

ELECTRONICALLY FILED
Superior Court of California
County of Sonoma
12/18/2020 10:20 AM
Arlene D. Junior, Clerk of the Court
By: Angela Mendia, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SONOMA

JOSE VASQUEZ RUIZ, as an individual
and on behalf of all others similarly
situated,

Plaintiff,

vs.

PERDUE FOODS, LLC., a Maryland
limited liability company; and DOES 1
through 50, inclusive,

Defendants.

Case No.: SCV-264649


~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION AND PAGA
SETTLEMENT

Date: December 9, 2020

Time: 3:00 PM

Dept.: 16

1 **Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement**

2 **GRANTED** as explained herein. The Final Fairness Hearing shall be held on Wednesday, March
3 17, 2021, at 3:00 p.m. in Courtroom 16, to consider the fairness, adequacy and reasonableness of
4 the Settlement preliminarily approved by this Order Granting Preliminary Approval, and to
5 consider the application of Class Counsel for an award of reasonable attorneys' fees and costs, and
6 the Class Representative's Enhancement. The parties shall send the proposed class notice in
7 accordance with the procedures and timelines set forth in the moving papers.

8 **The Action**

9 Plaintiff, alleging that he has been a non-exempt employee of Defendant since 2013,
10 complains that it has been violating Labor Code section 226(a) by consistently providing incorrect
11 wage statements which improperly reduce the employees' overtime pay in violation of state law,
12 and violating the provisions of Labor Code section 2698. He seeks to certify a class of all similarly
13 situated employees, except those bound by the settlement of SCV-260813, *Angelica Gutierrez v.*
14 *Petaluma Acquisition, LLC, et al.* ("Gutierrez").

15 **Case History and Settlement**

16 After lengthy negotiations regarding both the implications of *Gutierrez* and lengthy
17 discovery disputes, Plaintiff brought a motion to compel further responses which the Court granted
18 in July 2020. The following day, the parties tentatively reached a class-wide settlement which had
19 been in the works since November 2019. They then worked on further negotiations during which
20 Defendant provided payroll data on putative class members and the wage statements at issue while
21 correcting its violations by July 17, 2020. Agnew Dec. The negotiations resulted in the parties
22 entering into a class-wide settlement agreement ("the Settlement") in early September 2020,
23 including stipulations on the class action and PAGA settlement. *Ibid.* Plaintiff also uploaded the
24 Settlement, motion for preliminary approval of the class and settlement, and the proposed order
25 thereon on to the LWDA website.

26 **The Motion**

27 Plaintiff seeks conditional certification of the class for settlement purposes only,
28

1 preliminary approval of the Settlement, appointment of Plaintiff as class representative and his
2 attorneys as class counsel, a finding that the Settlement is reasonable, approval of the class notice
3 and its distribution, appointment of Phoenix Settlement Administrators ("Phoenix") as the
4 settlement administrator, and on order setting the final fairness and approval hearing.

5 **Authority Governing Approval of Class Settlements**

6 Settlement of a class action requires court approval after a hearing. California Rules of
7 court, rule 3.769(a). The court ultimately must determine that the settlement is fair, adequate and
8 reasonable. California Rules of Court, rule 3.769(g); *Dunk v. Ford Motor Co.* (1996) 48
9 Cal.App.4th 1794, 1801; see also, Fed. Rule of Civ. Proc., Rule 23(e). The trial court has broad
10 powers to do so. *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434.

11 Court approval of a class action settlement is a two-step process. California Rules of Court,
12 rule 3.769; *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336. As explained
13 in *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, at 336-337,
14 The trial court has broad discretion to determine whether a class action settlement is fair. It should
15 consider factors such as the strength of plaintiffs' case; the risk, expense, complexity and likely
16 duration of further litigation; the risk of maintaining class action status through trial; the amount
17 offered in settlement; the extent of discovery completed and the stage of the proceedings; the
18 experience and views of counsel; the presence of a governmental participant; and the reaction of
19 the class members to the proposed settlement. [Citations.] But the "list of factors is not exclusive
20 and the court is free to engage in a balancing and weighing of factors depending on the
21 circumstances of each case. [Citation.]" [Citation.] In sum, the trial court must determine that the
22 settlement was not the product of fraud, overreaching or collusion, and that the settlement is fair,
23 reasonable and adequate to all concerned.
24

25 The *Reed* court added, at 337, that the party seeking settlement approval has the burden of
26 showing the settlement to be "fair and reasonable" but that nevertheless "there is a presumption of
27 fairness when: (1) the settlement is reached through arm's-length bargaining; (2) investigation and
28 discovery are sufficient to allow counsel and the trial court to act intelligently; (3) counsel is

1 experienced in similar litigation; and (4) the percentage of objectors is small.” See also, *Chavez v.*
2 *Netflix, Inc.* (2008) 162 Cal.App.4th 43; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,
3 1801.

