

08/22/2023

David W. Slayton, Executive Officer / Clerk of Court

By: R. Arraiga Deputy

FINAL RULINGS/ORDERSRE: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Marroquin v. Food Castle, Inc., Case No.: 21STCV22582

The Parties' Motion for Final Approval of class action settlement is **GRANTED** as the settlement is fair, adequate, and reasonable.

The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$575,000.¹ [The Settlement is based on 180 Settlement Class Members during the Class Period. Should the number of such Settlement Class Members or the number of shifts as of the end of the Class Period exceed such stated number by more than 10% Plaintiff will have the right to abrogate this agreement, and the parties shall return to status quo ante. (¶4.)]

B. The Net Settlement Amount is the GSA minus the following:

- \$191,666.66 for attorney fees to Class Counsel, Lipeles Law Group, APC;
- \$7,434.11 for attorney costs to Class Counsel;
- \$5,000 enhancement award to the class representative, Flor De Maria Marroquin;
- \$7,000 for settlement administration costs to Phoenix Settlement Administrators (any remaining cost balance to be paid by Defendant up to the amount agreed upon by the parties);
- \$18,750 (75% of \$25,000 PAGA penalty) to the LWDA.

C. Defendant will be separately responsible for its portion of payroll taxes in addition to the GSA.

D. Plaintiffs release of Defendants from claims described herein.

By **September 22, 2023**, Class Counsel must give notice to the class members pursuant to California Rules of Court, rule 3.771(b) and to the LWDA, if applicable, pursuant to Labor Code §2699 (1) (3).

¹ There is a partial claims process for class members for whom Defendant is missing contact information and tax information, as described in the publication notice issued by the administrator.

By **August 22, 2024**, Class Counsel must file a Final Report re: Distribution of the settlement funds.

Court sets **Non-Appearence Case Review for August 29, 2024, 8:30 AM, Department 9.**

I.
INTRODUCTION

A. Background

On June 15, 2021, Plaintiff Flor De Maria Marroquin filed her Class Action Complaint alleging causes of action for: (1) Failure To Pay Overtime (Cal. Labor Code §§200, 510, 1194, 1198, et seq.); (2) Failure To Issue Accurate Itemized Wage Statements (Cal. Labor Code §§ 226); (3) Failure to Pay For Rest Periods Not Provided (Cal. Labor Code §226.7); (4) Failure to Pay Minimum Wage (Cal. Labor Code §1197); (5) (Failure To Pay All Wages Due Upon Separation of Employment (Cal. Labor Code §§ 201-203); and (6) Unfair/Unlawful Business Practices (Cal. Bus. And Prof. Code §§ 17200 et seq.).

On August 19, 2021, Plaintiff filed her First Amended Class Action Complaint adding a claim pursuant to the Private Attorney General Act of 2004, Cal. Lab. Code §§2699, et seq. ("PAGA"). On March 29, 2022, Plaintiff filed her Second Amended Class Action Complaint revising the claim for minimum wage.

On November 11, 2021, the parties virtually attended an all-day mediation with mediator Nikki Toll and negotiated a class-wide resolution. The Parties executed a Memorandum of Understanding on January 22, 2022 and subsequently executed the Settlement Agreement, a copy of which was filed with the Court.

On May 31, 2022, the Court issued a "checklist" to the parties pertaining to deficiencies with the proposed settlement. In response, the parties filed further briefing, including the revised Settlement Agreement.

The settlement was preliminarily approved on August 11, 2022. Thereafter, Plaintiff was apprised by Defendant and the Settlement Administrator that Defendant did not have social security numbers and contact information for sixty-two Class Members. Further, Defendant had addresses for seven (7) Class Members, but no social security numbers. As a result, the Parties sought to amend the August 11, 2022 Preliminary Approval

Order to provide for a publication notice process to those Class Members. On February 15, 2023, the Court signed the amended order granting preliminary approval of the settlement.

Now before the Court is the motion for final approval of the settlement agreement.

B. Settlement Class Definition

"Settlement Class" or "Settlement Class Members": all non-exempt persons employed by Defendant in the State of California at any time during the Class Period or PAGA Period. (Settlement Agreement, ¶2.25.)

"Class Period": June 15, 2017 through the date of Preliminary Approval. (¶2.5.)

"PAGA Employees": all non-exempt employees who were food packers and warehouse shippers who were employed by Defendant in the State of California during the PAGA Period. (¶2.15.)

