

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Cuenca Plaintiff/Petitioner(s)
VS.
Kaiser Permanente Defendant/Respondent(s) (Abbreviated Title)

No. **RG20065123**

Minutes

Department 19

Honorable Stephen Kaus, Judge

Cause called for Motion: June 14, 2021.

Plaintiff Michael Cuenca's ("Plaintiff") unopposed Motion for Preliminary Approval of Class Action Settlement, Approving Proposed Notice to Class, etc. (the "Motion") is GRANTED. On 6/1/2021, Plaintiff submitted a Supplemental Declaration adequately addressing the issues raised in the Court's 5/17/2021 Minute Order.

Plaintiff received leave of Court on 4/30/2021 to file a Second Amended Complaint alleging PAGA claims in addition to the Equal Pay Act and Fair Employment and Housing Act claims alleged in the original Complaint and First Amended Complaint. Plaintiff filed his Second Amended Complaint on 5/14/2021.

IF ANY PARTY WISHES TO CONTEST THIS TENTATIVE RULING, NO LATER than 4:00 p.m. on Friday, June 11, 2021 contesting party must email dept.19@alameda.courts.ca.gov and provide notice to all counsel of the intent to contest the tentative order.

Any requested hearing will most likely be conducted using the Blue Jeans Network, password # 5102676935. If a hearing is requested, the Court will advise the parties of the manner in which the hearing will be conducted in advance of the hearing.

If not timely contested, and the tentative ruling will become the final order of the Court.

The case is an Equal Pay Act and Fair Employment and Housing Action class action with recently added PAGA claims. Plaintiff alleges that certain classes of Hispanic and Latinx employees of defendants Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc. and Southern California Permanente Medical Group (collectively, "Defendants") have been systematically underpaid for their work compared to Defendant's non-Hispanic/Latinx employees.

The following constitutes analysis of the Moving Papers, the Settlement Agreement and the Notice, which are now acceptable to the Court.

The case preliminarily settled for \$7,372,586, of which \$73,726 (1%) is allotted to the PAGA claims (See Moving Schwartz Dec. Exh. A at §§ III.A.26 and V.D.2.) Plaintiff has now submitted evidence of timely service of the moving papers on the LWDA. (Supp. Schwartz Dec. ¶¶ 3-4.)

The settlement agreement also contains significant "programmatic" relief, meaning changes in Defendant's business practices, for a three-year period, including monitoring pay equity, retaining mutually agreed upon independent experts, remediation of later discovered pay inequities, additional training, formulation of objective selection process criteria, career development and developmental resources, management development, mentorship programs, reporting and compliance procedures. (Id. at Exh. B to Exh. A.) The estimated number of the class members is approximately 2,532. (Moving Vekker Dec. at p. 2:4-5.) The Settlement Agreement states that attorneys' fees will be \$2,211,775.80 (30% of the settlement amount), plus costs of litigation in an amount up to \$30,000 and Settlement administration costs up to \$27,000 to administrator JND Legal Administration, whom the Court hereby confirms as the Settlement Administrator. (Schwartz Dec. Exh. A at §§ XI.A, X.A.(b), III.A.25.) The Settlement Agreement calls for a class service award to Plaintiff of \$75,000, and the Cal. Labor and Workforce Development Agency ("LWDA") shall receive a net PAGA payment of \$55,294.50 (75% of PAGA settlement amount). (Id. at §

X.A(c) and (a.) The Settlement Agreement also provides for a \$50,000 contingency fund in case there are additional, as yet undiscovered class members or other contingencies. (Id. at X.A.(f).)

Thus, after expenses totaling \$2,449,070.30, a balance of \$4,923,515.70 would be available to Class Members, or an average of \$1,945 per class member. (Id. at § X.A(g).) However, awards will be highly variable based on number of weeks worked, whether the individual employee was an exempt or non-exempt employee and whether an individual employee fills out and timely submits an Enhancement Claim Form contending that the employee was denied a promotion during the Relevant Period, as defined in the Settlement Agreement

The parties engaged in extensive settlement negotiations but did not engage in mediation.

The proposed 45-day deadline for class members to opt out of or to submit objections to the proposed Settlement is acceptable. (Id. at Exh. B.)

The Court previously requested that the terms at Settlement Agreement §§ V.C.1, 3, and 4 and the Class Notice at p. 9, providing that Class members may not object to the settlement unless they submit a written objection within 45 days of mailing of the Class Notice and provide notice of the intent to appear at the Final Approval Hearing within 45 days of mailing of the Class Notice, be revised to allow class members to give two-days notice of appearance at the final approval hearing if they wished to present oral objections to the settlement even if they did not submit a written objection. The Class Notice at page 9 has been appropriately revised as requested. However, the Settlement Agreement at §§ V.C.1, 3, and 4 has not been revised. The Court will nevertheless grant this Motion with the understanding that the revised Class Notice will be controlling and that class members may appear to object at the final approval hearing provided they give two days' prior notice of their intent to appear, as expressly stated in the Revised Class Notice.