4 A party to the settlement agreement may bring a noticed motion for preliminary
5 approval. California Rules of Court, rule 3.769(c). If a party does so, it must file the settlement
6 agreement and send notice to class members. *Ibid.* Rule 3.769(c) states, in full, “[a]ny party to a
7 settlement agreement may serve and file a written notice of motion for preliminary approval of the
8 settlement. The settlement agreement and proposed notice to class members must be filed with the
9 motion, and the proposed order must be lodged with the motion.” Preliminary approval is
10 appropriate as long as the proposed settlement falls within the range of reasonableness and may be
11 appropriate for possible final approval. 4 Rubenstein, *Newberg on Class Actions* § 13:10 (5th
12 ed.2015, June 2020 Update). As the court stated in *Officers for Justice v. Civil Serv. Comm’n* (9th
13 Cir.1982) 688 F.2d 615, at 628, “[i]t is well-settled law that a cash settlement amounting to only a
14 fraction of the potential recovery does not per se render the settlement inadequate or unfair.” See
15 also, *In re Mego Financial Corp. Secs. Litig.* (9th Cir.2000) 213 F.3d 454, at 459. The court
16 in *Mego Financial Corp.* found that a class settlement recovering about 16% of the total potential
17 recovery was reasonable.

18 The Settlement

19 Plaintiff shows that the Settlement covers all current and former non-exempt employees of
20 Defendant in California who were paid overtime or double overtime from May 26, 2019 through
21 July 17, 2020, a total of about 576 according to Defendant’s payroll records. It requires Defendant
22 to pay a Maximum Settlement Amount of \$859,237.50, distributed to all who do not opt out. The
23 amount each member receives will be based on the number of pay periods in which the employee
24 received a wage statement with overtime or double overtime wages. It allocates \$20,000 to PAGA
25 penalties and 75% of this amount, or \$15,000, will be paid to the LWDA with the remainder
26 distributed to the class members. Defendant does not object to Plaintiff’s requested attorneys’ fees
27 of \$286,412.50 plus up to \$10,000 for actual litigation costs, subject to final court
28

1 approval. Plaintiff himself will receive an additional class service award of \$10,000. Finally, it
2 includes a stipulation to pay Phoenix its fees and expenses, currently estimated to be about \$9,500
3 based on Phoenix's quote, with anything left added to the Net Settlement Amount, which is the
4 Maximum Settlement Amount minus the PAGA payment to the LWDA, Plaintiff's service award,
5 attorneys' fees and costs, and the payment to Phoenix. The Net Settlement Amount is currently
6 anticipated to be at least \$528,325. This will result in an average payment to each class member of
7 up to \$917.23, or \$23.05 on average per qualifying wage statement.

8 Reasonableness

9 The potential penalties which the class could obtain if Plaintiff were to prevail at trial and
10 demonstrate both the alleged "injury" as well as "knowing and intentional" conduct would be
11 about \$2,262,500 under Labor Code section 226(e). Defendant contends that there was no actual
12 injury in fact and that it did not intentionally engage in such conduct.

13 Total potential PAGA penalties would be about \$5,728,250. There are disputes as to
14 whether Defendant may be able to have this reduced if the court were to find the defects only
15 technical or if they award of both statutory and civil penalties is considered confiscatory. Labor
16 Code section 2699(e)(2) states that the "court may award a lesser amount than the maximum civil
17 penalty amount specified by this part if, based on the facts and circumstances of the particular
18 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
19 confiscatory."
20

21 The Settlement award seems potentially reasonable. The amount is substantial in total and a
22 significant percentage of what Plaintiffs could obtain if prevailing at trial. Each employee will
23 receive an award that is not de minimis. There are risks with continued litigation, as well, with the
24 above arguments on behalf of Defendant providing facially reasonable bases for Defendant
25 potentially reducing the award of penalties.

