

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

JEREMIAH BROOKE, on behalf himself and  
other similarly situated and aggrieved employees,

Plaintiff,

vs.

LUSAMERICA FOODS, INC., a California  
Corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. 20CV361692

**ORDER RE: MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS AND REPRESENTATIVE  
ACTION SETTLEMENT**

The above-entitled matter came on for hearing on Wednesday, October 12, 2022, at 1:30 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and considered the written submissions filed by the parties and issued a tentative ruling on Tuesday, October 11, 2022. No party contested the tentative ruling; therefore, the court orders that the tentative ruling be adopted as the order of the court, as follows:

**I. INTRODUCTION**

This is an action arising out of various alleged wage and hour violations. The operative First Amended Class Action and PAGA Representative Action Complaint ("FAC"), filed on July 14, 2021, sets forth causes of action for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Provide Rest Periods;

(5) Failure to Provide Accurate Itemized Wage Statements; (6) Failure to Pay Wages Timely to Terminated Employees; (7) Failure to Reimburse Expenses; (8) UCL Claim; (9) Civil Penalties Under the PAGA for Failure to Pay Minimum, Regular, and/or Overtime Wages; (10) Civil Penalties Under the PAGA for Failure to Provide Meal Periods; (11) Civil Penalties Under the PAGA for Failure to Provide Rest Periods; (12) Civil Penalties Under the PAGA for Failure to Provide Accurate Itemized Wage Statements; (13) Civil Penalties Under the PAGA for Failure to Timely Pay All Wages Due Upon Termination of Employment; (14) Civil Penalties Under the PAGA for Failure to Maintain Records; and (15) Civil Penalties Under the PAGA for Failure to Reimburse Business Expenses.

The parties have reached a settlement. Plaintiffs Jeremiah Brooke (“Brooke”) and Juan Estrada (“Estrada”) (collectively, “Plaintiffs”) now move for preliminary approval of the settlement. The motion is unopposed.

## **II. LEGAL STANDARD**

Generally, “questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” (*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

“The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the

1 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
2 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a  
3 whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk, supra*, 48  
4 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

5 The burden is on the proponent of the settlement to show that it is fair and  
6 reasonable. However “a presumption of fairness exists where: (1) the settlement  
7 is reached through arm’s-length bargaining; (2) investigation and discovery are  
sufficient to allow counsel and the court to act intelligently; (3) counsel is  
experienced in similar litigation; and (4) the percentage of objectors is small.”

8 (*Wershba, supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

### 9 **III. DISCUSSION**

#### 10 **A. Provisions of the Settlement**

11 The consolidated case has been settled on behalf of the following class:

12 [A]ll individuals employed by Defendant [Lusamerica Foods, Inc. (“Defendant”)]  
13 in the State of California as non-exempt employees and who were paid on an  
14 hourly, piece-rate, per-mile basis, or combination therein at any point during the  
Class Period.

(Declaration of Jeremy F. Bollinger in Support of Unopposed Motion for Preliminary Approval  
15 of Class Action Settlement (“Bollinger Dec.”), Ex. 1 (“Settlement Agreement”), ¶ II.2.) The  
16 Class Period is January 14, 2016 to November 15, 2021. (*Id.* at ¶ II.5.) The class contains a  
17 subset of PAGA Members that are defined as all class members employed by Defendant at any  
18 time during the PAGA Period of November 18, 2018 to November 15, 2021. (*Id.* at ¶¶ II.20-21.)

19 According to the terms of settlement, Defendant will pay a total non-reversionary amount  
20 of \$700,000. (Settlement Agreement, ¶ II.12.) The total settlement payment includes attorney  
21 fees not to exceed \$245,000 (35 percent of the gross settlement amount), litigation costs not to  
22 exceed \$23,000, service awards in the total amount of \$20,000 (\$10,000 for each class  
23 representative), settlement administration costs not to exceed \$15,000 (based on 1,286 class  
24 members), and a PAGA allocation of \$50,000 (75 percent of which will be paid to the LWDA  
25 and 25 percent of which will be paid to PAGA Members). (*Id.* at ¶¶ II.19, III.3(a), & III.12.)

26 The net settlement amount will be distributed to the class members on a pro rata basis  
27 based on the number of workweeks worked during the Class Period. (Settlement Agreement,  
28 ¶ III.4.) Similarly, PAGA Members will receive a pro rata share of the 25 percent portion of the

1 PAGA payment allocated to aggrieved employees based on the number of workweeks worked  
2 during the PAGA Period. (*Id.* at ¶¶ III.4 & III.10.)