"PAGA Period": June 15, 2020 through the date of Preliminary Approval. (¶2.16.)

The Parties stipulate to class certification for settlement purposes only. (¶3.)

C. Terms of Settlement Agreement

The essential terms are:

- The Maximum Settlement Amount ("MSA") is \$575,000, non-reversionary. (¶4.)
 - o The Settlement is based on 180 Settlement Class Members during the Class Period. Should the number of such Settlement Class Members or the number of shifts as of the end of the Class Period exceed such stated number by more than 10% Plaintiff will have the right to abrogate this agreement, and the parties shall return to status quo ante. (¶4.)
- The Net Settlement Amount (\$332,000) is the MSA minus the following:
 - o Up to \$201,250 (35%) for attorney fees (¶III.L.10);
 - o Up to \$8,500 for litigation costs (Ibid.)
 - o Up to \$7,500 for a service award to Plaintiff (¶5.a);
 - o Up to \$7,000 for settlement administration (¶7.1); and
 - o Payment of \$18,750 (75% of \$25,000 PAGA penalty) to the LWDA (¶8.a).

- All Employer Taxes shall be paid by Defendants separately. (¶4.)
- Claims Process: There is a partial claims process for class members for whom Defendant is missing contact information and tax information, as described in the publication notice issued by the administrator. See Exhibit B to Declaration of Kevin Lee ("Lee Decl.").
- "Response Deadline" means the last date for Settlement Class Members to postmark, for return to the Settlement Administrator, Requests for Exclusion or Objections. The Response Deadline shall be forty-five (45) days after the Settlement Administrator has postmarked the Class Notice for mailing to Settlement Class Members, subject to adjustment in the case of re-mailings. (¶2.23.) Settlement Class Members who receive a re-mailed Class Notice shall have their Response Deadline extended fifteen (15) calendar days from the original Response Deadline. (¶16.1.b.)
 - o If ten percent (10%) or more of the Settlement Class Members submit complete and timely Requests for Exclusion, either Party shall have, in their sole and absolute discretion, the option to terminate this Joint Stipulation of Settlement. Plaintiff or Defendant shall be entitled to exercise these termination rights by providing written notice to Class Counsel at any time within fifteen (15) calendar days of learning of the condition triggering termination. (¶18.)
- Funding: Defendant shall electronically wire 1 payment and then 12 equal monthly installment payments thereafter. Defendant shall electronically wire fifty (50%) percent of the Maximum Settlement Amount (\$575,000.00), or \$287,500.00, and an amount sufficient to pay the employer's share of taxes on the wage portion of the Individual Settlement Payments to the Settlement Administrator within thirty (30) calendar days after the Court grants Preliminary Approval of the Settlement ("First Payment"). Within thirty (30) calendar days after the First Payment Defendant shall begin electronically wiring the remaining fifty (50%) percent of the Maximum Settlement Amount, or \$287,500.00 ("Final Payment"). Defendant shall wire twelve equal monthly installments of \$23,958.33 into an escrow account (administered by the Settlement Administrator). The last monthly installment payment shall be due within one (1) year of the First Payment. If the Court does not approve the foregoing payment plan, Defendant agrees to pay the full Maximum Settlement Amount pursuant to the Court's ordering of an alternative/revised payment plan (or no payment plan if the Court so orders). (¶¶10(a)-(b).)

