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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

RAUL FRIAS-ESTRADA, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

TREK RETAIL CORPORATION, a Wisconsin
corporation, and DOES 1 through 10, inclusive,

Defendants.

FILED
OCT 19 2022

K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By: *ASG*
A. Shaw, Deputy Clerk

Case No.: MSC20-01916

CLASS ACTION

[Assigned for all purposes to: Hon. Edward
G. Weil, Dept. 39]

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

PRELIMINARY APPROVAL HEARING

Date: October 13, 2022

Time: 9:00 a.m.

Dept: 39

1 Plaintiff Raul Frias-Estrada moves for preliminary approval of his class action and
2 PAGA settlement with defendant Trek Retail Corporation.

3 **A. Background and Settlement Terms**

4 The original complaint was filed on September 21, 2020, raising claims under
5 PAGA and a class action on behalf of non-exempt employees, alleging that defendant violated
6 the Labor Code in various ways, including failure to pay minimum wage, failure to pay
7 overtime, failure to provide meal and rest breaks, failure to provide proper wage statements,
8 and failure to reimburse employee expenses.

9 The settlement would create a gross settlement fund of \$675,000. The class
10 representative payment to the plaintiff would be \$10,000. Attorney's fees would be \$225,000
11 (one-third of the settlement). Litigation costs would not exceed \$15,000. The settlement
12 administrator's costs (Phoenix) are estimated at \$10,000. PAGA penalties would be \$10,000,
13 resulting in a payment of \$7,500 to the LWDA. The net amount paid directly to the class
14 members would be about \$405,000. The fund is non-reversionary. There are an estimated 491
15 class members. Based on the estimated class size, the average net payment for each class
16 member is approximately \$826.

17 The entire settlement amount will be deposited into a trust account for the benefit
18 of the class within 14 days after final approval of the settlement.

19 The proposed settlement would certify a class of "all persons who worked for any
20 Defendant in California as an hourly-paid or non-exempt employee during the Settlement
21 Period." The settlement period is September 22, 2016, through December 1, 2021.

22 The class members will not be required to file a claim. Class members may object
23 or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the
24 settlement.) Funds would be apportioned to class members based on the number of workweeks
25 worked during the class period.

26 Various prescribed follow-up steps will be taken with respect to mail that is
27 returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be
28 voided, and will be paid to a cy pres beneficiary, Los Angeles Trial Lawyers' Charities. The

1 president of that organization, Steven Vartazarian, attests that the organization will "allocate
2 the award to specific charitable efforts specifically related to employment and professional
3 development and monitor those charitable efforts to ensure the cy pres funds are indeed
4 utilized for the earmarked purposes." Counsel Marquez attests that he and his firm have "no
5 interest, financial or otherwise" in the proposed cy pres recipient.

6 The settlement contains release language covering "any and all wage-related claims
7 that were alleged in the Litigation or which could have been alleged in the Litigation based on
8 the facts asserted in the Litigation arising during the Settlement Period[.]" Under recent
9 appellate authority, the limitation to those claims with the "same factual predicate" as those
10 alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69
11 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the
12 allegations of the complaint." "Put another way, a release of claims that goes beyond the scope
13 of the allegations in the operative complaint' is impermissible." (*Id.*, quoting *Marshall v.*
14 *Northrop Grumman Corp.* (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

15 Informal discovery was undertaken, resulting in the production of substantial
16 documents, including sick pay policies. The matter settled after arms-length negotiations,
17 which included a session with an experienced mediator on October 1, 2021.

18 Counsel also has provided an analysis of the case, and how the settlement compares
19 to the potential value of the case, after allowing for various risks and contingencies. This
20 included an estimate of class claims at a maximum of about \$5.7 million (\$2.5 million of
21 which would be PAGA penalties), but with a "realistic" maximum of \$794,845.

22 The potential liability needs to be adjusted for various evidence and risk-based
23 contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a
24 number of reasons: they derive from other violations, they include "stacking" of violations, the
25 law may only allow application of the "initial violation" penalty amount, and the total amount
26 may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties
27 may be reduced where "based on the facts and circumstances of the particular case, to do
28 otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

1 The proof of service of the moving papers attests that the LWDA was notified of
2 the proposed settlement.

3 **B. Legal Standards**

4 The primary determination to be made is whether the proposed settlement is "fair,
5 reasonable, and adequate," under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801,
6 including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of
7 further litigation, the risk of maintaining class action status through trial, the amount offered
8 in settlement, the extent of discovery completed and the state of the proceedings, the
9 experience and views of counsel, the presence of a governmental participant, and the reaction
10 ... to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra*, 69
11 Cal.App.5th 521.)