3 The parties have provided that checks remaining uncashed more than 180 days after  
4 mailing will be void and the funds from those checks will be distributed to the State Controller  
5 Unclaimed Property Fund in the name of the class member for whom the funds are designated.  
6 (Settlement Agreement, ¶ III.14(g).) However, the parties’ proposal to send funds from  
7 uncashed checks to the Unclaimed Property Fund does not comply with Code of Civil Procedure  
8 section 384, which mandates that unclaimed or abandoned class member funds be given to  
9 “nonprofit organizations or foundations to support projects that will benefit the class or similarly  
10 situated persons, or that promote the law consistent with the objectives and purposes of the  
11 underlying cause of action, to child advocacy programs, or to nonprofit organizations providing  
12 civil legal services to the indigent.” Plaintiffs are directed to provide a new *cy pres* in  
13 compliance with Code of Civil Procedure section 384 before the final approval hearing.

14 **B. Fairness of the Settlement**

15 Plaintiffs assert that the settlement is fair, reasonable, and adequate, given the strength of  
16 their claims, the inherent risks of litigation, including substantial risks relative to class  
17 certification and the merits of the claims, and the costs of pursuing litigation. Plaintiffs state that  
18 after conducting substantial discovery, the parties attended mediation with Tripper Ortman and  
19 were eventually able to resolve the dispute. Plaintiffs provide a detailed estimate of the total  
20 value of their claims and the amount those claims were discounted for purposes of settlement.  
21 (Bollinger Dec., ¶¶ 34-83.) Specifically, Plaintiffs discounted the potential value of the claims  
22 given the risks inherent in continued litigation, the strength of Defendant’s defenses, the  
23 difficulties involved in obtaining class certification, the court’s ability to reduce PAGA penalties,  
24 and the risk that Defendant would solicit settlements and opt-outs or foist arbitration agreements  
25 on class members. (*Id.* at ¶¶ 25-33.) Plaintiffs state that the fair value of their claims is as  
26 follows: \$454,556 for unpaid wages; \$1,198,932 for meal break premiums; \$295,146 for rest  
27 break premiums; \$651,503 for waiting time penalties; \$173,613 for wage statement penalties;  
28 \$15,640 for non-reimbursed expenses; and \$372,400 for PAGA penalties. (*Id.* at ¶¶ 34-83.)

1 Plaintiffs assert that for the approximately 1,286 class members, the average net recovery is \$280  
2 per class member.

3 Overall, the court finds that the settlement is fair. The settlement provides for some  
4 recovery for each class member and eliminates the risk and expense of further litigation.

5 **C. Incentive Award, Fees, and Costs**

6 Plaintiffs request incentive awards of \$20,000 (\$10,000 for each class representative).

7 The rationale for making enhancement or incentive awards to named plaintiffs is  
8 that they should be compensated for the expense or risk they have incurred in  
9 conferring a benefit on other members of the class. An incentive award is  
10 appropriate if it is necessary to induce an individual to participate in the suit.

11 Criteria courts may consider in determining whether to make an incentive award  
12 include: 1) the risk to the class representative in commencing suit, both financial  
13 and otherwise; 2) the notoriety and personal difficulties encountered by the class  
14 representative; 3) the amount of time and effort spent by the class representative;  
15 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)  
16 enjoyed by the class representative as a result of the litigation. These “incentive  
17 awards” to class representatives must not be disproportionate to the amount of  
18 time and energy expended in pursuit of the lawsuit.

19 (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks,  
20 brackets, ellipses, and citations omitted.)

21 Plaintiffs submitted declarations detailing their participation in the action, not stating the  
22 amount of time they spent. Brooke states that he routinely monitored the case and checked in  
23 with his attorneys, responded to questions from class counsel, provided documents to class  
24 counsel, provided a declaration in opposition to Defendant’s motion to compel arbitration,  
25 responded to interrogatories, helped class counsel prepare for mediation, and reviewed the  
26 settlement agreement. (Declaration of Jeremiah Brooke in Support of Unopposed Motion for  
27 Preliminary Approval of Class Action Settlement, ¶¶ 7-13.) Estrada states that he met and  
28 communicated with class counsel regarding the status of the case, answered questions from class  
counsel, reviewed documents, helped class counsel prepare for mediation, and reviewed the  
settlement agreement. (Declaration of Juan Estrada in Support of Unopposed Motion for  
Preliminary Approval of Class Action Settlement, ¶¶ 11-14.) The court is mindful that Plaintiffs  
have taken on a potential impact on their future employment, but is also mindful that the  
substantial incentive awards requested reduce the amount of funds available to other class

1 members and aggrieved employees. Taking into account all the information provided, the court  
2 finds that incentive awards are warranted in the amount of \$7,500 each, \$15,000 total.

