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Superior Court of California
County of Los Angeles

JUL 21 2016

Sherri R. Carter, Executive Officer/Clerk
By: Nancy Navarro, Deputy

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

BRIAN BEHAIEN, et al.,

Plaintiffs,

v.

PIZZA HUT, INC.,

Defendant.

Case No.: BC384563

ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

Date: July 21, 2016

Time: 11:00 a.m.

Dept.: 307

I. BACKGROUND

This is a wage and hour class action. On January 29, 2018, Plaintiff Brian Behaein filed his class action complaint against Defendant Pizza Hut, Inc. (Defendant or PHI), alleging claims for Failure to Provide Required Meal Periods, Failure to Provide Required Rest Periods, Failure to Pay Overtime Compensation, Failure to Pay Minimum Wages, Failure to Maintain Required Records, and Unfair Business Practices. An earlier complaint, BC374942, was filed by Boris Gnezdilov against Pizza Hut; after that case was sent to arbitration, Gnezdilov intervened in this action and dismissed his action.

1 The Fourth Amended Complaint, filed on January 25, 2011, alleges additional causes of
2 action, including Failure to Pay All Wages Due to Discharged or Quitting Employees, Failure to
3 Maintain Required Records, Failure to Indemnify Employees for All Necessary Expenditures,
4 Failure to Pay Reporting Time Wages, and for civil penalties under PAGA. The proposed Fifth
5 Amended Complaint (Exhibit B to the Supplemental Declaration of Eileen B. Goldsmith) adds a
6 cause of action for FLSA violations.

7 On February 5, 2013, Judge Anthony Mohr granted Plaintiffs' motion for class
8 certification as to the meal and rest break and reporting time causes of action, but denied as
9 certification as to the subclass of delivery drivers regarding per-order reimbursements for
10 business-related vehicle expenses. On July 17, 2015, Judge Amy Hogue granted class
11 certification of the driver subclass's vehicle expense reimbursement claim. Defendant petitioned
12 for a writ of mandate seeking reversal of that order; this action settled before the Court of Appeal
13 took any action.

14
15 Following multiple rounds of mediation and negotiations, the parties entered into the
16 *Joint Stipulation of Settlement* (Settlement Agreement) and sought preliminary approval. In
17 advance of the May 10, 2016 hearing, the Court issued a Checklist of concerns with the Motion
18 for Preliminary Approval. Hearing on the motion was continued to today's date. The Court has
19 received and read the further briefing. The supplemental papers include a *Joint Stipulation to*
20 *Amend Settlement Agreement* (Amendment). (Exhibit 1 to Supplemental Goldsmith Declaration.)
21 The Amendment is signed by the attorneys but not the parties. The Court can only retain
22 jurisdiction to enforce agreements signed by parties, and therefore granting of this motion is
23 conditioned upon the filing of a copy signed by the parties. Additionally, there continue to be
24 issues with the release which must be resolved before approval is granted. See below.
25

1 **II. DISCUSSION**

2 **A. SETTLEMENT CLASS DEFINITION**

3 The proposed settlement class is defined as, “all former employees of PHI who were
4 actively employed at a restaurant in California owned or operated by PHI at any time between
5 May 26, 2006 and December 13, 2010, and who worked at any time during that period in any
6 Class Position.” (§V, ¶1.5.) “Class Position” means any of the following classifications:
7 delivery drivers, production employees (cooks), customer service representatives, hosts/servers,
8 and any other non-exempt, non-managerial positions. (§V, ¶1.10.)
9

10 The Driver Subclass means class members who worked as delivery drivers at any time
11 from June 6, 2006 through and including December 13, 2010. (§V, ¶¶1.10, 1.17.)

12 The parties stipulate and agree to the conditional certification of the class (to the extent it
13 is not certified) for purposes of this settlement only. (Settlement Agreement, §I, at 1:27-2:3.)

14 The class excludes any employee of Defendant for any time that the employee was
15 employed by a restaurant in California owned or operated by a Pizza Hut franchisee. (§V, ¶1.5.)