26 Notice

27 One primary issue for the court to determine at this point is the adequacy of the notice of
28 the settlement. The notice must include the time, date, and place of the approval hearing as well as

1 any other information found to be necessary. California Rules of Court, rule 3.769(e). It must
2 contain an explanation of the proposed settlement and procedures to follow in filing written
3 objections or arranging to appear and state objections. California Rules of Court, rule 3.769(f). As
4 the court put it in *Churchill Village LLC v. Gen. Elec.* (9th Cir.2004) 361 F.3d 566, at 575,
5 “[n]otice is satisfactory if it ‘generally describes the terms of the settlement in sufficient detail to
6 alert those with adverse viewpoints to investigate and to come forward and be heard.’
7 [Citation.]” Otherwise, the form, content, and service method of the notice are in the court’s
8 discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251.

9 Within 10 days of preliminary approval, Defendant will provide Phoenix with each
10 member’s full name, last known address, social security number, and number of qualifying pay
11 periods; Phoenix will perform a search for changed addresses as set forth in the moving papers;
12 Phoenix will mail the Notice to each member through first-class mail and if any are returned will
13 re-mail to a forwarding address affixed thereto or otherwise determine a new address by skip-
14 tracing or similar searches and then re-mail.

15 Members will have 45 calendar days in which to opt out or object and they will be notified
16 of the final approval hearing and will have an opportunity to appear.

17 The proposed Notice is attached as Ex.1 to the Settlement, itself attached to the Agnew
18 Dec. as Exhibit A. It appears to contain all of the requisite information and presents it, as well as
19 key points about the member’s options in a clear, easily readable format with appropriate sections
20 in bold, specific points clearly separated out by number with clear headings, dividing the
21 information into clear, easily identifiable sections. This Notice appears to be adequate.

22 Settlement Class Certification

23 No class has yet been certified and Plaintiff’s motion properly seeks conditional
24 certification of a class for settlement purposes. Parties in a matter not yet certified as a class action
25 may stipulate that a class be conditionally certified for the purposes of settlement only, but the
26 class must still meet the standard requirements for a class action. *Amchem Products, Inc. v.*
27 *Windsor* (1997) 521 U.S. 591, 625-627.
28

Class Certification Requirements

In California, Code of Civil Procedure section 382 generally governs certification of class actions and, by requiring an ascertainable, numerous class and a well-defined "community of interest" among class members, has class conditions similar to those in federal court. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Under Code of Civil Procedure section 382, "community of interest" requires three elements to be met: 1) predominant common questions of law or fact; 2) the class representatives have claims or defenses typical of the class; and 3) the class representative must adequately represent the class. *Id.*

There is of course no need to identify the individual potential class members and one case held a class identifiable where it consisted of all who rented cars from Hertz in California over four years, with potentially 5 million people. *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 138; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706. The Supreme Court also made clear in *Daar, supra*, at 706, 715, that a class action is particularly warranted where the issues involve a large number of small claims. It explained that "[i]t is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs."

Numerosity

Where there are many claims unlikely to be pursued individually, class certification is especially appropriate. *Daar, supra*, 706, 715. See, *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 (class of 42 sufficiently numerous for class certification); *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 364, fn.7 (class of just over 150 sufficiently numerous, and adequately impracticable to bring before the court individually, to support class certification). The class consists of about 576, which is quite numerous. This factor supports class certification.

Identifiability

The class is apparently easily identifiable from employment records and the parties have already in part identified the members and the number. This factor supports class certification.

1 **Likelihood of Individual Lawsuits**

2 It seems unlikely that each potential member would bring an individual suit given the
3 nature of the circumstances, fear of retribution, and small size of the claims. Employment cases
4 such as this are classic examples of cases where individual lawsuits are unlikely and class
5 certification appropriate. This factor supports class certification.

6 **Community of Interest**

7 As explained in *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, at 470, the
8 community-of-interest requirement consists of three factors:

- 9 1) common questions of fact or law predominate;
10 2) the class representative(s) has(have) claims typical of the class; and
11 3) the class representative(s) can adequately represent the class.

