWDA's claims. If the LWDA's claims have been released, then it is immaterial whether the settlement agreement states (correctly) that

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LWDA has released its claims or states (incorrectly) that other employees cannot assert claims on behalf of the LWDA.

The Agreement para 6.3 states: “All Aggrieved Employees and the LWDA are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released Parties from the Released PAGA Claims.” The Aggrieved Employees do not release the claims of the LWDA. This is not adequate.

ISSUE #4 - 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. (Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521, 537-538.)

The agreement at para 6.2 states that the Settlement Class Members are releasing the Released Class Claims. The agreement at para 1.40 defines the Released Class Claims. The Settlement Class Members do not release the claims of the LWDA. This is adequate.

ISSUE #5. RESIDUAL BENEFICIARY

The agreement at para 5.4 states that the residual will go to the Unclaimed Property Fund. (CCP 1300 et seq) This is not likely to get the money to the relevant employees. Sending funds to the Unclaimed Property Fund is not consistent with CCP 384. The agreement must identify a cy pres beneficiary consistent with CCP 384. Counsel must provide a declaration with the CCP 382.4 information. The concerns apply to all uncashed checks, without regard to whether they relate to the claims of the class or the claims of the LWDA. This is not adequate.

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

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

The complaint alleges various Labor Code claims.

The case preliminarily settled for a total of \$750,000.

The settlement agreement states there will be attorneys' fees of up to \$250,000 (33%), costs of up to \$20,000, service award of \$10,000 to plaintiff, settlement administration costs of up to \$17,000, and a PAGA payment of \$15,000 (\$11,250 to the LWDA). After these expenses, the amount available to be distributed to the Class would be \$442,000. Assuming that there are an estimated 1043 Class Members, the average payment per Class Member would be \$424.

The motion makes an adequate analysis as required by Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116.

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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 named plaintiff release is [NOT] appropriate. The agreement for the named plaintiff may include a Civil Code 1542 waiver.

The scope of the PAGA release is [NOT] appropriate. The scope of the LWDA's release is limited to the scope of the PAGA notice letter. (LaCour v. Marshalls of California, LLC (2023) 94 Cal.App.5th 1172, 1192-1196.)

The scope of the class release is [NOT] 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 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. (Agt, para 5.4.) 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.)

"[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." (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

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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.) The court recently reviewed and reaffirmed its use of a benchmark of 30%. (*Hurtubise v. Sutter East Bay Hosp.* (2021) 2021 WL 11134912.)

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.

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

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

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Dated : 02/20/2024

A handwritten signature in black ink, appearing to read "Noel Wise", is centered on the page.

Noel Wise / Judge