16 **B. TERMS OF SETTLEMENT AGREEMENT**

17 A copy of the fully executed Settlement Agreement is attached to the Supplemental
18 Declaration of Declaration of Eileen B. Goldsmith as Exhibit 1. A copy of the Amendment
19 (signed by counsel) is attached to the Supplemental Goldsmith Declaration.
20

21 The essential terms of the agreement are as follows:

- 22 • The Gross Settlement Amount is \$6,000,000, non-reversionary. (§V, ¶¶1.27, 2.1, 8.14.)¹

23
24
25 ¹ “The \$6 million settlement amount is fully non-reversionary, except that Defendant will receive back the estimated settlement shares of any class member who validly opts out of the settlement and does not rescind the opt-out.” (Motion for Preliminary Approval at p.8; see Settlement Agreement, ¶8.3(c).)

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- The Net Settlement Fund (\$3,357,000) is the Maximum Settlement Amount minus the following:
 - Up to \$2,000,000 for attorney fees (1/3 of the gross settlement amount) (¶5.1);
 - Up to \$450,000 for attorney costs (¶5.1);
 - Up to \$48,000 for enhancement awards (\$12,000 to each of the 4 named Plaintiffs) (¶¶1.36, 3.1);
 - Up to \$130,000 for settlement administration costs (Goldsmith Decl., ¶10, not the \$150,000 cap provided for in ¶6.1);
 - \$15,000 for PAGA penalties (75% share of PAGA penalty) payable to the LWDA (¶4.1);
 - Employer’s portion of payroll taxes will be paid from the Gross Settlement Amount (¶1.27).
 - For tax purposes, 15% of the payments shall be allocated as wages; 42.5% as penalties; and 42.5% as interest. (¶8.13(b).)
 - This settlement does not involve a claims form process. Instead, class members will automatically receive a settlement award by virtue of not opting out. (Ex. B, Notice.)
 - There may be potentially two distributions:
 - The settlement award to each class member will be based on the number of eligible workweeks worked. (¶8.2.) All participating class members shall be entitled to a minimum payment of \$10. (¶8.3(b).)
 - No settlement check shall be issued to any class member whose notice is returned as undeliverable with no valid address ascertained. For such class members, the value of their total estimated individual settlement payment shall be included in

1 the Final Settlement Proceeds to be allocated to participating class members.

2 (¶8.3(a).)

- 3 ○ The settlement administrator will calculate the final individual settlement
4 payment and refund to Defendants the estimated individual settlement payments
5 for class members who opted out. (¶8.3(c).)
- 6 ○ Checks will be valid for 120 days from the date of issuance. Any uncashed funds
7 will be voided and held in the Qualified Settlement Fund (“QSF”) set up by the
8 settlement administrator. (¶8.5.)
- 9 ○ The sum of the uncashed settlement payments from the initial distribution will be
10 distributed in a second distribution on a pro rata basis to participating class
11 members who timely cashed their first checks. (¶8.8.) Class members who
12 would receive less than \$5 in the second distribution will not be eligible for a
13 payment in the second distribution, but their portion will be allocated to
14 remaining class members. (¶8.8(a).)
- 15 ▪ The check-cashing deadline for the second distribution is 90 days.
16 Uncashed checks will be void and be returned to the QSF. (¶8.10.)
- 17 ○ The settlement administrator will hold in the QSF \$10,000 of unclaimed funds
18 from the initial distribution to provide late payments to participating class
19 members to timely cash their initial payments but who are determined to be
20 legitimate payees regarding disputes. (¶8.8(b).)
- 21 ○ If the amount of unclaimed funds from the initial distribution does not exceed
22 \$75,000, there shall be no second distribution and all remaining funds will be held
23 in the QSF for 6 months and then distributed to a cy pres recipient. (¶8.8(c).)
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- 1 • The designated cy pres recipient is Legal Services for Children. (§8.11.) **In response to**
2 **the Checklist, counsel for Plaintiff submitted a declaration stating that no Class**
3 **Counsel has any interest or involvement in the proposed cy pres recipient. Defense**
4 **counsel filed a similar declaration on behalf of Defendant and all defense counsel.**
- 5 • The claims administrator will be KCC LLC. (§1.38.)
- 6 • The Named Plaintiffs and participating class members will release certain claims against
7 Defendant. (See further discussion below)

8 **C. SETTLEMENT STANDARDS AND PROCEDURE**

9 California Rules of Court, rule 3.769(a) provides: “A settlement or compromise of an
10 entire class action, or of a cause of action in a class action, or as to a party, requires the approval
11 of the court after hearing.” “Any party to a settlement agreement may serve and file a written
12 notice of motion for preliminary approval of the settlement. The settlement agreement and
13 proposed notice to class members must be filed with the motion, and the proposed order must be
14 lodged with the motion.” See CRC rule 3.769(c).

