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FILED
ALAMEDA COUNTY

MAY 21 2019

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CARLOS GALVEZ, et al,
Plaintiffs/Petitioners,

v.

RAY TECH PROFESSIONAL PAINTING, et
al,
Defendants/Respondents.

No. RG14-737391

ORDER GRANTING MOTION OF
PLAINTIFF FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

Date: 5/10/19
Time: 10:00 a.m.
Dept.: 21

The motion of plaintiff for preliminary approval of class action settlement came on for hearing on 5/10/19, in Department 21 of this Court, the Honorable Winifred Y. Smith presiding.

After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of plaintiff for preliminary approval of class action settlement is GRANTED.

NOTICE TO MEMBERS OF THE PUTATIVE CLASS

The court has some concerns that the settlement might not adequately compensate the members of the class for the release of their claims. Therefore, the court is considering awarding counsel less than their requested fees of \$43,750 and awarding the named plaintiff less than the

1 requested \$7,500. Any decrease in the fees and service award would increase the net settlement
2 to the class.

3 This is an order for preliminary approval, not an order for final approval. The court will
4 consider the objections and opt-outs of the members of the class before final approval, if any, of
5 the proposed settlement.

6 Any member of the class may (1) object to the proposed settlement as a whole on the
7 grounds that it is not in the interest of the class as a whole or (2) opt-out of the proposed
8 settlement and pursue his or her individual claims or (3) do nothing and remain in the class.
9

10 11 THE COURT'S ANALYSIS OF THE PROPOSED SETTLEMENT

12 The complaint filed 8/19/14 alleges claims for failure to pay overtime, work off the clock,
13 wage statements, wage due at termination, meal and rest breaks, and wages in a timely manner,
14 and similar claims.

15 On 7/22/16, the court denied the motion of plaintiff for class certification. The order
16 states that at that time there were 170 members of the putative class.

17 In the 5/24/17 Joint CMC statement, defendant suggest mediation. On 6/1/17, 7/19/17,
18 and 1/24/18 the parties attended unsuccessful settlement conferences with the court.
19

20 On 4/26/18, the case settled at a settlement conference with Judge Zika. As of 7/12/18,
21 there were 225 members in the class. (Agreement, para IX.E, page 23.) Four months later, on
22 8/16/18, plaintiff reserved a hearing date of 10/26/18 for a motion for preliminary approval.
23

24 On 9/X/18, the parties agreed to a long form settlement agreement. (Kim Dec., para 15.)
25 Counsel did not obtain plaintiff's signature until 12/X/18. Counsel then found defects in the long
26

1 form settlement agreement and the amended agreement was signed on 1/10/19. (Williams Dec.,
2 Exh A.)

3 Four months later, on 4/12/19, plaintiff filed the motion for preliminary approval of class
4 settlement. The agreement defines the class as defendants' employees in California from 8/19/10
5 to the date of the hearing. (Para I.G.) The motion states there are approximately 225 persons in
6 the class.
7

8 The case preliminarily settled for a total of \$125,000. The settlement agreement states
9 there will be attorneys' fees of up to \$43,750 (35%), attorneys' cost of \$5,000, a service award of
10 \$7,500 for the class representative, settlement administration costs of \$10,000, and a net PAGA
11 payment to the LDWA of \$7,500. After these expenses of \$73,750, the class would get a net
12 settlement of \$51,250. This is an average of \$225 per class member.
13

14 The settlement was mediated with the assistance of Judge Zika. The court gives
15 "considerable weight to the competency and integrity of counsel and the involvement of a neutral
16 mediator in [concluding] that [the] settlement agreement represents an arm's length transaction
17 entered without self-dealing or other potential misconduct." (*Kullar v. Foot Locker Retail, Inc.*
18 (2008) 168 Cal.App.4th 116, 129.) (See also *In re Sutter Health Uninsured Pricing Cases* (2009)
19 171 Cal.App.4th 495, 504.)

20 The proposed class notice form and procedure are adequate but the notice does not
21 address the concerns identified in this order. The court ORDERS that the notice must also
22 include a copy of this order.
23

24 The motion does not makes an adequate analysis of the class claims as required by *Kullar*
25 *v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. A settlement of the class claims must
26

1 reflect the value of the class claims because the members of the class would be settling their
2 claims.

