

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

**34-2020-00278363-CU-OE-GDS: Gloria Nazareno vs. Anand Inc
07/14/2023 Hearing on Motion for Preliminary Approval of Settlement in Department 28**

Tentative Ruling

On the Court's own motion, the Hearing on Motion for Preliminary Approval of Settlement scheduled for 07/14/2023 is continued to 09/01/2023 at 09:00 AM in Department 28 at Gordon D. Schaber Superior Court.

Plaintiffs Gloria Nazareno and Eloise Iyar (collectively “Plaintiffs”) are expected to address the issues identified below by filing supplemental briefs and/or declarations no later than August 10, 2023. Defendant may file a response no later than August 21, 2023.

If either party is unavailable on **September 1, 2023 at 9:00 AM**, the parties shall meet and confer to identify three other *Fridays* at 9:00 AM that work for the parties to schedule the Preliminary Approval hearing. They shall submit those dates to the Court via email at Dept28@saccourt.ca.gov, and the Court will reschedule the hearing accordingly. If the Court reschedules the hearing, the deadlines for the supplemental briefs stated above will not change.

Moving Counsel’s captions incorrectly indicate that the Honorable Jill Talley is presiding. The Honorable Lauri A. Damrell is presiding.

Background

On May 8, 2020, Plaintiff Gloria Nazareno filed a class action complaint on behalf of herself and other non-exempt employees of Defendant Anand, Inc. dba Jack in the Box (“Defendant”). Plaintiff Nazareno filed a First Amended Complaint on July 16, 2020, adding Eloise Iyar as a Plaintiff. Plaintiffs filed a Second Amended Complaint on June 14, 2023, which added a PAGA cause of action for violation of Labor Code sections 2698, et seq. In the operative complaint, Plaintiffs allege that Defendant failed to provide meal and rest periods, reimburse work related expenditures, pay earned wages, provide accurate pay stubs and, by engaging in such unlawful conduct, violated California Business & Professions Code section 17200 et. seq. and the Private Attorney General Act (“PAGA”). (Schoech Decl., ¶ 3.)

Plaintiffs now seek preliminary approval of the Parties’ Joint Stipulation of Class and PAGA Settlement (“Settlement Agreement” or “Agreement”). (Schoech Decl., Exh. B (“SA”).)

Legal Standard

The law favors the settlement of lawsuits, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, expense, and rigors of formal litigation. (See *Neary v. Regents of Univ. of Cal* (1992) 3 Cal.4th 273, 277-281; *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 52.) However, a class action may not be dismissed, compromised, or settled without approval of the court, and the decision to approve or reject a proposed settlement is committed to the court’s sound discretion. (See Cal. Rules of

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Court, Rule 3.769; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35 (*Wershba*).

In determining whether to approve a class settlement, the court's responsibility is to "prevent fraud, collusion or unfairness to the class" through settlement because the rights of the class members, including the named plaintiffs, "may not have been given due regard by the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enters. of Am.* (2006) 141 Cal.App.4th 46, 60.) The court must independently determine "whether the settlement is in the best interests of those whose claims will be extinguished" and "make an independent assessment of the reasonableness of the terms to which the parties have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130, 133.) The burden of establishing the fairness and reasonableness of the settlement is on the proponent. (*Wershba, supra*, 91 Cal.App.4th at p. 245; see also *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135 1165-66.)

The Court does not rubber stamp these motions, but rather serves as a guardian of absent class members' rights to ensure the settlement is fair. (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 95.) "Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" (*7-Eleven, supra*, 85 Cal.App.4th at p. 1145.) "A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'" (*Wershba, supra*, 91 Cal.App.4th at pg. 250, citations omitted.) The court's primary objective for preliminary approval is to establish whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a final fairness hearing. (Rubenstein et al., *Newberg on Class Actions* (6th ed. 2022) § 13:10.)

Summary of Agreement

Under the terms of the Settlement Agreement, Defendant denies liability, but agrees to pay a Maximum Gross Settlement Amount ("MGSA") of \$260,000. (SA, ¶¶ 1.20, 5.1.) Defendant will separately pay any applicable employer side payroll taxes. (*Id.*, ¶ 5.1.)

The following amounts will be paid from the MGSA:

- Class Counsel's attorney's fees up to one third of the MGSA or \$86,666.67;
- Class Counsel's litigation expenses not to exceed \$23,000;
- Settlement Administration costs not to exceed \$17,650;
- Enhancement Payments to Plaintiffs not to exceed \$10,000 or \$5,000 each;
- PAGA Payment of \$10,000, 75% of which or \$7,500 will be paid to the LWDA and 25% of which or \$2,500 will be included in the amount allocated to the Settlement

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Class.