12 The representative's claim need not be identical to those of others. *Classen v.*
13 *Weller* (1983) 145 Cal.App.3d 27, 45. The representative basically has to have the same interest
14 with respect to Defendants' actions and the amount of damage to each member is
15 irrelevant. *Rosack, supra*, 762-763. "The commonality test is qualitative rather than quantitative-
16 one significant issue common to the class may be sufficient to warrant certification." *Dukes v.*
17 *Wal-Mart, Inc.* (9th Cir.2007) 509 F.3d 1168, 1177. Moreover, "[a]ll questions of fact and law
18 need not be common to satisfy the rule. The existence of shared legal issues with divergent factual
19 predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies
20 within the class." *Ibid*.

21 Notably, as mentioned, use of statistical analyses is appropriate in determining
22 commonality of factual and legal issues. *Dukes v. Wal-Mart, Inc.* (9th Cir.2007) 509 F.3d 1168,
23 1179-1180. The 9th Circuit in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, at 1180, ruled that it was
24 proper to demonstrate class-wide discrimination using statistical analyses in certifying a
25 nationwide class of employees, with data from 41 regions, each with 80-85 stores.
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1 Occupational Safety and Health and give them an opportunity to determine whether to handle the
2 matter or give notice that they do not intent to do so, allowing the employee to proceed with the
3 lawsuit only after the agency provides such notice or fails to act within the specified time. Labor
4 Code section 2699.3. PAGA also requires notice to the LWDA and court approval of any
5 settlement of an action filed pursuant to PAGA. Labor Code section 2699(1)(2). Plaintiff
6 demonstrates that he has sent this notice to the LWDA.

7 Fees and Costs

8 Under Labor Code sections 226(e) and 2699(g), and Code of Civil Procedure section
9 1021.5, the prevailing employees are entitled to an award of attorney's fees and costs.

10 Plaintiff relies on all three of the above statutes and applies the lodestar and multiplier
11 approach applicable to public-interest litigation in general, as under Code of Civil Procedure
12 section 1021.5.

13 In figuring fees in such cases, courts generally use the "lodestar" approach, basing the
14 decision on the number of hours reasonably expended multiplied by the reasonable hourly rate in
15 the community for similar work. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136 (anti-SLAPP
16 context); *Serrano v. Priest* (1977) 20 Cal.3d 25, 28 (*Serrano III*) (private attorney general doctrine,
17 now Code Civ. Proc., § 1021.5); *Robertson v. Fleetwood Travel Trailers of Cal., Inc.* (2006) 144
18 Cal.App.4th 785, 819 (under Song-Beverly Consumer Warranty Act).

19 The court should consider a wide variety of factors, including the nature of the litigation,
20 the difficulty, the amount involved, the skill, the success, the attorneys' experience, the importance
21 of the litigation, and the time consumed. *Church of Scientology v. Wollersheim* (1996) 42
22 Cal.App.4th 628, 638-639; *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 656-657. Finally, the
23 court may apply a fee enhancement modifier to take into account a risk in contingency situations
24 of not being reimbursed due to the nature of the work. *Ketchum v. Moses* (2001) 24 Cal.4th 1122,
25 1131-1140. Courts under this approach multiply the time spent by the reasonable fee, rather than
26 focusing on the fees "actually" charged. *PCLM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084,
27 1094-1096.
28

1 The court must determine “whether under all the circumstances of the case the amount of
2 actual time expended and the monetary charge being made for the time expended are
3 reasonable.” *Karapetian v. Kia Motors Am., Inc.* (C.D. Cal. 2013) 970 F.Supp.2d 1032, 1036,
4 quoting, *Nightingale v. Hyundai Motor Am.* (1994) 31 Cal.App.4th 99, 104; see also, *Doppes v.*
5 *Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, at 998. The prevailing party “bears the burden of
6 demonstrating all of the following: ‘the [attorneys’] fees incurred were allowable, were reasonably
7 necessary to the conduct of the litigation, and were reasonable in amount.” (*Ibid*,
8 citing, *Nightingale, supra*, 31 Cal.App.4th at 104, quoting, *Levy, supra*, 4 Cal.App.4th at 816.

