

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF TULARE**

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| <p><b>Duran, Angela</b><br/>Plaintiff/Petitioner,</p> <p>vs.</p> <p><b>Fresh Select, LLC</b><br/>Defendant/Respondent.</p> | <p>Jud. Officer: <b>Bret Hillman</b><br/> Clerk: <b>Bethany Vasquez</b><br/> Bailiff: <b>Randy Nash</b><br/> CSR: <b>Tamara Sumpter</b><br/> Interpreter:<br/> Language:</p> |
| <p>Minutes: <b>Motion Hearing</b><br/><b>Preliminary Approval</b></p> <p>Date: <b>February 8, 2022</b></p>                 | <p>Case No. <b>VCU284892</b><br/><b>Department 07</b></p> <p>Related Cases:</p>  |

- Appearances:  No Appearances
- Party: \_\_\_\_\_
- Remote Appearance
- Party: \_\_\_\_\_
- Remote Appearance
- Party: \_\_\_\_\_
- Remote Appearance
- Other: \_\_\_\_\_

- Attorney: David Bibiyan for Plaintiff via CourtCall
- Remote Appearance
- Attorney: \_\_\_\_\_
- Remote Appearance
- Attorney: \_\_\_\_\_
- Remote Appearance

**Motion: Motion for Preliminary Approval of Class Action and PAGA Settlement**

- No requests for oral argument presented.
- Comments heard from Mr. Bibiyan.

**ORDER: The Court adopts the Tentative Ruling as the Order of the Court as follows:**

To grant the motion to preliminarily approve the settlement. The Final Approval Hearing is set for June 21, 2022 at 8:30am in Department 7.

**1. Sufficiency of Amount of Settlement (Net: \$528,750.00)**

The gross settlement amount is \$900,000.00. Plaintiff estimates "over one thousand" class members. The Class Members consist of:

"All non-exempt, hourly-paid employees employed by Defendant from approximately October 22, 2016 through the date of preliminary approval."

This settlement also resolves Plaintiff's PAGA claims for Class Members who worked as nonexempt, hourly-paid employees of Defendant from July 27, 2019 through the date of preliminary approval.

Plaintiff provides estimates of the maximum recovery for each of the asserted wage and hour claims and penalties with information showing how the estimates were calculated including the damages models utilized. The total estimated maximum recovery in the event of an outright victory is \$22,778,623.00 based upon \$445,414.00 for unpaid wages, \$96,788.00 for waiting in line to clock in, \$65,871.00 for reporting time pay, \$60,500.00 for failure to include bonuses in calculation of overtime, \$679,523.00 for non-compliant meal periods, \$1,029,847.00 for non-complaint rest periods, \$912,800.00 for wage statement violations, 3,057,480.00 for waiting time penalties, and \$16,430,400 for PAGA penalties.

Plaintiffs' discussion includes evaluation of the various strengths and weaknesses of Plaintiffs' case and Defendant's defenses to Plaintiffs' claims for each category above, specifically under *Maldonado* and whether penalty claims are recoverable under *Naranjo* as to derived penalties, including risk of non-certification and risk of being unsuccessful on the merits of each claim.

The deductions from the gross settlement of \$900,000 are proposed as follows:

|                                  |           |                   |
|----------------------------------|-----------|-------------------|
| Court Approved Attorney Fees     | \$        | 315,000.00        |
| Attorney Costs incurred          | \$        | 25,000.00         |
| Enhancement Payment to Plaintiff | \$        | 7,500.00          |
| Settlement Administrator Costs   | \$        | 13,750.00         |
| PAGA payment to the LWDA         | \$        | 10,000.00         |
| <b>Net Settlement Amount</b>     | <b>\$</b> | <b>528,750.00</b> |

The Court finds the information provided sufficient to support the reasonableness of the gross settlement amount.

## **2. Class Notice**

The settlement agreement provides no claim form will be required of class members to participate in distributions. Only those wishing to object or opt out must file notice with the settlement administrator. Objections or opt out notices are to be made within 60 days.

The Court regularly approves notice periods of 60 days or longer. The class notice period is preliminarily approved.

With respect to the content of the Notice, the Court finds the Class Notice to be reasonable. It clearly provides to the class member an estimate of the settlement share the employee is to receive and provides adequate instructions for any class member to opt out of the settlement or to submit an objection.

## **3. Enhancement Awards to Class Representatives**

Previously, the Court preliminarily approved Plaintiff Angela Duran as the Class Representative for settlement purposes.

The proposed enhancement awards to Plaintiff Duran is \$7,500.00 The Court has, in past cases, approved enhancement awards of \$5,000.00 routinely. In this case, Plaintiff has now submitted a declaration in support of an increased award.

Plaintiff details her involvement totaling of 23 hours. Plaintiff indicates she met over twenty (20) times with counsel over a 20 month period and that this time consisted of presenting documents reflecting Defendant's wage and hour policies, including its job classifications, meal and rest period policies, timekeeping and off the clock work, as well as preparing and reviewing documents, developing of case strategy, identifying witnesses, reviewing and responding to discovery, and reviewing settlement documents. Additionally, Plaintiff assisted in preparation for mediation and remained available to answer questions from the mediator, as well in review of settlement documents. Plaintiff is receiving approximately \$76.24 as a Class Member due to her low number of weekly pay periods. This declaration is sufficient to support an increased award of \$7,500 each considering Plaintiff's Class Member award.