15
16 “In a class action lawsuit, the court undertakes the responsibility to assess fairness in
17 order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
18 action. The purpose of the requirement [of court review] is the protection of those class
19 members, including the named plaintiffs, whose rights may not have been given due regard by
20 the negotiating parties.” See Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of
21 America (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); see also Wershba
22 v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 245 (Court needs to “scrutinize the
23 proposed settlement agreement to the extent necessary to reach a reasoned judgment that the
24 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
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1 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
2 concerned”) (internal quotation marks omitted).

3 “The burden is on the proponent of the settlement to show that it is fair and reasonable.
4 However ‘a presumption of fairness exists where: (1) the settlement is reached through arm's-
5 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court
6 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
7 objectors is small.” See Wershba at 245 (citing Dunk v. Ford Motor Co. (1996) 48
8 Cal.App.4th 1794, 1802. Notwithstanding an initial presumption of fairness, “the court should
9 not give rubber-stamp approval.” See Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th
10 116, 130. “Rather, to protect the interests of absent class members, the court must
11 independently and objectively analyze the evidence and circumstances before it in order to
12 determine whether the settlement is in the best interests of those whose claims will be
13 extinguished.” *Id.* In that determination, the court should consider factors such as “the strength
14 of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk
15 of maintaining class action status through trial, the amount offered in settlement, the extent of
16 discovery completed and stage of the proceedings, the experience and views of counsel, the
17 presence of a governmental participant, and the reaction of the class members to the proposed
18 settlement.” *Id.* at 128. “Th[is] list of factors is not exclusive and the court is free to engage in
19 a balancing and weighing of factors depending on the circumstances of each case.” Wershba at
20 245.
21

22 “A settlement need not obtain 100 percent of the damages sought in order to be fair and
23 reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if ‘the
24 relief afforded by the proposed settlement is substantially narrower than it would be if the suits
25

1 were to be successfully litigated,' this is no bar to a class settlement because 'the public interest
2 may indeed be served by a voluntary settlement in which each side gives ground in the interest
3 of avoiding litigation.'" *Id.* at 250.

4 **D. ANALYSIS OF SETTLEMENT AGREEMENT**

5 **1. Does a presumption of fairness exist?**

- 6 a. Was the settlement reached through arm's-length bargaining? Yes. The parties
7 engaged in mediation multiple times in order to settle the action. (Goldsmith
8 Decl., ¶5.) After multiple attempts in 2009 and 2010, the parties participated in
9 another mediation on December 15, 2015 with mediator Hunter R. Hughes III.
10 (*Id.*, ¶¶5-7.) Class counsel states that the mediation was non-collusive and
11 conducted at arms' length and that the parties reached an agreement after
12 accepting the mediator's proposal. (*Id.*, ¶7.) The parties subsequently negotiated
13 and entered into the Settlement Agreement. (*Id.*)
- 14 b. Were investigation and discovery sufficient to allow counsel and the court to act
15 intelligently? Yes. Class counsel states that the parties engaged in extensive
16 discovery and investigation of their claims and Defendant's defenses. (*Id.*, ¶11.)
17 Plaintiffs took the deposition of 4 PMQs for Defendant, and Defendant deposed
18 the 4 named Plaintiffs and another 9 former rank-and-file employees and low-
19 level managers. (*Id.*) The parties also exchanged thousands of pages of
20 documents and propounded and responded to extensive interrogatories. (*Id.*)
21 Class counsel were also able to use discovery and depositions from other related
22 cases. (*Id.*)
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1 c. Is counsel experienced in similar litigation? Yes. Class counsel states that he is
2 experienced in class action litigation, including wage and hour class actions. (*Id.*,
3 ¶15.)