(SA, ¶¶ 5.2, 5.3, 5.4, 5.5.)

The remaining amount – the Net Settlement Amount (“NSA”) – is estimated to be \$112,683.33. (See SA, ¶ 5.8.1.) Payment to Qualified Claimants of their share of the NSA will require the submission of the Claim Form; however, payment to Aggrieved Employees of their share of the PAGA Payment will not require the submission of a Claim Form. (*Id.*, ¶ 5.8.) “Each Qualified Claimants’ share of the [NSA] shall be determined by taking the Qualifying Workweeks for the individual Qualified Claimant and dividing that by the Qualifying Workweeks for all Class Members and multiplying that fraction by the [NSA]. However, regardless of the claims rate, Defendants shall be obligated to pay out a minimum of 40% of the [NSA]. If less than 40% of the [NSA] is claimed by Qualified Claimants, the Qualified Claimants will have their individual shares of the [NSA] increased, pro rata, until 40% of the [NSA] is distributed. Any portion of the [NSA] in excess of the minimum 40% threshold that is not claimed by Qualified Claimants shall remain the property of Defendant.” (*Id.*, ¶ 5.8.1.) Each Aggrieved Employee’s portion of the PAGA Payment “will be determined by dividing their total weeks worked within the PAGA Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period. That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee’s individual share.” (*Id.*, ¶ 5.8.3.)

For tax purposes, 10% of each Qualified Claimants’ share will be allocated for payment of wages and 90% will be allocated for penalties and interest. (SA, ¶¶ 5.9.1, 5.9.2.) 100% of each Aggrieved Employee’s share of the PAGA Payment will be allocated for penalties. (*Id.*, ¶ 5.9.3.) The Claims Administrator will mail a check to Qualified Claimants and Aggrieved Employees. The check shall become null and void after 120 calendar days from issuance. (*Id.*, ¶ 7.9.) “For any portion of the [NSA] or PAGA Payment allocated to Qualified Claimants and/or Aggrieved Employees that were not claimed by cashing their respective settlement checks before the deadline to do so, that remaining amount shall be returned to Defendant.” (*Id.*, ¶ 5.6.)

Issues to Be Addressed

1. While Counsel declares that Plaintiffs submitted a letter to the LWDA to notify it of their intent to seek civil penalties against Defendant under PAGA for various violations of the Labor Code and submitted the proposed Settlement to the LWDA concurrent with the filing of this motion, Plaintiffs fail to provide a copy of the Notice Letter or proof of their submission of the proposed Settlement. Section 2699, subdivision (1)(2) provides that the court “shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.” Accordingly, Class Counsel must provide evidence that the settlement was provided to the LWDA.

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2. Plaintiffs must explain why the claims-based approach is superior to a checks-mailed approach. The Class Notice and Claim Form will be distributed pursuant to a Class List provided by Defendant. (SA, ¶¶ 7.2, 7.3, 7.5.4.) Plaintiffs do not provide a copy of the Claim Form for the Court's review; however, these forms appear to serve the purpose of informing class members of their membership in the Class and their workweek information. It is not clear to the Court why a Class Member should be required to make a claim, especially where Aggrieved Employees receive their individual share of the PAGA Payment without submitting a claim form. (*Id.*, ¶ 5.8.) Plaintiffs must explain how Plaintiffs will encourage claim submission and provide an estimate of the anticipated claims rate or explain why such an estimate cannot be provided.

3. Plaintiffs must also explain (1) why reversion to Defendant as described in the Settlement Agreement is appropriate and (2) why the claim submission process is not so burdensome that relief would be inaccessible to putative Class Members. (See SA, ¶¶ 5.6, 5.8.1.) "[R]everision to a defendant may be appropriate where deterrence is not a factor." (*Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 728-729; see also *Millan v. Cascade Water Servcs., Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 612; *Hadley v. Kellogg Sales Co.* (N.D. Cal. 2020) 2020 U.S. Dist. LEXIS 30193, *12-13; contra *Nur. v. Tatitlek v. Support Servs., Inc.*, No.15-CV-00094 SVW (JPRx) (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 74296.)

