

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

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- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS

DATE: DECEMBER 20, 2023 TIME: 1:30 P.M.

PREVAILING PARTY SHALL PREPARE THE ORDER

UNLESS OTHERWISE STATED (SEE [RULE OF COURT 3.1312](#))

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV357419	Gonzalez, et al. v. Food Management Partners, Inc., et al.	See Line 1 for tentative ruling.
LINE 2	22CV407152	Torres v. Henley Restaurants, Inc. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	Unopposed motions for admission <i>pro hac vice</i> in Lines 3 and 4 are GRANTED. No appearances necessary. Court will sign proposed orders.
LINE 4	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	
LINE 5			
LINE 6			
LINE 7			
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Gonzalez, et al. v. Food Management Partners, Inc., et al.
Case No.: 19CV357419

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on December 20, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a representative action arising out of various alleged wage and hour violations. On October 25, 2019, plaintiffs Reina Gonzalez and Esperanza Jimenez (collectively, “Plaintiffs”) filed a complaint alleging a single cause of action under the Private Attorneys General Act of 2004. (Complaint, ¶¶ 2 & 21.)

On April 20, 2021, defendants Food Management Partners, Inc., Buffets, LLC, and FMP-Ovation Payroll, LLC (collectively “Defendants”) notified this court that they filed a petition for chapter 11 bankruptcy.

On October 11, 2022, Spencer Skeen (“Skeen”), Tim Johnson, and Jesse Ferrantella, attorneys with the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (“Ogletree”), moved to be relieved as counsel of record for Defendants.

On November 29, 2022, the court (Hon. Patricia Lucas) took the motion off calendar, explaining that the motion violated the bankruptcy stay as nothing in the file suggested the stay had been lifted.

On June 9, 2023, Plaintiffs filed a Case Management Conference Statement, advising that the bankruptcy court entered an order modifying the automatic stay to allow Ogletree to withdraw from representation of Defendants in this action and Ogletree’s renewed motion to withdraw as counsel was forthcoming.

Now before the court is Ogletree’s renewed motion to be relieved as counsel of record for Defendants. The motion is unopposed.

II. LEGAL STANDARD

California Rules of Court, rule 3.1362 sets forth the requirements for a motion to be relieved as counsel. That rule provides that “[a] notice of motion and motion to be relieved as

counsel under Code of Civil Procedure section 284(2) must be directed to the client and must be made on the Notice of Motion and Motion to Be Relieved as Counsel-Civil (form MC-051).” (Cal. Rules of Ct., rule 3.1362(a).) “[N]o memorandum is required to be filed or served with a motion to be relieved as counsel.” (Cal. Rules of Ct., rule 3.1362(b).) “The motion to be relieved as counsel must be accompanied by a declaration on the Declaration in Support of Attorney’s Motion to Be Relieved as Counsel-Civil (form MC-052),” which “must state in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1).” (Cal. Rules of Ct., rule 3.1362(c).)

“The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. The notice may be by personal service, electronic service, or mail.” (Cal. Rules of Ct., rule 3.1362(d).) If the notice is served on the client by mail, it must be accompanied by a declaration stating facts showing that either: (1) the service address is the current residence or business address of the client; or (2) the service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved. (Cal. Rules of Ct., rule 3.1362(d)(1).) “If the notice is served on the client by electronic service under Code of Civil Procedure section 1010.6 and rule 2.251, it must be accompanied by a declaration stating that the electronic service address is the client’s current electronic service address.” (Cal. Rules of Ct., rule 3.1362(d)(2).) As used in the rule, “current” means that the address was confirmed within 30 days before the filing of the motion to be relieved. (*Ibid.*)

“The proposed order relieving counsel must be prepared on the Order Granting Attorney’s Motion to Be Relieved as Counsel-Civil (form MC-053) and must be lodged with the court with the moving papers.” (Cal. Rules of Ct., rule 3.1362(e).) “The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order.” (*Ibid.*)

The determination of whether to grant a motion to withdraw as counsel lies in the sound discretion of the trial court. (See *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1106.)

III. DISCUSSION

Ogletree seeks to be relieved as counsel of record for Defendants on the grounds that Ogletree was named as a defendant by the bankruptcy Trustee, David Gonzales, in a verified complaint filed to recover fees paid to Ogletree for services rendered to Defendants.

In support of its motion, Ogletree submits a declaration from Skeen, who declares that Defendants were served by mail at their last known address with copies of the moving papers. Furthermore, Skeen declares that he confirmed within the past 30 days the Defendants' address is current through email communications with the bankruptcy trustee. The proof of service filed with the motion also demonstrates that the bankruptcy trustee was served with the moving papers via mail and email on November 8, 2023. Additionally, Ogletree presents evidence that on May 3, 2023, the bankruptcy court lifted the automatic stay to allow Ogletree to withdraw from representation of Defendants in this action. Based on the foregoing, the court finds that Ogletree has justified the requested to be relieved as counsel.