3 The motion instead makes an analysis of the strength of the PAGA claims on behalf of
4 the Labor Workforce Development Agency ("LWDA"). (Motion at 14-15.) A settlement of the
5 LWDA's claims would not release the claims of the individual members of the class. If the
6 parties want to settle only the PAGA claims on behalf of the LWDA, then they can settle those
7 claims and seek to dismiss the class claims.
8

9 Assuming the settlement is fair, adequate, and reasonable, the scope of the release at para
10 I.X is appropriate. The release of claims by the class is limited by the "factual predicate rule."
11 (*Hesse v. Sprint Corp.* (9th Cir. 2010) 598 F.3d 581, 590.)

12 The Court notes and approves of the plan to distribute the settlement funds with no claims
13 process.

14 The unclaimed funds will be distributed to the DIR Unclaimed Wage Fund. This is
15 consistent with CCP 384 as recently amended.
16

17 The Court will not approve the amount of attorneys' fees and costs until final approval
18 hearing. The Court cannot award attorneys' fees without reviewing information about counsel's
19 hourly rate and the time spent on the case. This is the law even if the parties have agreed that
20 Defendants will not oppose the motion for fees. (*Robbins v. Alibrandi* (2005) 127 Cal. App. 4th
21 438, 450-451.)
22

23 The court notes that counsel seeks fees of \$43,750, which is 35% of the total fund. When
24 using the percentage of recovery approach, the court's benchmark for fees is 30% of a total fund.
25 *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495, approved an award of 33% and
26 noted that the federal courts have a benchmark of 25%. (See also *Schulz v. Jeppesen Sanderson*,

1 *Inc.* (2018) 27 Cal.App.5th 1167, 1175; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545,
2 557 fn 13; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 fn 11.)

3 On the facts of this case, the court is inclined to award fees of less than the requested
4 amount. The court is generally concerned that counsel undervalued the case by considering only
5 the value of the LWDA's claims and not the claims of the members of the class. (Motion at 14-
6 15.)

7
8 At the hearing on 5/10/19 counsel explained that the value of the class settlement
9 reflected the denial of class certification. Although it is true that a modest recovery in settlement
10 can be better than no recovery at all, a modest recovery in a class action settlement still results in
11 a release of the substantive claims by all the members of the class.

12 The court is specifically concerned that counsel settled the case on 4/26/18 but did not file
13 the motion for approval of the settlement until 4/12/19. The one year delay decreases the value
14 of the settlement for each member of the class because the class has grown in number. The
15 increase in the size of the class means that the settlement covers more employees of defendant.
16 The class size increased from 170 in mid-2016 (Order of 7/22/16), to 225 on 7/12/18
17 (Agreement, para IX.E, page 23), and is now presumably approximately 240.

18
19 The Settlement Agreement at para IX.E on page 23 addresses augmenting the settlement
20 as a result of delay and increase in class size, but the motion refers to the \$125,000 settlement
21 figure without augmentation.

22 The court is inclined to award fees of less than the amount requested to (1) reflect the
23 diligence of counsel in filing the motion, (2) reflect settlement of both the PAGA claims and the
24 class claims and (3) ensure that settlement compensates the members of the proposed class as
25 though counsel brought the motion one year ago.
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1 The Court will not decide the amount of any service award until final approval hearing.
2 Plaintiff must provide evidence regarding the nature of his participation in the action, including a
3 description of his specific actions and the amount of time he committed to the prosecution of the
4 case. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.)

5 The court is inclined to award a service award of less than the amount requested.
6 Plaintiff's unavailability for three months in late 2018 delayed the conclusion of the case,
7 resulted in a larger class, and suggests that plaintiff did not meet his responsibilities as a fiduciary
8 for the proposed class. At the hearing on 5/10/19 counsel took responsibility for the delay.
9

10 By way of example, awarding counsel fees of \$15,000 and a service award of \$5,000
11 would result in total expenses of \$42,500, and increase the net settlement to \$82,500. This
12 would be an average of \$366 per class member.

13 The Court ORDERS that 10% of any fee award to be kept in the administrator's trust fund
14 until the completion of the distribution process and Court approval of a final accounting.
15

16 The Court will set a compliance hearing after the completion of the distribution process
17 and the expiration of the time to cash checks for counsel for plaintiff and the Administrator to
18 comply with CCP 384(b) and to submit a summary accounting how the funds have been
19 distributed to the class members and the status of any unresolved issues. If the distribution is
20 completed, the Court will at that time release any hold-back of attorney fees.

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2 The court will sign the proposed order. The court sets 9/13/19 for the final approval
3 hearing. Plaintiff must reserve a hearing for the motion for final approval.
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5 Dated: May 21, 2019
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7 Winifred Y. Smith
8 Judge of the Superior Court
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