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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Carrasco Plaintiff/Petitioner(s) VS. Vince, LLC Defendant/Respondent(s) (Abbreviated Title)	No. RG18898840 Order Motion for Preliminary Approval of Class Settlement Granted

The Motion for Preliminary Approval of Class Settlement was set for hearing on 08/20/2019 at 09:00 AM in Department 16 before the Honorable Michael M. Markman. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Plaintiff Francisco Carrasco's ("Plaintiff") Motion for Preliminary Approval of Class Action Settlement is GRANTED.

To protect the interests of absent class members, class action settlements must be reviewed and approved by the Court. (Duran v. Obesity Research Institute, LLC (2016) 1 Cal.App.5th 635, 646 ["The [trial] court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement"].)

California follows a two-stage procedure for court approval: first, the Court reviews the form of the terms of the settlement and form of settlement notice to the class and provides or denies preliminary approval; later, the Court considers objections by class members and grants or denies final approval. (Cal. Rules of Court, rule 3.769.)

When no class has been certified, as is the case here, the Court must determine whether the case meets requirements for certification. (See Amchem Prods., Inc. v. Windsor (1997) 521 U.S. 591, 625-627.) The concerns of manageability and due process for absent class members, which counsel against class certification in a trial context, are eliminated or mitigated in the context of settlement. (Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1807, fn. 19.)

Class certification in California courts is governed by Code of Civil Procedure section 382. The Court has discretion to certify a class if it meets three criteria: "[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class superior to the alternatives." (Alberts v. Aurora Behavioral Care (2015) 241 Cal.App.4th 388, 397, quoting Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1021.) The "community of interest" element requires consideration of three subfactors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (Id.)

The Court finds that the proposed class of 450 persons is sufficiently numerous and its members are

readily ascertainable from defendant Vince, LLC ("Defendant") records. The Court finds that the class has sufficient common questions of law and fact to support a community of interest, given their allegations of common employment policies and practices and the lessened manageability concerns in the settlement context. The Plaintiff's claims are sufficiently typical of those of the class, given the lessened manageability concerns in the settlement context, because Plaintiff and absent class members have suffered similar injuries. The Plaintiff and his counsel will be adequate representatives of the class. The Court further finds that class treatment for settlement purposes will provide substantial benefits that render it a superior alternative to individual actions.

The settlement was mediated with the assistance of an experienced mediator, David Rotman. The Court gives "considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in [concluding] that [the] settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 129; see also In re Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495, 504.)

The Court therefore CONDITIONALLY CERTIFIES the following class for settlement purposes: "All persons employed as non-exempt hourly paid employees in any of Defendant's facilities located in the State of California and who received a wage statement containing the line item "Retail OT .5X" during the Settlement Period (defined as March 28, 2014 through May 29, 2019), except for any person who previously settled, released, or was paid or awarded through civil or administrative action for the claims at issue, or affirmatively elects to exclude himself or herself from the class."

The Court notes and preliminarily approves of the parties' Third Amended Joint Stipulation of Class Action Settlement and Release ("Settlement Agreement"). The Court has considered (1) the relative strength of Plaintiffs' case; (2) the high risk, expense, complexity, and likely duration of further litigation of this dispute; (3) the high risk of maintaining class status through trial; (4) the relatively generous amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel that settlement is reasonable; and (7) the lack of any objections to the proposed settlement and choice of all class members not to "opt out" and thereby remain in the class. (See Dunk, 48 Cal.App.4th at 1801.) The various declarations of Plaintiffs' counsel together with the August 10, 2019 declaration of Defendant's lead counsel provided sufficient information to enable the Court to assess the application of the Dunk factors to this action. Defendant is correct that the Court of Appeal's publication of its opinion in Raines v. Coastal Pacific Food Distributors, Inc. (2018) 23 Cal.App.5th 667, 676-676 after the filing of this action significantly reduced the potential value of Plaintiff's claims. Based on the representations made by counsel for both sides, which the Court finds to be facially reasonable and credible, the Court preliminarily finds the Settlement Agreement to be fair, reasonable, and adequate.