4 d. What percentage of the class has objected? This cannot be determined until the
5 fairness hearing. See Weil & Brown, Cal. Practice Guide: Civil Procedure
6 Before Trial (The Rutter Group 2014) ¶ 14:139.18, (“Should the court receive
7 objections to the proposed settlement, it will consider and either sustain or
8 overrule them at the fairness hearing.”).

9 CONCLUSION: The settlement is entitled to a presumption of fairness.

10 **2. Is the settlement fair, adequate, and reasonable?**

11 a. Strength of Plaintiffs’ case. “The most important factor is the strength of the case
12 for plaintiffs on the merits, balanced against the amount offered in settlement.”
13 See Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.

14 Plaintiffs believe that there is a substantial risk of continuing litigation
15 and delaying payment to the class. (Motion for Preliminary Approval at p.11.)
16 Although Plaintiffs estimated Defendant’s overall exposure to be in the tens of
17 millions of dollars based on the analysis of Plaintiff’s expert witness, Paul Regan,
18 of Defendant’s historical delivery data and the analysis of Plaintiff’s expert,
19 Aaron Wolfson, of a sample of payroll and time records. (*Id.*) The claims cover
20 the period from 2006 to 2010 and thus Plaintiffs believe class members are
21 receiving substantial benefits from the settlement now rather than waiting several
22 more years to receive compensation, if any, after trial and appeals. (*Id.*)
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1 The break and reporting time claims were certified for certain issues only
2 by Judge Mohr in 2013, and thus Plaintiffs recognized that there would still be
3 multiple individual claims. (*Id.* at pp.11-12.) Furthermore, for the Drivers
4 Subclass' vehicle expense reimbursement claim, though the class was certified,
5 there were still substantial legal and factual challenges and Defendant filed a
6 petition for writ of mandate to overturn the classification order. (*Id.* at p.12.)
7 Regan's damages model for the subclass estimated Defendant's liability at
8 approximately \$17 million, but Defendant presented 2 experts to challenge
9 Regan's analysis. (*Id.*) For the 8 years of this case, the parties appear to have
10 vigorously contested the merits of Plaintiffs' claims.

- 11 b. Risk, expense, complexity and likely duration of further litigation. Given the
12 nature of the class claims, the case is likely to be expensive and lengthy to try.
13 Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong
14 the litigation as well as any recovery by the class members.
- 15 c. Risk of maintaining class action status through trial. Even if a class is certified,
16 there is always a risk of decertification. See Weinstat v. Dentsply Intern., Inc.
17 (2010) 180 Cal.App.4th 1213, 1226 ("Our Supreme Court has recognized that
18 trial courts should retain some flexibility in conducting class actions, which
19 means, under suitable circumstances, entertaining successive motions on
20 certification if the court subsequently discovers that the propriety of a class action
21 is not appropriate.").
- 22 d. Amount offered in settlement. As indicated above, the Gross Settlement Amount
23 is \$600,000,000. Assuming full participation, the average settlement share for
24 is \$600,000,000. Assuming full participation, the average settlement share for
25

1 members of the Driver Subclass (before payroll tax withholding) is \$303, and
2 other class members will receive on average \$86. (Goldsmith Decl., ¶9.)

3 e. Extent of discovery completed and stage of the proceedings. As discussed above,
4 at the time of the settlement, Plaintiffs conducted extensive discovery.

5 f. Experience and views of counsel. The settlement was negotiated and endorsed
6 by class counsel who, as indicated above, is experienced in class action litigation,
7 including wage and hour cases.

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

9 h. Reaction of the class members to the proposed settlement. The class members'
10 reactions will not be known until they receive notice and are afforded an
11 opportunity to opt out or object. This factor becomes relevant during the fairness
12 hearing.

13
14 CONCLUSION: The settlement can be preliminarily deemed “fair, adequate, and
15 reasonable.”

16 **3. Scope of release**

17 All class members shall be deemed to have released the PHI Releasees from all Released
18 Claims through the Preliminary Approval Date. (Settlement Agreement, ¶13.1.) “Released
19 Claims” shall mean any and all causes of action arising out of the “facts alleged in the Fourth
20 and Fifth Amended Complaints, whether known or unknown, and whether anticipated or
21 unanticipated, arising under state laws or regulations or local rule or ordinance or federal law,
22 including the FLSA minimum wage claims to be alleged in the Fifth Amended Complaint, that
23 accrued or accrue through the Preliminary Approval Date, including without limitation the
24 causes of action asserted in the Fourth Amended Complaint for violations of California Labor
25

1 Code §§ 200-203, 226, 226.7, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 2698-2699; Cal.
2 Bus. And Prof. Code § 17200; Industrial Welfare Commission Wage Order No. 5; and the
3 California Labor Code Private Attorneys General Act.” (*Id.*, ¶1.35.)