- Individual Settlement Payments: The Individual Settlement Payment for each Settlement Class Member who does not Opt Out and is deemed a Participating Class Member shall be calculated as follows: (a) the number of WW each Participating Class Member worked as a non-exempt employee for Defendant in California during the Class Period; divided by (b) the aggregate number of WW for all Participating Class Members as calculated under subparagraph (a); and then multiplied by (c) the Net Settlement Amount. The Shifts worked shall be calculated using Defendant's payroll records. Because PAGA Employees cannot opt out of the PAGA claims, each PAGA Employee, whether or not a Participating Class Member, shall also receive his or her Individual PAGA Payment calculated as follows: (a) the number of WW each PAGA Employee worked as a non-exempt employee for Defendant in California during the PAGA Period; divided by (b) the aggregate number of WW worked by all PAGA Employees during the PAGA Period; and then multiplied by (c) the PAGA Employees Portion. (§9.2.)
 - o Tax Allocation: 25% wages and 75% as interest and penalties. The PAGA Payments shall be 100% penalties. (§9.3.)
- Uncashed Checks: Participating Class Members and PAGA Employees will have one hundred eighty (180) calendar days from the date of issuance of the check to cash or otherwise deposit their check. For any check not cashed after 180 calendar days, the Settlement Administrator shall cancel the check and remit the funds to the California State Controller's Office, Unclaimed Property Division in the name of the Participating Class Member who failed to cash their check (§10(d))
- The claims administrator will be Phoenix Class Action Administration Solutions ("Phoenix"). (§2.26.)
- Notice of final judgment will be posted on the administrator's website. (Notice pg. 7)
- The LWDA was provided notice of the Settlement on July 21, 2022 (Supp. Lipeles Decl. ISO Prelim, Exhibit D.)
- Release: As of the Effective Date and full funding of the Maximum Settlement Amount by Defendant to the Settlement Administrator, each Participating Class Member hereby fully, finally, and forever releases and discharges each and every one of the Released Parties from any and all claims, debts, liabilities, demands, obligations, penalties, premium pay, guarantees, costs, expenses, attorney's fees, damages, actions or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, under any legal theory under state law for any alleged failure to pay all wages due (including minimum wage and overtime wages), failure to pay for all hours worked, failure to provide rest periods, failure to

timely pay wages and final wages, failure to furnish accurate wage statements including claims derivative and/or related to these claims during the class period ("Released Class Claims"). This Release shall include all claims and theories arising under the California Labor Code, wage orders, and applicable regulations, including Labor Code Sections 201, 202, 203, 226, 226.7, 512, 1194, 1197, and 1198, as well as claims under Business and Professions Code section 17200 et seq., and/or Labor Code Section 2698 et seq. based on alleged violations of the above Labor Code provisions, as alleged in the Action. The release shall run through the date of Preliminary Approval. (§12.1.)

- PAGA Release: As of the Effective Date and full funding of the Maximum Settlement Amount by Defendant to the Settlement Administrator, each PAGA Employee and the State of California hereby fully, finally, and forever releases and discharges each and every one of the Released Parties from all claims, demands, rights, liabilities, and causes of action: (a) arising in whole or in part, during the PAGA Period, for any of the following: any alleged or actual unfair business practices or any alleged or actual violations of the Private Attorneys General Act, Labor Code section 2699 et seq. ("PAGA") which derive from the foregoing Released Class Claims; or (b) in any manner arising out of any of the other facts or legal theories alleged or asserted in the Action, whether formally raised in the operative complaint in this Action, the June 10, 2021 letter to the LWDA, or otherwise (collectively, the "Released PAGA Claims") (together the Released Class Claims and Released PAGA Claims are the "Released Claims"). (§12.2.)

- "Released Parties" means: (a) Food Castle, Inc., and each and all past or present partners, parents, subsidiaries, or affiliates (regardless whether such partners, parents, subsidiaries, or affiliates are individuals, corporations, partnerships, limited partnerships, limited liability companies, or other forms of entity) of Defendant; (b) each and all of the predecessor or successor entities of any of those entities identified in subparagraph (a); (c) any other individuals or entities of any kind, including but not limited to any payroll companies, which have been or could be alleged to be in any manner responsible (whether on an alter ego, joint employer, integrated enterprise, or any other theory) for any violations described in the releases below and occurring as a result of employment; and (d) all past and present directors, officers, owners, representatives, insurers, agents, shareholders, partners, members, lawyers, and employees of any of the individuals or entities identified in subparagraphs (a), (b), or (c). (§2.21.)

- The Class Representative will also provide a general release and CC 1542 waiver. (¶13)

II. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. On November 11, 2021, the parties virtually attended an all-day mediation with mediator Nikki Toll. With Ms. Toll's help, we negotiated a class-wide resolution at the mediation. The Parties executed a Memorandum of Understanding on or about January 22, 2022, and negotiated a long-form agreement for a couple of more months before executing the Settlement Agreement. (Lipeles Decl. ISO Prelim ¶¶ 16-19.)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Counsel represents that in preparing for the mediation, he reviewed various information and data produced by Defendant, including, inter alia,: (1) review and analysis of relevant documents, including but not limited to, documents demonstrating Defendant's overtime, minimum wage and rest break policies and procedures; (2) examination and analysis of documents relating to Defendant's workweek and compensation data, including combined redacted paystubs and combined redacted time samples; (3) review of relevant data regarding the size of the putative class; (4) examination of data related to Food Castle's PAGA exposure; and (5) research with respect to the applicable law and the potential defenses thereto. (Id. at ¶7.)