The provision that Class Members must cash their settlement checks within 90 days of issuance is acceptable, and the Court appreciates that the Class Notice has been revised to call attention to this deadline on Class Members.

The Court notes and approves of the plan to distribute the settlement funds with no claims process as to the basic settlement. The Court finds acceptable the opt-in process requiring timely submission (within 45 days) of an Enhancement Claim Form regarding claims of denial of promotion for the proposed 10% award enhancement.

The release of claims by the class must be limited by the "identical factual predicate rule." (Hesse v. Sprint Corp. (9th Cir. 2010) 598 F.3d 581, 590.) (See also Hendricks v. Starkist Co (N.D. Cal. 2016) 2016 WL 692739 at * 2-4 [Denying motion for final approval of class settlement because scope of release overbroad].) The class release at § VI.A of the proposed Settlement Agreement and at p. 6 of the Class Notice is properly limited to the claims that were alleged or could have been alleged based on Plaintiff's factual allegations herein.

The proposed definition of "Settlement Class" at § III.A.27 of the Settlement Agreement ("Hispanic/Latinx employees employed full-time by any of the Kaiser-Related Entities in California in a Class-Covered Job in any of the following Regions at any time between June 17, 2016 and March 31, 2021: Northern California (NCAL); Southern California (SCAL); California locations of the Program Offices Region; and California locations of the KP-IT Region.") is acceptable for settlement purposes. "Class-Covered Job" means any of the approximately 400 positions listed in Appendix I to the Settlement Agreement. (See § III.A.10.)

Plaintiff is conditionally approved as the Class Representative, and Plaintiff's counsel of record are conditionally approved as Class Counsel for purposes of this settlement. The Court also conditionally approves the administration costs to JND Legal Administration in the amount set forth above.

The motion makes an adequate analysis required by Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, because it provides a reasonable estimate of the number of Class members, the total estimated possible recovery and some explanation why the settlement was reasonable in light thereof. (See Moving Schwartz Dec. ¶¶ 11-12.)

The Settlement Agreement provides at § X.A(f) that unnegotiated settlement checks to participating class members after all distributions or other unclaimed funds will be allocated to Legal Aid at Work. Legal Aid at Work is an acceptable cy pres beneficiary. (See CCP § 384.)

The Settlement Agreement appears to be presumptively valid, subject to any objections that may be raised by Class Members.

The Court will not approve the amount of attorneys' fees and costs until the final approval hearing. The Court's preference, but not a requirement, is that plaintiffs file both the motion for final approval and the motions for attorneys' fees, costs and service award as a single motion, because the Court is less likely to misfile a single set of motion papers.

THE COURT CANNOT AWARD ATTORNEYS' FEES WITHOUT REVIEWING SUFFICIENTLY DETAILED INFORMATION ABOUT COUNSEL'S HOURLY RATE(S) AND THE AMOUNT OF TIME PLAINTIFF'S LEGAL COUNSEL SPENT ON THE CASE. This is the law even if the parties have agreed that Defendants will not oppose the motion for fees. (*Robbins v. Alibrandi* (2005) 127 Cal. App. 4th 438, 450-451.)

The court notes that counsel is authorized by the Settlement Agreement to seek 30% of the total value of the settlement. The court sets out its standard analysis below. Counsel may address that analysis in the fee application.

When using the percentage of recovery approach, the court's benchmark for fees is 30% of a total fund. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495; *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 fn 13; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 fn 11.)

When cross-checking with the lodestar/multiplier, the court will evaluate the lodestar based on reasonable fees that would have been charged at hourly rates and then apply a multiplier. The multiplier includes contingent fee risk and other factors.

The Court will not decide the amount of any service awards until the final approval hearing. **PLAINTIFF MUST SUBMIT EVIDENCE REGARDING THE NATURE OF HIS PARTICIPATION IN THE ACTION, INCLUDING A DESCRIPTION OF HIS SPECIFIC ACTIONS AND THE AMOUNT OF TIME HE COMMITTED TO THE PROSECUTION OF THE ACTION.** (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.) The service award will reflect Plaintiff's actual contributions to the litigation based on the evidence submitted in support of the service award in connection with Motion for Final Approval.

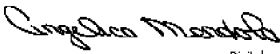
The Court will order that 10% of any fee award be kept in the administrator's trust fund until the completion of the distribution process and Court approval of a final accounting.

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

The Court sets Wednesday, October 20, 2021 at 3:00 p.m. in Dept. 19 as the date of the final approval hearing. Plaintiff must reserve a hearing for the motion for final approval.

Minutes of 06/14/2021
Entered on 06/15/2021

Chad Finke Executive Officer / Clerk of the Superior Court

By 
Digital

Deputy Clerk

