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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 613

MALU VAESAU, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

DOUBLE AA CORPORATION, a California
corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. CGC-19-572598

TENTATIVE RULING RE: MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

TENTATIVE RULING

Because of the COVID-19 pandemic, the Court has significantly reduced its operations and staffing levels. Department 613 is presently closed. Thus, the Court previously vacated the April 23, 2020 hearing on Plaintiff’s motion. The Court issues the tentative ruling to move this case toward prompt resolution. The parties are hereby authorized to submit a supplemental filing responding to this tentative ruling, which should address the issues raised below, on or before June 30, 2020. Upon receipt and review of the supplemental filing, if necessary, the Court will set a continued hearing date consistent with Court operations in light of the health issues presented by the COVID-19 pandemic. If the Court determines no hearing date is required, the Court may request supplemental briefing and set a corresponding submission deadline.

1 If the parties jointly agree to modify the June 30, 2020 filing deadline, they may contact this
2 department through a joint email to Department613ComplexLit@sftc.org setting forth their
3 request. Although the departmental email inbox will send an auto-reply message, the email inbox will be
4 monitored.

5 The motion for preliminary approval will be **CONTINUED FOR SUPPLEMENTAL**
6 **BRIEFING**. The Court's concerns regarding the motion are summarized in more detail below.¹

7 **I. Class Certification**

8 **A. Commonality and Predominance**

- Named Plaintiff must submit a declaration attesting that common issues predominate.

9 **B. Typicality and Adequacy**

- Named Plaintiff must submit a declaration evidencing typicality and adequacy.

10 **II. Kullar Analysis – Reasonableness**

11 **A. Maximum Liability Calculations**

- Plaintiff must provide (1) a valuation of the minimum and straight time wages claim or (2) an explanation as to why the value is zero.
 - Is the value of this claim accounted for in Plaintiff's maximum liability calculation for her off-the-clock claim? It appears the calculation only estimates the potential value for 13,333 unpaid hours in the Class Period that should have been paid at the overtime rate. (See Moon Decl. ¶ 15.)
- Please explain which claims are accounted for in Plaintiff's estimate that Defendant's potential liability is \$151,200 for her derivative claim for statutory penalties. (See *id.* at ¶ 18.)
 - Plaintiff must provide (1) a valuation of the UCL claim, or (2) an explanation as to why the value is zero.
 - Plaintiff must provide (1) a valuation of the waiting time penalties claim, or (2) an explanation as to why the value is zero.

12 **B. Discounts**

13 While some discount is certainly appropriate to account for the risk of continued litigation,
14 Plaintiff has not shown that such a risk alone justifies an 85-90% discount. Further, Plaintiff has not
15 explained the facts underpinning the anticipated legal issues in sufficient detail to justify the settlement
16 discount. For each basis justifying a discount, Plaintiff should summarize (1) Plaintiff's contentions,
17 including the legal and factual support for her contentions; (2) Defendant's contentions, including the
18 legal and factual support for its contentions; and (3) Plaintiff's response, including the legal and factual
19 support for Plaintiff's response. This summary need not be lengthy or accompanied by documentary
20 evidence, but it should be sufficient to permit the court to independently evaluate the fairness of the
21 discount.

- Plaintiff must provide the discount amount and justification for the discount of the minimum and straight time wages claim.
- Plaintiff must provide a justification for the 90% discount of the off-the-clock claim.

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28 ¹ This summary is prepared to assist the parties in preparing further briefing. It may not identify every concern that will be presented by subsequent briefing.

- For example, how did Plaintiff establish that a 90% discount was proper to account for the risks associated with certification of the off-the-clock claim and the defenses to the claim as opposed to a 25%, 50%, or 75% discount, etc.?
- Please provide legal authority to support a 90% discount of this claim.
- Plaintiff must provide the justification for a 90% discount for the meal period claim.
 - For example, how did Plaintiff establish that a 90% discount was proper to account for the risks associated with certification of the meal period claim and the defenses to the claim as opposed to a 25%, 50%, or 75% discount, etc.?
 - Please provide legal authority to support a 90% discount of this claim.
- Plaintiff must provide the justification for a 90% discount of the rest period claim.
 - For example, how did Plaintiff establish that a 90% discount was proper to account for the risks associated with certification of the rest period claim and the defenses to the claim as opposed to a 25%, 50%, or 75% discount, etc.?
 - Please provide legal authority to support a 90% discount of this claim.
- Plaintiff must provide the justification for an 85% discount of the derivative claim(s).
 - For example, how did Plaintiff establish that an 85% discount was proper to account for the risk and uncertainty of prevailing at trial on the derivative claim(s) as opposed to a 25%, 50%, or 75% discount, etc.?
 - Please provide legal authority to support an 85% discount of this claim.
 - Plaintiff must provide the discount amount and justification for the discount of the UCL claim.
 - Plaintiff must provide the discount amount and justification for the discount of the waiting time penalties claim.