3 The court also has an independent right and responsibility to review the requested  
4 attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*  
5 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will  
6 seek attorney fees not to exceed \$245,000 (35 percent of the gross settlement amount). The court  
7 notes that the percentage is higher than the court typically is asked to approve. Plaintiffs'  
8 counsel shall submit lodestar information (including hourly rates and hours worked) prior to the  
9 final approval hearing so the court can compare the lodestar information with the requested fees.  
10 Plaintiffs' counsel shall also submit evidence of actual costs incurred.

11 **D. Conditional Certification of Class**

12 Plaintiffs request that the putative class be conditionally certified for purposes of the  
13 settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an  
14 order approving or denying certification of a provisional settlement class after [a] preliminary  
15 settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a  
16 class "when the question is one of a common or general interest, of many persons, or when the  
17 parties are numerous, and it is impracticable to bring them all before the court . . . ." As  
18 interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and  
19 (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v.*  
20 *Superior Court* (2004) 34 Cal.4th 319, 326.)

21 The "community-of-interest" requirement encompasses three factors: (1) predominant  
22 questions of law or fact; (2) class representatives with claims or defenses typical of the class;  
23 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*  
24 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the  
25 probability that each class member will come forward ultimately to prove his or her separate  
26 claim to a portion of the total recovery and whether the class approach would actually serve to  
27 deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)  
28 The plaintiff has the burden of establishing that class treatment will yield "substantial benefits"

1 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d  
2 381, 385.)

3 As explained by the California Supreme Court:

4 The certification question is essentially a procedural one that does not ask whether  
5 an action is legally or factually meritorious. A trial court ruling on a certification  
6 motion determines whether the issues which may be jointly tried, when compared  
7 with those requiring separate adjudication, are so numerous or substantial that the  
8 maintenance of a class action would be advantageous to the judicial process and  
9 to the litigants.

10 (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation  
11 marks, ellipses, and citations omitted.)

12 Plaintiffs state that there are approximately 1,286 class members. Class members can be  
13 ascertained from Defendant’s records. There are common issues regarding whether Defendant  
14 violated wage and hour laws regarding payment of wages, the provision of meal and rest breaks,  
15 the issuance of wage statements, and reimbursement of business expenses. No issue has been  
16 raised regarding the typicality or adequacy of Plaintiffs as class representatives. In sum, the  
17 court finds that the proposed class should be conditionally certified.

18 **E. Class Notice**

19 The content of a class notice is subject to court approval. “If the court has certified the  
20 action as a class action, notice of the final approval hearing must be given to the class members  
21 in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

22 The class notice submitted with the moving papers generally complies with the  
23 requirements for class notice. (See Settlement Agreement, Ex. A.) It provides basic information  
24 about the settlement, including the settlement terms, and procedures to object or request  
25 exclusion. However, that notice had the following problems, noted in the tentative ruling.

26 First, the notice currently stated in paragraph 7 that the settlement provides for litigation  
27 costs in the amount of \$25,000. The notice was amended to reflect the correct amount of  
28 \$23,000.

Second, the description of the payment to be made to PAGA Members in paragraph 7  
did not track the language of the settlement agreement and was modified.

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1 Third, the notice needed to be updated to instruct class members that they may object or  
2 request exclusion by providing their name to the court or the settlement administrator, as  
3 appropriate, without the need to provide their address or other identifying information.

4 Fourth, the class notice needed to be amended to clarify that any class member may  
5 appear at the final approval hearing to make an oral objection whether or not any notice of  
6 appearance has been provided.

7 Fifth, the notice need to be amended with respect to the type of appearances that may be  
8 made at the final approval hearing. The notice now includes the following language regarding  
9 appearances at the final approval hearing:

10 Class members may appear at the final approval hearing remotely using the  
11 Microsoft Teams link for Department 3 (Afternoon Session). Instructions for  
12 appearing remotely are provided at [https://www.scsccourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.scsccourt.org/general_info/ra_teams/video_hearings_teams.shtml) and  
13 should be reviewed in advance. Class members who wish to appear remotely are  
encouraged to contact class counsel at least three days before the hearing if  
possible, so that potential technology or audibility issues can be avoided or  
minimized.

14 The amended notice provided to the court after the issuance of the tentative ruling has  
15 addresses all these issues and is approved.

#### 16 IV. CONCLUSION

17 The motion for preliminary approval of the class action settlement is GRANTED, subject  
18 to approval of the amended class notice. The final approval hearing is set for March 1, 2023, at  
19 1:30 p.m. in Department 3.

20 The Case Management Conference scheduled for October 12, 2022 is vacated.

21 Dated: October 12, 2022



22 Patricia M. Lucas  
23 Judge of the Superior Court  
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