4. Plaintiffs' moving papers fail to provide sufficient information for the Court to determine that the consideration being received for the release of Class Members' claims is reasonable in light of the strengths and weaknesses of the claims and risk of the litigation. (*Kullar*, supra, 168 Cal.App.4th at p. 129.) The Court requires that this discussion provide "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Id.* at p. 120.) Plaintiffs assert that "the potential recovery for the core allegations of premium payments being owed for missed meal breaks and waiting time penalties is approximately \$1,013,540.56." (Schoech Decl., ¶ 16.) However, Plaintiffs do not explain how that figure was calculated. Plaintiffs also assert that their "other claims for failing to pay to maintain uniforms and missed rest breaks would involve individualized inquiries as they cannot be proven by Defendant's payroll and timekeeping records." (*Id.*, ¶ 16, fn 1.) The Court assumes this means Plaintiffs entirely discounted these claims, but Plaintiffs should clarify. Similarly, Plaintiffs assert that they calculated the potential maximum PAGA penalties to be "in the order of \$818,050," but again fails to explain how figure was calculated. (*Id.*, ¶ 25.) The Court also requires Plaintiff to provide a discussion of the PAGA Penalty Amount, including the manner in which it was valued and how the payment meets the standards set forth in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 75-77.

5. The Court has a number of concerns about the scope of the releases contained in the Agreement. With regard to the release of class claims, the Agreement provides as follows: "Upon the Effective Date, all Class Members who did not opt out will be deemed to fully, finally and forever release Class Member's Released Claims as to all Released Parties. In addition, on the Effective Date, all Class Members who did not opt out and their successors in interest will be

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permanently enjoined and forever barred from prosecuting any of Class Members' Released Claims against any of the Released Parties.” (SA, ¶ 6.1.) The “Class Members' Released Claims” are defined as “all claims contained in the Complaint and any additional wage and hour claims that could have been brought in the operative Complaint, through the Class Period. This release excludes the release of claims not permitted by law. The Class Members' Released Claims exclude claims for workers' compensation of unemployment insurance benefits. This release will cover all Class Members who do not opt out regardless of whether they have submitted a Claim Form.” (*Id.*, ¶ 1.32.) The Court is not persuaded this language is consistent with the instruction of *Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th, 521, 538 (*Amaro*) that the “release must be tied to the *factual allegations* in the complaint, not the claims or theories of liability asserted.” (Emphasis original.) Moreover, the “could have been brought” language is not modified with “reasonably.” (*Id.*) Finally, pursuant to the Agreement, all Class Members, regardless of whether they submit a claim form, are subject to the release unless they opt out of the Settlement. Why is this construction appropriate? Because Class Members effectively have to opt-in to the Settlement, should the release only extend to Qualified Claimants?

Similarly, the release for PAGA claims states: “Upon the Effective Date, all Aggrieved Employees will be deemed to fully, finally and forever release the Released PAGA Claims as to all Released Parties. In addition, on the Effective Date, all Aggrieved Employees and their successors in interest will be permanently enjoined and forever barred from prosecuting any of the Released PAGA Claims against any of the Released Parties.” (SA, ¶ 6.2.) The Agreement defines “Released PAGA Claims” as “any and all claims that were brought under the Private Attorneys General Act, Labor Code § 2698 et seq., in the Complaint or any wage and hour claim that could have been brought in the Complaint during the PAGA Claim Period. Aggrieved Employees cannot opt out of this waiver of claims.” (*Id.*, ¶ 1.34.) As with the class release above, the PAGA release focuses on the claims alleged in the complaint. The release for Aggrieved Employees should be tied to the facts alleged in the notice given to the LWDA. (See *Amaro v. Anaheim Management* (2021) 69 Cal.App.5th 521, 541, fn. 5; *Uribe v. Crown Building Maintenance Co.* (2021) 70 Cal.App.5th 986, 1005.)

The Court requires Plaintiffs to reexamine the releases and provide justification to the Court as to why they are not overbroad as well as why the Class Claims release should cover those Class Members who do not file a claim form.

6. The Settlement Agreement names attorneys from two firms as Class Counsel (SA, ¶ 1.7), but there is no indication as to how the requested attorneys' fees will be split between those firms. Class Counsel must provide information regarding any fee splitting agreement and whether the client has given written approval. (*Mark v. Spencer* (2008) 166 Cal.App.4th 219, RPC Rule 1.5.1; CRC Rule 3.769.)