III. Distribution of the Settlement Proceeds

The distribution process presents the following concerns:

- The Court requires further explanation as to why this formula is the most appropriate in this case. Indeed, the parties have proposed a distribution in proportion to the number of weeks each class member worked during the Class Period. This is a common approach and may be the fairest and most efficient approach in this litigation.
 - Before this approach is approved, the parties must confirm that other approaches were considered and rejected and provide a brief explanation of those approaches.
 - For example, if there is some systematic means to identify class members with stronger claims, it may support an alternative distribution scheme that weighs the distribution in favor of individuals with stronger claims.
- Tax Treatment: The Settlement Agreement provides that Settlement Payments will be allocated as follows: 50% to wages, 20% to penalties, and 30% to interest. (See *id.* at ¶ 14(F).) Why? Is this congruent with the valuation of damages?

IV. Notice

A. Notice to the Class - Process

The notice procedure raises the following concerns:

- Were there any alternatives to mail notice considered? Were any additional forms of notice considered? For example, are email addresses not available?
- How strictly will the requirements for objections and requests for exclusion be enforced? For example, will an objection that includes the Class Member's full name but fails to state the grounds for the objection be rejected?
 - If strict compliance is required, will the Claims Administrator make a reasonable effort to

1 give potential objectors / Class Members requesting exclusion an opportunity to cure
2 technical deficiencies?

- 3 ○ If these requirements must be strictly enforced, the parties should consider disseminating
4 opt-out and objection forms to Class Members.
- 5 • The Settlement Agreement provides that opt-outs and objections must be mailed to the Claims
6 Administrator. It would be less burdensome if Class Members could also submit objections and
7 opt-outs electronically. Did the parties consider submission of objections and opt-outs via email
8 or on a Class website?
- 9 • How promptly will the Claims Administrator re-mail notices returned as undeliverable? A date
10 certain must be provided.
- 11 • If a notice is returned a second time after being sent to a forwarding address, will the Claims
12 Administrator do a computer search for a new address using the Class Member's social security
13 number?
- 14 • Will Class Members whose notices are re-mailed have an extension of time to object, opt out,
15 dispute workweeks, etc.? It appears there will be no extension of time.
- 16 • Website: will there be one? Absent a compelling argument regarding expense, a website should
17 be used.

18 **B. Notice to the Class – Substance**

19 A summary of concerns regarding the Notice is provided here:

- 20 • All deadlines within the Notice should be filled in in bold.
- 21 • Page 1: In the first paragraph, “THROUGH JANUARY 31, 2020” should be input.
- 22 • Page 1: *Why should you read this Notice?*
 - 23 ○ “the Hon. Teri L. Jackson” must be changed to “the Hon. Andrew Y.S. Cheng”.
- 24 • Page 1: **YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT**
 - 25 ○ A third column providing the deadline for each option in bold should be added.
 - 26 ○ Each option should provide the section within the notice where Class Members can find
27 more information about that option.
 - 28 ○ “Object”:
 - “only if you do not exclude yourself from the Settlement” should be bold.
 - A fourth option “Dispute Covered Workweeks” should be added.
- Page 1: *Who is affected by this proposed Settlement*
 - The first sentence should be revised as “The Court has preliminarily certified, for
settlement purposes only, the following class (the “Class”):”
- Page 2: *Who are the attorneys representing the Parties?*
 - This section should clarify that Class Counsel represents the Class for settlement purposes
only.
- Pages 2-3: *What are the Settlement terms?*
 - This section should provide the Net Settlement Amount, assuming the Court approves the
requested Class Representative Service Award to Plaintiff, attorneys’ fees and costs to
Class Counsel, and the payment to the Claims Administrator for settlement administration
services.
 - **Individual Settlement Payments.**
 - Is there an average recovery amount? If so, it should be included in this section.
 - “one hundred eighty (180) days from the date of the checks issuance and shall
thereafter automatically be void if not cashed by a participating Class Member
within that time” should be bold.
- Pages 3-4: *What claims are being released by the proposed Settlement?*
 - This section is riddled with legalese. The releases should be explained in layman’s terms.
This section should also direct Class Members to the section of the Settlement Agreement
where the entire release of claims can be found, including where Class Members can view
the Settlement Agreement (e.g., on the Class website).
- Page 4: *What are my options in this matter?*
 - The last sentence of the first paragraph should be revised to “If you choose option (a), you
may also (1) object to the settlement and/or (2) dispute your number of Covered

Workweeks, as explained below.”