Counsel further represents that Defendant provided the following documents which Plaintiff reviewed: a chart of all of the food packer employees including their hire and termination dates, paystubs relating to putative class members and copies of checks paid to Plaintiff by Defendant. Defendant also provided information concerning the total number of Class Members (139), number of workweeks, number of wage statements issued, the average hourly rate, and the applicable policies concerning overtime, minimum wage, and rest breaks. Further, Food Castle informally produced to Plaintiff's counsel anonymized time records and wage statements for a random sampling of 10% of the packers (14 individuals total). (Supp. Lipeles Decl. ISO Prelim ¶2.)

In addition, the parties indicate that Defendant's financial instability was a factor considered in negotiating the proposed settlement, and in particular, necessitating the proposed funding plan. Decl. of Eliyahu Levy filed July 21, 2022.

3. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced in class action litigation, including wage and hour class action cases. (Lipeles Decl. ISO Prelim ¶¶ 38-42).

4. What percentage of the class has objected? None. (Declaration of Kevin Lee ("Lee Decl.") ¶11.

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Counsel provided the following exposure analysis:

CLAIM	MAXIMUM EXPOSURE
Overtime Claim	\$259,911.18
Rest Periods	\$519,430.34
Wage Statement Violations	\$278,000.00
Waiting Time Penalties	\$168,540.00
Minimum Wage Claim	\$156,809.16
PAGA	\$2,623,300.00
TOTAL	\$4,005,990.68

(Lipeles Decl. ISO Prelim ¶¶ 13-14; Supp. Brief ISO Prelim at 1:24-2:3.)

2. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

3. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (See Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized

that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate.”.)

4. Amount offered in settlement. Plaintiff’s counsel obtained a \$575,000 non-reversionary settlement which is approximately 14.3% of the maximum estimated exposure which, given the uncertain outcomes, is within the “ballpark of reasonableness.”

The settlement amount, after the requested deductions, leaves approximately \$318,565.89 to be divided among approximately 188 participating class members. The resulting payments will average approximately \$1,679.12 per class member).

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Class Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including wage and hour class actions.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement.

Number of class members: 188 (Lee Decl. ¶¶3, 7.)

Number of notice packets mailed: 126 (Id. at ¶¶5, 7.)

[There were 62 class members without mailing addresses for which publication notice was given]

Number of undeliverable notices: 14 (Id. at ¶9.)

Claims received (out of 62 class members): 2 (Id. at ¶14.)

Number of opt-outs: 0 (Id. at ¶10.)

Number of objections: 0 (Id. at ¶11.)

Number of Participating Class Members: 188 (Id. at ¶13.)

Average individual payment: \$1,679.12 (Id. at ¶17.)

Highest estimated payment: \$6,474.07 (Ibid.)

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C. Attorney Fees and Costs

Class Counsel requests an award of \$201,250 (35%) in fees and \$7,434.11 in costs. (Motion for Class Counsel's Fees at 2:2-3, 13:6-7.) The Settlement Agreement provides for fees up to \$201,250 (35%) and costs up to \$8,500 (¶III.L.10).

"Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on another ground in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.) Here, class counsel requests attorney fees using the common fund method as cross-checked against the lodestar. (Motion for Class Counsel's Fees at pp. 2-13.) In common fund cases, the Court may employ a percentage of the benefit method, as cross-checked against the lodestar. (Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 503.)

The fee request represents approximately 35% of the gross settlement amount, which is above the average generally awarded in class actions. See In re Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 558, fn. 13 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.").

Counsel provided the following lodestar information:

Attorney	Rates	Hours	Totals
Kevin Lipeles	\$750	41.7	\$31,425.00
Thomas Schelly	\$750	14.7	\$11,025.00
Jala Amsellem	\$750	75.5	\$56,625.00
Todd Vollucci, paralegal	\$225	5.7	\$1,282.50
Totals		137.80	\$100,357.50

(Decl. of Kevin Lipeles ISO Final ¶49.)

Counsel's percentage-based fee request is higher than the unadjusted lodestar, which would require the application of an approximate 2x multiplier to reach the requested fees. Notice of the fee request was provided to class members in the notice packet and no one objected. (Lee Decl. ¶11, Exhibit A thereto.)

Here, a fee award of \$191,666.66 (i.e., 33 1/3% of the settlement amount), represents a reasonable percentage of the total funds paid by Defendant.