## **4. Attorneys' Fees and Costs**

Attorneys' fees of 35% of the gross settlement fund of \$900,000.00 or \$315,000.00 and costs not to exceed \$25,000 are sought by Plaintiff's counsel. Although the Court recognizes the utilization of the percentage of the common fund methodology to award attorneys' fees, the Court requires a declaration from counsel that provides an estimate as to what the lodestar would be in this case. The ultimate goal of the Court is to award reasonable

attorneys' fees irrespective of the method of calculation. As such, the court needs to know the estimate of the approximate lodestar supported by declarations for preliminary approval.

Here, the Declaration of David Bibiyan sets forth that class counsel has worked, collectively, a total of 665.1 hours. Counsel then categorizes the hours spent by himself, other counsel and assistants at their various rates. Counsel also itemizes the hours by activity in the case. The lodestar amount is calculated to be \$332,362.50. This provides a negative lodestar of .94. The Court finds the attorney fee request reasonable given this calculation and preliminarily approves

The Court also reviewed the Declaration of Bibiyan as to the costs currently expended as \$15,319.38 and preliminarily approves costs up to \$25,000 based on this declaration.

As noted previously, the Court finds that Plaintiff's counsel are experienced class action attorneys through the declaration of counsel.

#### **5. Claims Administrator**

The Court previously preliminarily approved Phoenix Settlement Administrators as the claims administrator for this class action based on prior experience with this settlement administrator in other class actions litigated in this court. The Court has reviewed the Declaration of Jodey Lawrence, Vice President of Business Development for Phoenix and the itemized estimate provided. The Court preliminarily approves the administrative costs up to \$13,750.00.

#### **6. Unclaimed Settlement Proceeds**

The court preliminarily approves the distribution of unclaimed settlement proceeds to California Farmworker Foundation ("CFF"), located in Delano, California. The Court has reviewed both the Declaration of Bibiyan (Plaintiff's Counsel) and the Declaration of Weiland (Defendant's Counsel) that neither their firms, nor their clients, have any has any interest or conflict that would preclude the appointment of CFF such that CFF would be an acceptable *cy pres* for any unclaimed settlement proceeds in this Class Action and PAGA settlement.

#### **7. Release**

The court finds the proposed release of claims reasonable under the circumstances.

#### **8. LWDA Notice**

The Declaration of Bibiyan provides, in Exhibit "4," proof of submission and receipt of the proposed settlement agreement under Lab. Code, § 2699, subd. (l)(2).

#### **9. Class Certification**

Code of Civil Procedure § 382 permits certification "when the question is of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc. § 382.) The plaintiff bears the burden of demonstrating that class certification under section 382 is proper. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.) To do so, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.)

Here, the initial Motion and initial Declaration of Bibiyan filed November 17, 2021

sufficiently sets forth the basis for finding the class is numerous and ascertainable as over 1,000 employees have been identified through Defendant's employment records. Additionally, common questions of law and fact predominate within the individual causes of action based on class wide policies and procedures of Defendant. Further, the class representative, through her declaration, has indicated she will adequately and fairly represent the Class Members and will not place her interests above any Class Member. The Class Representative was employed by Defendant in California during the relevant time period and thus worked under the same policies and procedures as the Class Members. The requirements of Code of Civil Procedure section 382 are met in this case.

Accordingly, the motion to preliminarily approve the settlement is granted. The Final Approval Hearing is set for June 21, 2022 at 8:30am in Department 7.

If no one requests oral argument, under Code of Civil Procedure section 1019.5(a) and California Rules of Court, rule 3.1312(a), no further written order is necessary. The minute order adopting this tentative ruling will become the order of the court and service by the clerk will constitute notice of the order.

Clerk to provide notice to parties by mail

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF TULARE  
Visalia Division  
221 S Mooney Blvd, Room 303  
Visalia, CA 93291  
559.730.5000

FILED  
TULARE COUNTY SUPERIOR COURT  
VISALIA DIVISION

FEB 08 2022

STEPHANIE CAMERON, CLERK

BY: *B. Vasquez*

Duran, Angela  
Plaintiff/Petitioner,

vs.

Fresh Select, LLC  
Defendant/Respondent.

Case No. VCU284892

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause.

I certify that I caused the Minute Order Dated February 8, 2022 to be served on the persons listed below in the following manner:

BY MAIL: I placed the documents for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on February 9, 2022.

STEPHANIE CAMERON,  
CLERK OF THE SUPERIOR COURT  
COUNTY OF TULARE

By *Bethany Vasquez*  
Bethany Vasquez, Deputy Clerk

Names and Mailing/E-Mail Address of Person(s) Served:  
DAVID BIBIYAN  
8484 WILSHIRE BOULEVARD SUITE 500  
BEVERLY HILLS, CA 90211

IAN WEILAND  
5260 N PALM AVE STE 400  
FRESNO, CA 93704