9 The court retains discretion to reduce the fee award where fees were not reasonably
10 incurred. *Ibid*, citing, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (“Padding’ in the form of
11 inefficient or duplicative efforts is not subject to compensation.”); *Gorman v. Tassajara Dev.*
12 *Corp.* (2009) 178 Cal.App.4th 44, 90-92 (“A reduced [attorneys’ fees] award might be fully
13 justified by a general observation that an attorney ... submitted a padded bill or that the opposing
14 party has stated valid objections”). “If the time expended or the monetary charge being made for
15 the time expended is not reasonable under all the circumstances, then the court must take this into
16 account and award attorney fees in a lesser amount.” *Ibid*, citing, *Nightingale, supra*, 31
17 Cal.App.4th at 104; see also, *Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807,
18 815-816.

19 The reasonable hourly rate is generally “that prevailing in the community for similar
20 work.” *City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 69, quoting, *PLCM Group, Inc. v.*
21 *Drexler* (2000) 22 Cal.4th 1084, 1095; see also, *Rey v. Madera Unified Sch. Dist.* (2012) 203
22 Cal.App.4th 1223, 1241; see also, *Ketchum, supra*, 24 Cal.4th at 1132 (hourly rate used in lodestar
23 calculation is “the basic fee for comparable legal services in the community;”); *Serrano v.*
24 *Unruh* (1982) 32 Cal.3d 621, 640, fn. 31 (lodestar calculation uses the “comparable salaries earned
25 by private attorneys with similar experience and expertise in equivalent litigation,” or “hourly
26 amount to which attorneys of like skill in the area would typically be entitled.”); *Children’s Hosp.*
27 *& Med. Ctr. v Bontá* (2002) 97 Cal.App.4th 740, 783 (the court is often called upon to determine
28

1 reasonable hourly rates of attorneys who appear in front of it and in order to determine "reasonable
2 market value" and must determine whether the requested rates are "within the range of reasonable
3 rates charged by and judicially awarded comparable attorneys for comparable work" in the
4 community.).

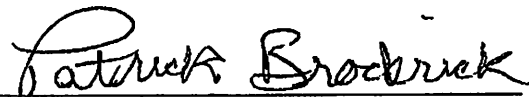
5 The fees and costs requested here seems potentially reasonable and valid considering the
6 factors set forth above.

7 Conclusion

8 The Court accordingly GRANTS the motion.

9 IT IS SO ORDERED.

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11
12 DATED: 12-18-2020


HON. PATRICK M. BRODERICK
SUPERIOR COURT OF CALIFORNIA

1
2
3 **PROOF OF SERVICE**

4 (Code of Civil Procedure Sections 1013a, 2015.5)

5 STATE OF CALIFORNIA]
6]ss.
7 COUNTY OF LOS ANGELES]

8 I am employed in the County of Los Angeles, State of California. I am over the age of
9 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
10 1250, Los Angeles, California 90071.

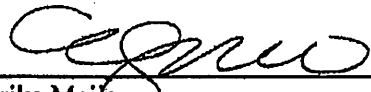
11 On December 14, 2020, I served the following document(s) described as:
12 **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY**
13 **APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT** on the interested parties in
14 this action as follows:

15
16 Michael J. Nader
17 Ogletree, Deakins, Nash,
18 Smoak & Stewart, P.,C.
19 500 Capitol Mall, Suite 2500
20 Sacramento, California 95814
21 *Attorney for Defendant Perdue Foods, LLC*

Aaron H. Cole
Ogletree, Deakins, Nash,
Smoak & Stewart, P.,C.
400 South Hope Street, Suite 1200
Los Angeles, California 90071
Attorney for Defendant Perdue Foods, LLC

22 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
23 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
24 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
25 the above-entitled case. The service transmission was reported as complete and a copy of the
26 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
27 in this office.
28

I declare under penalty of perjury under the laws of the State of California that the
above is true and correct. Executed on December 14, 2020, at Los Angeles, California.

22
23 
24 Erika Mejia

492159

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA**

HALL OF JUSTICE
600 ADMINISTRATION DRIVE
SANTA ROSA, CALIFORNIA 95403-2878

Return Service Requested

DIVERSITY LAW Group P.C.
515 S. FIGUEROA ST. STE 1250
LOS ANGELES, CA 90071



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