12 Because this matter also proposes to settle PAGA claims, the Court also must
13 consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in
14 *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In
15 *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class
16 actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must
17 assess "the fairness of the settlement's allocation of civil penalties between the affected
18 aggrieved employees[.]" (*Id.*, at 64-65.)

19 California law provides some general guidance concerning judicial approval of any
20 settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of*
21 *California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement
22 contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d
23 405,412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot
24 surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as
25 a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court*
26 (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not
27 always apply, because "[w]here the rights of the public are implicated, the additional
28 safeguard of judicial review, though more cumbersome to the settlement process, serves a

1 salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America*
2 (2006) 141 Cal.App.4th 48, 63.)

3 **C. Attorney fees**

4 Plaintiff seeks one-third of the total settlement amount as fees, relying on the
5 "common fund" theory. Even a proper common fund-based fee award, however, should be
6 reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1
7 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to
8 determine whether the percentage allocated is reasonable. It stated: "If the multiplier
9 calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court
10 should consider whether the percentage used should be adjusted so as to bring the imputed
11 multiplier within a justifiable range, but the court is not necessarily required to make such an
12 adjustment." (*Id.*, at 505.) Following typical practice, however, the fee award will not be
13 considered at this time, but only as part of final approval.

14 Similarly, litigation costs and the requested representative payment of \$10,000 for
15 plaintiff will be reviewed at time of final approval. Criteria for evaluation of representative
16 payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175
17 Cal.App.4th 785, 804-807.

18 **D. Discussion and Conclusion**

19 The proposed settlement is sufficiently fair, reasonable, and adequate to justify
20 preliminary approval.

21 Motion granted.

22 Counsel are directed to prepare an order reflecting this tentative ruling, the other
23 findings in the previously submitted proposed order, and to obtain a hearing date for the
24 motion for final approval from the Department clerk. Other dates in the scheduled notice
25 process should track as appropriate to the hearing date. The ultimate judgment must provide
26 for a compliance hearing after the settlement has been completely implemented. Plaintiffs'
27 counsel are to submit a compliance statement one week before the compliance hearing date.
28 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory

1 compliance as found by the Court.

2
3
4 The Court has before it Plaintiff's Motion for Preliminary Approval of Class Action
5 Settlement. Having reviewed the Motion for Preliminary Approval of Class Action
6 Settlement, the Declaration of Justin F. Marquez, the Declaration of LATLC President Steven
7 Vartazarian, the Joint Stipulation Re: Class Settlement (which is referred herein as the
8 "Settlement" or "Settlement Agreement"), the First Amendment to Joint Stipulation Re: Class
9 Settlement (which is referred herein as the "First Amendment to Settlement Agreement" or
10 "First Amendment to Settlement"), and good cause appearing, the Court hereby finds and
11 orders as follows:

12 1. The Court finds on a preliminary basis that the Settlement Agreement and First
13 Amendment to Settlement Agreement appear to be fair, adequate, and reasonable and
14 therefore meet the requirements for preliminary approval. The Court grants preliminary
15 approval of the Settlement, First Amendment to Settlement, and the Settlement Class based
16 upon the terms set forth in the Settlement Agreement and First Amendment to Settlement
17 Agreement between Plaintiff and Defendant, attached to the Declaration of Justin F. Marquez
18 in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement as
19 Exhibits 1 and 2, respectively.

20 2. The Settlement and First Amendment to Settlement fall within the range of
21 reasonableness of a settlement which could ultimately be given final approval by this Court.
22 The Court notes that Defendant has agreed to create a common fund of \$675,000.00 to cover:
23 (a) settlement payments to the class members who do not validly opt out; (b) a \$10,000.00
24 payment to the State of California, Labor & Workforce Development Agency ("LWDA") for
25 its share of the settlement of claims for penalties under the Private Attorneys General Act
26 ("PAGA"), with 75% of which (\$7,500.00) being paid to the LWDA and 25% (\$2,500.00)
27 being paid to participating PAGA Members; (c) the Class Representative service payment of
28 up to \$10,000.00 for Plaintiff; (d) Class Counsel's attorneys' fees, not to exceed 33 1/3% of

1 the Gross Settlement Amount (\$225,000.00), and up to \$15,000.00 in costs for actual litigation
2 expenses incurred by Class Counsel; and (e) Settlement Administration Costs of up to
3 \$10,000.00.