7. The Settlement Agreement includes inconsistent definitions of the Notice Period. The Agreement defines the Notice Period as 30 calendar days from the initial mailing of the Notice

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and Claim Form to the Class Members and Aggrieved Employees. (SA, ¶ 1.24.) However, the Agreement later indicates that Class Members and Aggrieved Employees have 60 days to submit a claim form, object, dispute their workweeks, or opt-out of the Settlement. (SA, ¶ 8.1 (p. 26).) A 60-day response period is consistent with the Settlement Administrator's obligation to send out reminder cards no later than 35 days after the Notice and Claim Form were mailed. (*Id.*, ¶ 7.4.) Plaintiffs must clarify which timeframe applies. The Court believes the 60-day response period is more appropriate. However, if the 30-day response deadline stated in paragraph 1.24 is controlling, Plaintiffs must justify why 30 days is sufficient and not a deterrent to Class Members' participation in the Settlement.

8. The Court generally prefers a 180-day check cashing period. Plaintiffs must explain why the shorter 120-day period is justified and appropriate here.

9. The Settlement Agreement provides for an incentive award of up to \$10,000 to Plaintiffs. (SA, ¶ 1.17, 5.4.) Plaintiffs clarify in their moving papers that the award will be split evenly with \$5,000 to each Plaintiff. (Mot., p. 17:1.) Plaintiffs argue this incentive award should be preliminarily approved given "the risk, assistance, and time required in bringing this case and resolution of this case." (*Id.*, pp. 16:7-17:2.) Class Counsel generally describes the work Plaintiffs performed. (Schoech Decl., ¶ 18.) Plaintiffs, not their counsel, are expected to file declarations attesting to the nature of their respective participation in this case, including a description of their specific actions and an estimate of time they each committed to prosecution of the case. (See *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.)

10. The Court notes the following issues that must be addressed in the Class Notice. First, the following language on page two "...in order to avoid the burden and expense associated with ongoing litigation" and the entirety of section II.F "Reasonableness of Settlement" on page four must be removed. The Court finds this language is unnecessary and may improperly discourage class members from objecting to the settlement. Second, the description of the minimum settlement amount threshold at section II.B on page 3 is incorrect. To the extent the Parties maintain (and the Court approves) a claims-based, reversionary approach, this section must be revised to reflect a 40% minimum threshold in conformity with paragraph 5.8 of the Agreement. If the Parties amend the Agreement to address the Court's concerns, the Parties are expected to consider whether any additional revisions are required to accurately describe the Agreement. ***Plaintiffs shall submit a redline version of the revised Class Notice and Claim Form with their supplemental briefing.***

11. Plaintiffs must address whether the Class Notice and Claim Form should be provided in additional languages.

12. Finally, Plaintiffs must provide a proposed order.

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This minute order is effective immediately. No formal order or other notice is required. (Code Civ. Proc., § 1019.5; Cal. Rules of Court, rule 3.1312.)

To request oral argument on this matter, you must call Department 28 at (916) 874-6695 by 4:00 p.m. the court day before this hearing and notify the opposing party/counsel of oral argument. If no call is made, the tentative ruling becomes the order of the court. (Local Rule 1.06.)

Parties requesting services of a court reporter will need to arrange for private court reporter services at their own expense, pursuant to Government Code §68086 and California Rules of Court, Rule 2.956. Requirements for requesting a court reporter are listed in the Policy for Official Reporter Pro Tempore available on the Sacramento Superior Court website at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-6a.pdf>. Parties may contact Court-Approved Official Reporters Pro Tempore by utilizing the list of Court Approved Official Reporters Pro Tempore available at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-13.Pdf>

*If you are not using a reporter from the Court's Approved Official Reporter Pro Tempore list, a Stipulation and Appointment of Official Reporter Pro Tempore (CV/E-206) must be signed by each party, the private court reporter, and the Judge. **The signed form must be filed with the clerk prior to the hearing.***

If a litigant has been granted a fee waiver and requests a court reporter, the party must submit a Request for Court Reporter by a Party with a Fee Waiver (CV/E-211). The form must be filed with the clerk at least 10 days prior to the hearing or at the time the hearing is scheduled if less than 10 days away. Once approved, the clerk will forward the form to the Court Reporter's Office and an official reporter will be provided.

If oral argument is requested, the Parties are encouraged to appear via Zoom with the links below:

*To join by Zoom link - <https://saccourt-ca-gov.zoomgov.com/my/sscddept28>
To join by phone dial (833) 568-8864 ID 16039062174*

Counsel for Plaintiffs is directed to notice all parties of this order.

Please note that the Complex Civil Case Department now provides information to assist you in managing your complex case on the Court website at <https://www.saccourt.ca.gov/civil/complex-civil-cases.aspx>. The Court strongly encourages parties to review this website regularly to stay abreast of the most recent complex civil case procedures. Please refer to the website before directly contacting the Court Clerk for information.