The Court does not accord deference to the allocation of a portion of the settlement funds to the claims asserted under PAGA on account of the parties' arm's-length negotiations or the presence of a private mediator. Under PAGA, plaintiffs seek civil penalties that would otherwise be recoverable by the Labor and Workforce Development Agency ("LWDA"). (Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348, 382.) Any monetary penalties assessed against the defendant are split between the LWDA and aggrieved employees, with 75% going to the LWDA. (Labor Code § 2699(i).) Representative litigants must submit any settlement of a PAGA representative action for Court approval. (Labor Code § 2699(l)(2).) Unlike government entities represented in False Claims Act qui tam actions, the LWDA does not have a statutory right to intervene or object to settlement. (Compare Gov. Code § 12652(c)(1), (e)(2)(b), (f)(2)(B), with Labor Code § 2699(l).)

Since the LWDA does not have a proverbial seat at the table, the Court's review of a PAGA settlement must make sure that the interests of the LWDA in civil enforcement are defended and that the settlement is fair, adequate, and reasonable under all the circumstances. (O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133; see also Gov. Code § 12652(e)(2)(B) [requiring False Claims Act qui tam settlements be "fair, adequate, and reasonable under all the circumstances"]; see also Consumer Advocacy Group, 141 Cal.App.4th at 62 [noting duty of court to ensure private enforcer brings action in public interest] and Iskanian, 59 Cal.4th at 379 [PAGA cases are brought in public interest].) The Court will not approve the final apportionment of funds to PAGA and LWDA until the final approval hearing. However, the Court does preliminarily approve of the parties' proposed revised distribution of the PAGA penalties to all Class Members in a manner proportional to the total number of pay periods worked by each Class Member.

The Court notes and approves of the plan to distribute the settlement funds with no claims process. (3rd Am. Joint Stip., ¶ 51 at 15, Ex. A to Aug. 12, 2019 Supp. Hyun Decl.)

The Court finds that the form of the Class Notice as revised is adequate. (Ex. C to Aug. 12, 2019 Supp. Hyun Decl.)

The form of the proposed Settlement Agreement (Ex. A to Aug. 12, 2019 Supp. Hyun Decl.) is therefore PRELIMINARILY APPROVED.

The employment of Phoenix Settlement Administrators as Settlement Administrator is PRELIMINARILY APPROVED. The Court directs the mailing of the Class Notice by regular First-Class U.S. Mail to members of the Class in accordance with the implementation schedule set forth in paragraphs 46 to 49 of the Settlement Agreement. The Court finds the dates selected for the mailing and distribution of the Class Notice meet the requirements of due process, provide the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

The Court notes that Plaintiff's counsel intends to seek an award of fees up to $63,333.33 which is 33% of the Gross Fund Value of $190,000.00. When using the percentage of recovery approach, the Court's benchmark for attorney's fees is 30% of the common fund. Laffitte v. Robert Half International, Inc. (2016) 1 Cal.5th 480, 495 approved an award of 33% and noted that the federal courts have a benchmark of 25%. (See also 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 will not approve the amount of attorney's fees until the final approval hearing. The Court cannot award attorney's 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 Defendant will not oppose the motion for fees. (Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 450-451.) Plaintiff may move for an award of attorney's fees and costs as part of his motion for final approval. Briefing shall be filed under the schedule established by Code of Civil Procedure section 1005(b), unless and until the Court orders otherwise.

The parties are advised that the Court intends to order that 10% of any fee and costs award be held back by the settlement administrator until the completion of the distribution process and Court approval of a final accounting. The Court will set a compliance hearing approximately 60 days after the completion of the distribution process for Plaintiff's counsel 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 has been completed, the Court will at that time release any hold-back of attorney's fees.

The Court will not decide the amount of any incentive 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 SETS a hearing for final approval for 9:00 a.m. on March 3, 2020 in Department 16. At that hearing, the Court will hear and decide the question of whether the proposed settlement should be finally approved as fair, reasonable, and adequate as to the class conditionally certified above.

Dated: 08/20/2019

Facsimile

Judge Michael M. Markman