Accordingly, the motion to be relieved as counsel is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 2

Case Name: Torres v. Henley Restaurants, Inc. (Class Action/PAGA)

Case No.: 22CV407152

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on December 20, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This is a putative class and Private Attorneys General Act (“PAGA”) action arising out of various alleged wage and hour violations. The operative Complaint, filed on November 4, 2022, sets forth the following causes of action: (1) Failure to Pay Minimum Wages (Labor Code §§ 1194, 1197, 1197.1, 1198, 1199); (2) Failure to Reimburse Work Related Expenses (Labor Code § 2802); (3) Failure to Provide Timely Rest Periods and/or Pay Rest Period Premiums (Labor Code § 226.7 and § 12 of IWC Wage Order No. 5); (4) Failure to Provide Timely Meal Periods and/or Pay Meal Period Premiums (Labor Code §§ 226.7, 512, and § 11 of IWC Wage Order No. 5); (5) Failure to Provide Complete Wage Statements (Labor Code § 226(a) and (e)); (6) Failure to Pay Timely Wages (Labor Code §§ 204, 210); (7) Failure to Pay Final Wages (Labor Code §§ 201-203); (8) UCL Violations (Bus. & Prof. Code §§ 17200); and (9) PAGA and Other Penalties (Labor Code §§ 2698-2699.6).

The parties have reached a settlement. On July 13, 2023, the court (Hon. Socrates P. Manoukian) granted preliminary approval of the settlement.

On November 27, 2023, the court entered an Order Deeming Case Complex.

Plaintiff Maria Millan Torres (“Plaintiff”) now moves for final approval of the settlement. The motion is unopposed.

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

The burden is on the proponent of the settlement to show that it is fair and reasonable. However “a presumption of fairness exists where: (1) the settlement 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.”

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

IV. DISCUSSION

The action has been settled on behalf of the following class:
Plaintiff and all other individuals who are or were employed by Defendant Henely Restaurants, Inc. [(“Defendant”)], as hourly-paid employees, and who worked at least one shift in California from August 21, 2020 through December 6, 2022.

The class includes a subset of Aggrieved Employees, who are defined as “Plaintiff and all other individuals who are or were employed by [Defendant] as hourly-paid employees, and who worked at least one shift in California from March 1, 2021 through ... December 6, 2022.”

As discussed in connection with preliminary approval, Defendant will pay a gross, non-reversionary amount of \$250,000. The gross settlement amount includes attorney fees not to exceed \$83,333.33 (1/3 of the gross settlement amount), litigation costs up to \$15,000, a service award not to exceed \$15,000, settlement administration costs of no more than \$15,000, and a PAGA Payment of \$25,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be distributed to Aggrieved Employees).

The net settlement amount will be distributed to class members pro rata based on the number of workweeks worked during the class period. Funds from checks that remained uncashed 180 days after issuance will be sent to the California Controller's Unclaimed Property Fund.

In exchange for the settlement, class members who do not opt out will release Defendant, and related persons and entities, from all causes of action that were alleged in this action or reasonably could have been alleged based on the facts alleged in the Complaint.

On August 9, 2023, the settlement administrator mailed notice packets to 524 class members. (Declaration of Jennifer Forst With Respect to Settlement Administration and Class Notice ("Forst Dec."), ¶¶ 5-7.) Ultimately, 52 notice packets were deemed undeliverable. (*Id.* at ¶ 9.) As of October 24, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 11-12.)

The estimated average payment is \$212.46, the estimated highest payment is \$513.49, and the estimated lowest payment is \$4.05. (Forst Dec., ¶ 16.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests a service award in the amount of \$15,000. Plaintiff submitted a declaration in support of her request, detailing her participation in the action. Plaintiff declares that she spent approximately 30 hours in connection with the litigation, including discussing the case with class counsel, providing documents to class counsel, attending mediation via Zoom, reviewing pleadings, and reviewing the settlement agreement. (Declaration of Maria Millan Torres in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶¶ 7-11.)

Moreover, Plaintiff undertook risk by putting her name on the case because it might impact her future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant “reputational risk” in bringing an action against an employer].)

However, the amount of the requested service award is excessive. Each class member will receive an average payment of approximately \$212.46. Consequently, the sought-after service award would amount to more than 70 times the estimated average payout. In light of the foregoing, the court finds that a service award in the amount of \$2,500 is reasonable and it approves the award in that lesser amount.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff’s counsel seeks attorney fees in the amount of \$83,333.33 (1/3 of the gross settlement amount). Plaintiff’s counsel provides evidence demonstrating a combined lodestar of \$119,909.47. (Declaration of Craig J. Ackerman in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement and Attorneys’ Fees and Costs (“Ackerman Dec.”), ¶¶ 13-17 & Ex. A; Declaration of Tatiana Hernandez in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement and Attorneys’ Fees and Costs (“Hernandez Dec.”), ¶¶ 8-17 & Ex. A.) This results in a negative multiplier. The attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiff’s counsel also requests \$10,587.62 in litigation costs and provide evidence of costs incurred in that amount. (Ackerman Dec., ¶¶ 19-20 & Ex. B; Hernandez Dec., ¶ 18.) The costs appear to be reasonable and are approved. The administrative costs in the amount of \$11,000 are also approved. (Forst Dec., ¶ 17.)

Accordingly, the motion for final approval of the class and representative action settlement is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

The court will set a compliance hearing for August 21, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Lines 3 – 4

Case Name: Sagemcom Broadband SAS v. DIVX, LLC, et al.

Case No.: 23CV424785

Unopposed motions for admission *pro hac vice* in Lines 3 and 4 are GRANTED. No appearances necessary. Court will sign proposed orders.

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Calendar Line 4

Case Name:

Case No.:

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Calendar Line 5

Case Name:

Case No.:

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Calendar Line 6

Case Name:

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