- **Objecting to the Settlement:**
 - “in any way” should be removed from the first sentence in this section.
 - Class Members are not required to file a notice of intent to appear at the final approval hearing. This requirement must be removed from the Notice and the Settlement Agreement. This section must instead provide that Class Members who file an objection may but are not required to appear in person at the final approval hearing to object.
- **Option A.** should also include a section providing the process for disputing the Class Member’s Covered Workweeks, including the deadline to dispute Defendant’s records; the formalities required to validly dispute the Covered Workweeks; how promptly the Settlement Administrator will notify Class Members if their dispute is accepted/rejected; and if rejected, whether the Class Members may seek Court involvement to appeal the Settlement Administrator’s determination, etc.
 - Alternatively, Option A. should provide that this information can be found in the accompanying Settlement Payment Allocation Form.
- Page 5: *How can I get additional information?*
 - The website and the information it will include should be provided here.
 - It is the Court’s position that the parties should use a settlement website to disseminate the operative complaint, notice, settlement agreement, preliminary approval order, and all papers filed in connection with preliminary approval motions (including all orders and tentative rulings) to the class. It also is useful for purposes of distributing any final judgment, and all final approval related documents, to the Class. At the end of the document, the documents contained on the settlement website should be listed.
 - In addition, the notice should direct the reader to the Court’s website (<https://www.sfsuperiorcourt.org/online-services>), which provides access to the full docket in this case free of charge. The notice should contain step-by-step instructions on how to use the Court’s website, by entering the case number, etc.

C. Notice – Settlement Payment Allocation Form:

A summary of concerns regarding the Settlement Payment Allocation Form is provided here:

- **Calculation of Settlement Payments:**
 - This section should include the total Covered Workweeks worked by all participating Class Members and the Net Settlement Amount. This information is required for Class Members to be able to independently calculate their Individual Settlement Payment.
- **Procedure for Disputing Information:**
 - This section should include how promptly the Settlement Administrator will notify Class Members if their dispute is accepted/rejected.

D. Release

The release raises the following concerns:

- Please provide justification and legal authority to support the release of FLSA claims for Class Members who do not submit a Claim Form, and thus, have never taken any steps to affirmatively opt-in to a FLSA action in writing as required by 29 U.S.C. 216(b).
 - The Settlement Agreement provides that the parties agree the cashing of checks by Settlement Class members shall be deemed an opt-in to an FLSA collective action, the settlement of which includes the FLSA releases specified in Paragraph(b)(1). Please provide support for this procedure.
 - This procedure seems problematic because Class Members will receive their settlement checks *after* the opt-out deadline has passed. As such, Class Members are bound by a FLSA action (1) prior to opting-in to the action via cashing the check and (2) regardless of whether they cash the check.

- 1 • Settlement Agreement § 14(i) provides Plaintiff’s Service Payment of up to \$5,000 is “in
2 exchange for a general release”. The Service Payment should not be contingent upon Plaintiff
3 signing a broader release. (See *Roes, I-2 v. SFBSC Management, LLC* (9th Cir. 2019) 944 F.3d
4 1035, 1056-1058 [holding a court should not permit common funds to be paid to settle individual
5 claims in exchange for a general release, as payments for general releases (1) “appear to be
6 contrary to [Ninth Circuit] caselaw on incentive payments,” and (2) “also raise concerns about a
7 potential conflict of interest between the class representatives and unnamed class members”].)
8 While plaintiff may sign a broader release, there is no good reason it should be given in exchange
9 for her service award. Moreover, please identify where within the Settlement Agreement the
10 terms of Plaintiff’s general release are provided.

11 **VI. Miscellaneous Issues**

12 Further Settlement Agreement & Notice Documents: For future purposes, if the parties change the
13 Settlement Agreement or Notice documents, the parties should provide both a clean and redlined version in
14 its supplemental filings. This will assist the Court in discerning whether the parties have sufficiently
15 addressed all of the Court’s previously outlined concerns.

16 Further briefing: For future settlement approval motions in this Court, including this one, the parties
17 should be advised that (in addition to briefing) the parties must submit via email to
18 Department613ComplexLit@sftc.org a *separate* document reproducing the Court’s tentative ruling, and
19 citing to the exact sections in the parties’ briefing (i.e. Settlement, Declarations, etc.) that address each of
20 the Court’s points in the previous tentative ruling.

21 Proposed Order: Plaintiff must submit an electronic Word-editable version of the proposed order.