4 3. The Court preliminarily finds that the terms of the Settlement and First
5 Amendment to Settlement appear to be within the range of possible approval, pursuant to
6 California Code of Civil Procedure § 382 and applicable law. The Court finds on a
7 preliminary basis that: (1) the settlement amount is fair and reasonable to the class members
8 when balanced against the probable outcome of further litigation relating to class certification,
9 liability and damages issues, and potential appeals; (2) significant informal discovery,
10 investigation, research, and litigation have been conducted such that counsel for the Parties at
11 this time are able to reasonably evaluate their respective positions; (3) settlement at this time
12 will avoid substantial costs, delay, and risks that would be presented by the further
13 prosecution of the litigation; and (4) the proposed settlement has been reached as the result of
14 intensive, serious, and non-collusive negotiations between the Parties with the assistance of a
15 well-respected class action mediator. Accordingly, the Court preliminarily finds that the
16 Settlement Agreement and First Amendment to Settlement Agreement were entered into in
17 good faith.

18 4. A Final Fairness Hearing on the question of whether the proposed settlement,
19 attorneys' fees and costs to Class Counsel, payment to the LWDA for its share of the
20 settlement of claims for penalties under PAGA, and the class representative's enhancement
21 award should be finally approved as fair, reasonable and adequate as to the members of the
22 class is hereby set in accordance with the Implementation Schedule set forth below.

23 5. The Court provisionally certifies for settlement purposes only the following
24 class (the "Settlement Class"): "All persons who worked for any Defendant in California as an
25 hourly-paid or non-exempt employee during the Settlement Period (together, collectively
26 referred to as the "Class Members")."

27 6. The Settlement Period means the period from September 22, 2016 through
28 December 1, 2021.

1 7. The Court finds, for settlement purposes only, that the Settlement Class meets
2 the requirements for certification under California Code of Civil Procedure § 382 in that: (1)
3 the Settlement Class Members are so numerous that joinder is impractical; (2) there are
4 questions of law and fact that are common, or of general interest, to all Settlement Class
5 Members, which predominate over individual issues; (3) Plaintiff's claims are typical of the
6 claims of the Settlement Class Members; (4) Plaintiff and Class Counsel will fairly and
7 adequately protect the interests of the Settlement Class Members; and (5) a class action is
8 superior to other available methods for the fair and efficient adjudication of the controversy.

9 8. The Court appoints as Class Representative, for settlement purposes only,
10 Plaintiff Raul Frias-Estrada.

11 9. The Court appoints, for settlement purposes only, Wilshire Law Firm, PLC as
12 Class Counsel.

13 10. The Court appoints Phoenix Settlement Administrators as the Settlement
14 Administrator with reasonable administration costs estimated not to exceed \$10,000.00.

15 11. The Court approves, as to form and content: (1) the Notice of Proposed Class
16 Action Settlement, attached as Exhibit A to the Settlement Agreement; and (2) the Workweek
17 Dispute Form, attached as Exhibit B to the Settlement Agreement (collectively, the "Notice
18 Packet"). The Court finds, on a preliminary basis, that the plan for distribution of the Notice
19 Packets to Settlement Class Members satisfies due process, provides the best notice
20 practicable under the circumstances, and shall constitute due and sufficient notice to all
21 persons entitled thereto.

22 12. The Parties are ordered to carry out the Settlement according to the terms of the
23 Settlement Agreement and First Amendment to Settlement Agreement.

24 13. Any Class Member who does not timely and validly request exclusion from the
25 Settlement may object to the Settlement Agreement and First Amendment to Settlement
26 Agreement.

27 ///

28 ///

14. The Court orders the following Implementation Schedule:

Defendant to provide Class List to the Settlement Administrator	November 16, 2022
Settlement Administrator to mail the Notice Packets	November 28, 2022
Response Deadline (Opt-out or Dispute Workweeks)	January 12, 2023
Deadline to Provide Written Objections, if any	January 12, 2023
Deadline for Administrator to Submit Report	January 19, 2023
Deadline to file Motion for Final Approval, Request for Attorneys' Fees and Costs, and Service Award to Plaintiff	January 24, 2023
Final Fairness Hearing	February 16, 2023 at 9:00 a.m.

The Court further ORDERS that, pending further order of this Court, all proceedings in this lawsuit, except those contemplated herein and in the settlement, are stayed.

IT IS SO ORDERED.

DATE: **OCT 17 2022**



Hon. Edward G. Weil
Contra Costa County Superior Court

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MSC20-01916

PROOF OF SERVICE