4 With respect to the Released Claims, the class members will be deemed to have released
5 to the fullest extent any rights and benefits under Civil Code §1542. (*Id.*, ¶13.2.)

6 The Court flagged both two issues: the problem of releasing FLSA claims as to
7 employees who do not affirmatively opt-in, and the CC§1542 waiver as to putative class
8 members. As to the first, the parties attempted to resolve the issue by amending the agreement
9 to add language to the effect that cashing of checks constitutes opting in. (Amendment, ¶6.)

10 This only partially resolves the problem, however, because ¶1.35 still includes FLSA claims in
11 the definition of “Released Claims,” which applies to all class members who do not opt out.

12 (¶13.1) Either remove the words “federal” and “FLSA minimum wage claims to be alleged in
13 the Fifth Amended Complaint” from the definition of “Released Claims,” or amend ¶1.35 to
14 specifically state that such claims are only released as to class members who cash settlement
15 checks.
16

17 As for the waiver of CC§1542, the parties argue that such waiver is no broader than the
18 release of “Released Claims.” (Supplemental Brief at 4:17-18.) If that is true then such language
19 is superfluous. To the extent it is not, it could later be interpreted with a broader meaning than is
20 now expressed. Because all putative class members are former employees who may have other
21 claims against Defendant that should not be released through this litigation, and because of the
22 Court’s fiduciary duty to them, the agreement will not be approved unless §13.2 is deleted, or
23 amended so that it only applies to Class Representatives.
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1 “Class Representatives’ Released Claims” includes a release of claims of whatever
2 nature and is a general release. (*Id.*, ¶1.12.) Class Representatives will also release the
3 Released Claims, and any claims under any provision of the FLSA, Labor Code, or IWC Wage
4 Orders. (*Id.*)

5 **4. May conditional class certification be granted?**

6 a. Standards

7 A detailed analysis of the elements required for class certification is not required, but it is
8 advisable to review each element when a class is being conditionally certified. Amchem
9 Products, Inc. v. Winsor (1997) 521 U.S. 591, 620, 622-627. The trial court can appropriately
10 utilize a different standard to determine the propriety of a settlement class as opposed to a
11 litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
12 cases. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1807, FN 19. Finally, the Court is
13 under no “ironclad requirement” to conduct an evidentiary hearing to consider whether the
14 prerequisites for class certification have been satisfied. Wershba at 240.

15 b. Analysis

- 16
- 17 i. Numerosity. There are approximately 18,762 class members, of whom
18 approximately 700 are delivery drivers. (Goldsmith Decl., ¶8.) Thus,
19 numerosity has been sufficiently established. See Rose v. City of
20 Hayward (1981) 126 Cal.App.3d 926, 934 (stating that “[n]o set number
21 is required as a matter of law for the maintenance of a class action” and
22 citing examples wherein classes of as little as 10 [Bowles v. Superior
23 Court (1955) 44 Cal.2d 574] and 28 [Hebbard v. Colgrove (1972) 28
24 Cal.App.3d 1017] were upheld).
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- ii. Ascertainability. The class is defined above. The class definition is “precise, objective and presently ascertainable.” See Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919. Class members are identifiable from Defendant’s records. (Settlement Agreement, ¶7.2.)
 - iii. Community of interest. “The community of interest requirement involves three factors: ‘(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.’” Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. First, the class members share common questions of law and fact regarding Defendant’s wage and hour policies and practices. Second, the named Plaintiffs’ claims are typical of the class in that they were employees of Defendant during the relevant time period and Defendant’s policies were uniformly applied to other class members. Plaintiffs Behhaein and Gnezdilov have claims typical of the Driver Subclass, while Plaintiffs Clemente and Cruz have claims typical of the non-driver class. Lastly, the named Plaintiffs can adequately represent the class because his interests in this action appear to be coextensive with the interests of the class. (See Proposed Fifth Amended Complaint, ¶11.C-D.)
 - iv. Adequacy of class counsel. As indicated above, class counsel has shown experience in class action litigation.