As for costs, Class Counsel is requesting \$7,434.11. This is less than the \$8,500 cap provided in the Settlement Agreement, for which Class Members were given notice and did not object. (Lee Decl. ¶11, Exhibit A thereto.) Costs include, but are not limited to: Mediation (\$4,100), Filing Fee (\$1,638.45), and Case Anywhere (\$918). (Lipeles Decl. ISO Final ¶51, Exhibit A.) The costs appear to be reasonable in amount and reasonably necessary to this litigation.

Based on the above, the court awards \$191,666.66 for attorneys' fees and \$7,434.11 for attorneys' costs.

D. Claims Administration Costs

The settlement administrator, Phoenix Settlement Administrators, requests administration costs of \$21,500 (Lee Decl. ¶20). The Settlement Agreement provides for costs up to \$7,000 (¶7.1), and is the amount disclosed to Class Members in the Notice to which no one objected. (Lee Decl. ¶11, Exhibit A thereto).

For the increased costs related to the publication notice that were contemplated after the initial preliminary approval of the settlement, the Amended Order granting preliminary approval indicated that Defendant agreed to pay the administrator up to \$13,000 for those additional costs. See Order Granting Amended Preliminary Approval of February 15, 2023 at pp. 2-3.

Based on the above, the awards costs in the amount of \$7,000 out of the Settlement Amount, with any remaining cost balance to be paid by Defendant up to the amount agreed upon by the parties.

E. Incentive Award to Class Representative

Plaintiff Flor De Maria Marroquin seeks an enhancement award of \$7,500 for her contributions to the action. (Declaration of Flor De Maria Marroquin ISO Final ¶8.)

In connection with the final fairness hearing, named Plaintiffs must submit declarations attesting to why they should be entitled to an enhancement award in the proposed amount. The named Plaintiffs must explain why they "should be compensated for the expense or risk he has incurred in conferring a benefit on other members of the class." (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars

with "nothing more than pro forma claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit" (Id. at 806-807, italics and ellipsis in original.)

Plaintiff represents that her contributions to this action include: participating in interviews and phone conferences, searching for and producing documents, reviewing pleadings, documents and data, communicating about the case with class members, and attending via phone the all-day mediation. (Marroquin Decl. ISO Final ¶6.) She does not provide an estimate of her total time spent on the case.

Based on the above, the court grants the enhancement award in the reduced amount of \$5,000 to Plaintiff Flor De Maria Marroquin.

IV. CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Final Approval of class action settlement is GRANTED as the settlement is fair, adequate, and reasonable.

2) The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$575,000.² [The Settlement is based on 180 Settlement Class Members during the Class Period. Should the number of such Settlement Class Members or the number of shifts as of the end of the Class Period exceed such stated number by more than 10% Plaintiff will have the right to abrogate this agreement, and the parties shall return to status quo ante. (¶4.)]

B. The Net Settlement Amount is the GSA minus the following:

² There is a partial claims process for class members for whom Defendant is missing contact information and tax information, as described in the publication notice issued by the administrator.

\$191,666.66 for attorney fees to Class Counsel,
Lipeles Law Group, APC;
\$7,434.11 for attorney costs to Class Counsel;
\$5,000 enhancement award to the class representative,
Flor De Maria Marroquin;
\$7,000 for settlement administration costs to Phoenix
Settlement Administrators (any remaining cost balance to be paid
by Defendant up to the amount agreed upon by the parties);
\$18,750 (75% of \$25,000 PAGA penalty) to the LWDA.

C. Defendant will be separately responsible for its
portion of payroll taxes in addition to the GSA.

D. Plaintiffs release of Defendants from claims described
herein.

3) By September 22, 2023, Class Counsel must give notice
to the class members pursuant to California Rules of Court, rule
3.771(b) and to the LWDA, if applicable, pursuant to Labor Code
§2699 (1) (3).

4) By August 22, 2024, Class Counsel must file a Final
Report re: Distribution of the settlement funds.

5) Court sets Non-Appearance Case Review for August 29,
2024, 8:30 AM, Department 9.

CLERK TO GIVE NOTICE TO MOVING PARTY. THE MOVING PARTY TO GIVE
NOTICE TO ALL OTHER PARTIES.

IT IS SO ORDERED.

DATED: August 22, 2023



Yvette M. Palazuelos

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT
Yvette M. Palazuelos / Judge