1 v. Superiority. Given the relatively small size of the individual claims, a
2 class action appears to be superior to separate actions by the class
3 members.

4 CONCLUSION: The class may be conditionally certified since the prerequisites of class
5 certification have been satisfied.

6 **5. Is the notice proper?**

7 a. Method of class notice.

8 Within 10 calendar days of the preliminary approval date, Defendant will provide a class
9 list to the settlement administrator. (Settlement Agreement, ¶7.2.) For the Driver Subclass,
10 Defendant will also provide drivers' license numbers where available. (*Id.*) Within 10 calendar
11 days of receiving the class list, the settlement administrator shall mail the class notice (in both
12 English and Spanish) to the class members via first class U.S. Mail. (*Id.*, ¶7.3.) Prior to
13 mailing, the settlement administrator will update class members' addresses provided by
14 Defendant through the NCOA system and shall further skip trace all addresses using social
15 security numbers. (*Id.*, ¶7.3.) For notices returned with a forwarding address, the settlement
16 administrator will re-mail the notice. (*Id.*, ¶7.5.) If no forwarding address is provided, the
17 settlement administrator will perform a standard skip-trace to ascertain an updated address and
18 perform a re-mailing up to 3 alternative addresses. (*Id.*, ¶7.6.)

19
20 The notice of settlement will also include a website address for a website created by the
21 settlement administrator. (*Id.*, ¶7.7.) The proposed method of class notice appears to provide
22 the best possible means for giving actual notice to the putative class members.
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1 The postmark deadline to opt-out or object shall be 30 calendar days after the notice
2 packet is initially mailed to the class members by the settlement administrator. (*Id.*, ¶¶7.8 [opt-
3 out], 7.9 [object].)

4 b. Content of class notice.

5 The amended proposed Class Notices are attached to the Supplemental Goldsmith
6 Declaration as Exhibits A-1 and A-2. The Checklist inquired about the possibility of including
7 an estimate of recovery in the class notice; the Supplemental Brief essentially answers this
8 question in the negative, based upon the many contingencies that will affect the size of
9 settlement payments. Accordingly, the Court accepts A-1 as the form of notice to be sent to
10 class members. It is acceptable as it includes information such as: a summary of the litigation;
11 the nature of the settlement; the terms of the settlement agreement; the maximum deductions to
12 be made from the gross settlement amount (i.e., attorney fees and costs, class representative
13 enhancement awards, claims administration costs, and PAGA payments to LWDA); the
14 procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the
15 consequences of participating in, opting out of, or objecting to, the settlement; the consequences
16 of doing nothing; and the date, time, and place of the final approval hearing. It also informs
17 class members that notice of the final judgment will be posted on the settlement administrator's
18 website. However, please modify to make the release language match any Amendment, and
19 replace the words, "Judge Hogue" with "Dept. 307."

21 c. Cost of class notice.

22 As indicated above, settlement administration costs are estimated not to exceed \$130,000.
23 Prior to the time of the final fairness hearing, the claims administrator must submit a declaration
24 attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for
25 approval by the Court.

1 **6. Attorney fees and costs**

2 CRC rule 3.769(b) states: “Any agreement, express or implied, that has been entered into
3 with respect to the payment of attorney fees or the submission of an application for the approval
4 of attorney fees must be set forth in full in any application for approval of the dismissal or
5 settlement of an action that has been certified as a class action.”

6 Ultimately, the award of attorney fees is made by the court at the fairness hearing, using
7 the lodestar method with a multiplier, if appropriate. PLCM Group, Inc. v. Drexler (2000) 22
8 Cal.4th 1084, 1095-1096; Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615,
9 625-626; Ketchum III v. Moses (2000) 24 Cal.4th 1122, 1132-1136. Despite any agreement by
10 the parties to the contrary, “the court ha[s] an independent right and responsibility to review the
11 attorney fee provision of the settlement agreement and award only so much as it determined
12 reasonable.” Garabedian v. Los Angeles Cellular Telephone Company (2004) 118 Cal.App.4th
13 123, 128.

14 The question of class counsel’s entitlement to \$2,000,000 in attorney fees will be
15 addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.
16 Class counsel must provide the court with sufficient information and timekeeping records so
17 that it can properly apply the lodestar method, and must indicate what multiplier (if applicable)
18 is being sought.

19 Class counsel includes Altshuler Berzon LLP, Righetti Glugoski, and Rastegar &
20 Matern, APC. (Settlement Agreement, ¶1.6.) **Another Checklist item was disclosure of any
21 fee-splitting agreement. Class Counsel describes the fee-splitting agreement but does not
22 state that the clients have provided their written consent to it; such evidence must be
23 presented at the time of final approval. (Rule of Professional Conduct 2-200.)**
24
25

1 **7. Enhancement Award to Class Representatives**

2 The Settlement Agreement provides for enhancement awards of up to \$48,000 for the
3 named Plaintiffs, or \$12,000 to each of the four class representatives. **This was also a**
4 **Checklist item, and it was responded to. The Court will decide this issue at the time of final**
5 **approval.**

6 In connection with the final fairness hearing, the named Plaintiffs must submit
7 declarations attesting to why they should be entitled to an enhancement award in the proposed
8 amount. The named Plaintiffs must explain why they “should be compensated for the expense
9 or risk he has incurred in conferring a benefit on other members of the class.” See Clark v.
10 American Residential Services LLC (2009) 175 Cal.App.4th 785, 806. Trial courts should not
11 sanction enhancement awards of thousands of dollars with “nothing more than *pro forma* claims
12 as to ‘countless’ hours expended, ‘potential stigma’ and ‘potential risk.’ Significantly more
13 specificity, in the form of quantification of time and effort expended on the litigation, and in the
14 form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is
15 required in order for the trial court to conclude that an enhancement was ‘necessary to induce
16 [the named plaintiff] to participate in the suit’” Id. at 806-807 (italics and ellipsis in
17 original).

18
19 **III. CONCLUSION AND ORDER**

20 **A. TENTATIVE RULING**

21 Contingent upon the following, the tentative below will issue: (1) submission of an
22 Amendment addressing the two problems with the Released Claims highlighted above; (2)
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1 submission of a copy of the Amendment and/or any subsequent amendment signed by the
2 parties; and (3) submission of a modified Class Notice containing the changes outlined above.

- 3 (1) Grant approval to file the Fifth Amended Complaint, copy to be provided to the clerk
4 for filing this date:
- 5 (2) Grant preliminary approval of the settlement as fair, adequate, and reasonable;
- 6 (3) Grant conditional class certification;
- 7 (4) Appoint Brian Behaien, Boris Gnezdilov, Raquel Cruz, and Bersayna Clemente as
8 class representatives;
- 9 (5) Appoint Altshuler Berzon LLP, Righetti Glugoski, and Rastegar & Matern, APC as
10 class counsel;
- 11 (6) Appoint KCC LLC as claims administrator;
- 12 (7) Approve the proposed notice plan; and
- 13 (8) Approve the proposed schedule of settlement proceedings.

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15 **B. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

- 16 • Preliminary approval hearing: July 21, 2016
- 17 • Deadline for Defendant to provide class list to settlement administrator: July 31, 2016
18 (10 calendar days after preliminary approval²)
- 19 • Deadline for settlement administrator to mail notice packets: August 10, 2016 (10
20 calendar days after receiving the class list³)
- 21 • Deadline for class members to opt out or object: September 30, 2016 (30 calendar days
22 after mailing of notice to class members⁴)
- 23

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25 ² See Settlement Agreement, ¶7.2.

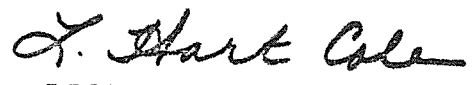
³ See Settlement Agreement, ¶7.3.

⁴ See Settlement Agreement, ¶¶7.8, 7.9.)

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- Deadline for class counsel to file motion for final approval: October 18, 2016 (16 court days prior to final fairness hearing)
- Final fairness hearing: November 10, 2016 (30 calendar days from the Response Deadline) at 10:00 am

Dated: **JUL 21 2016**


~~LISA HART COLE~~
LISA HART COLE
Judge of the Superior Court