UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JEREMY R. LUSK, **Plaintiff,** **v.** **FIVE GUYS ENTERPRISES LLC; AND ENCORE FGBF, LLC,** **Defendants.**	**CASE NO. 1:17-cv-00762-AWI-EPG** **ORDER ON PLAINTIFF'S THIRD-AMENDED MOTION FOR PRELIMINARY APPROVAL** (Doc. No. 75)

In this class action lawsuit, Jeremy Lusk is suing Five Guys Enterprises LLC and Encore FGBF, LLC, on grounds that they violated federal and California credit/consumer reporting laws, California wage-and-hour laws, and California unfair competition law. Although the parties have reached a proposed class settlement, the Court has denied Lusk's first three motions under Federal Rule of Civil Procedure 23(e) for preliminary approval of the settlement and conditional certification of the putative class. Lusk now moves a fourth time for such relief. For the reasons discussed below, the Court will deny this motion.

BACKGROUND

Lusk filed his lawsuit in state court on May 2, 2017, and Defendants removed the action. Thereafter, Lusk filed a first-amended complaint, wherein he pleaded the following twelve class claims: (1) failure to make a proper disclosure, in violation of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681b(b)(2)(A); (2) failure to provide a proper summary of rights, in violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681d(a)(1) and 1681g(c); (3) failure to make a proper disclosure, in violation of California's Investigative Consumer Reporting Agencies Act,

Cal. Civ. Code § 1786.16(a)(2)(B); (4) failure to make a proper disclosure, in violation of California's Consumer Credit Reporting Agencies Act, Cal. Civ. Code § 1785.20.5(a); (5) failure to provide meal periods or compensation in lieu thereof, in violation of Cal. Labor Code §§ 226.7, 512, and 1198, and California Industrial Welfare Commission Wage Order 5-2001 ("Wage Order 5"); (6) failure to provide rest periods or compensation in lieu thereof, in violation of Cal. Labor Code §§ 226.7 and 1198, and Wage Order 5; (7) failure to pay earned wages, including overtime wages, in violation of Cal. Labor Code §§ 204, 223, 510, 1194, 1197, and 1198, and Wage Order 5; (8) failure to reimburse for necessary gas and mileage expenditures, in violation of Cal. Labor Code § 2802(a); (9) failure to provide accurate itemized wage statements, in violation of Cal. Labor Code § 226; (10) failure to pay separation wages, in violation of Cal. Labor Code §§ 201–203; (11) violations of California's unfair competition law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.; and (12) entitlement to civil penalties under California's Private Attorney General Act ("PAGA"), Cal. Lab. Code § 2698 et seq. Doc. No. 13 ("FAC").

After conducting some discovery, the parties participated in mediation and reached a proposed agreement for a class-wide settlement. Doc. No. 29. Lusk has since moved three times for preliminarily approval of that proposal and conditional certification of the putative class, with the Court denying each motion. Doc. Nos. 36, 43, 52, 55, 61, 66. Lusk now moves for the same relief for a fourth time. Doc. No. 75 ("Motion").[1] With his latest motion, Lusk submits a supporting declaration from counsel, which itself comes with attached copies of the proposed class settlement, class notice, and class member claim form. Doc. No. 76 ("Setareh Decl."); Doc. No. 76-1.[2] For the first time, Defendants have submitted a statement of non-opposition and supplemental briefing on Lusk's motion, along with a declaration from counsel. Doc. No. 78; Doc. No. 78-1 ("Woo Decl.").

[1] In this order, citations to specific page numbers of Document No. 75 will refer to the pdf pagination of that document, and not the pagination used in the motion itself.

[2] The settlement, class notice, and claim form are all found at the same docket number. Doc. No. 76-1 at 1–25 ("Proposed Settlement"); 27–32 ("Settlement Notice"); 34–35 ("Claim Form"). Lusk has also separately submitted a fully executed copy of the proposed settlement. Doc. No. 80-1.

LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires judicial review and approval of any class settlement. This process generally involves three stages. In the first, the parties move for "preliminary approval" of the proposed settlement and, if necessary, "conditional certification" of the class. 4 William B. Rubenstein, Newberg on Class Actions § 13:16 (5th ed.). If the court grants this threshold relief, the second and third stages require (1) the provision of notice to the class members, along with an opportunity for them to object to or opt out of the proposed settlement, and (2) a "final approval" determination (and actual class certification, if necessary) following a fairness hearing. Id.

To secure preliminary approval and condition certification, the parties must provide sufficient information for the court to determine that it "will likely be able to" grant final approval of the settlement under Rule 23(e)(2) and certify the class for a judgment on the settlement. Fed. R. Civ. P. 23(e)(1)(B). As to the first determination, Rule 23(e)(2) states that a binding class settlement may be approved only on finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). As to the second determination, a class may be certified if it meets the four prerequisites under Rule 23(a) and at least one of the three categories of class actions under Rule 23(b). Fed. R. Civ. P. 23(a)–(b).

The court's role in the class settlement process is an important one, as "the parties that are present and settling the case—class counsel, the class representatives, and the defendants—are proposing to compromise the rights of absent class members." Newberg on Class Actions § 13:40. To ensure the interests of the absent class members are properly safeguarded, the "judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation." Id. (quoting Manual for Complex Litigation § 21.61 (4th ed.)).

DISCUSSION

The Court will deny Lusk's latest motion because, once again, he has not provided sufficient information showing that the proposed settlement is likely to be approved as "fair,

reasonable, and adequate" upon certification of the class under Rule 23.

A. Preliminary Approval

As noted above, at the preliminary approval stage, the court need only determine that the proposed settlement is "likely" to be finally approved under Rule 23(e)(2). Rule 23(e)(2) itself provides that a court may approve a class-binding settlement only on finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Before making such a finding, courts must consider whether: (1) the class representative and counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate in light of the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; the terms of any proposed award of attorney's fees, including timing of payment; and any agreement made in connection with the proposal; and (4) the proposal treats class members equitably relative to each other. Id.; see also In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) (quoted source omitted) (enumerating additional non-exhaustive factors that are to be considered for purposes of granting final approval of a class settlement).

While Rule 23(e) does not mandate that courts consider these same factors for purposes of determining whether preliminary approval is warranted, doing so often proves useful given the role these factors play in final approval determinations. The court may also consider any other topic that it regards as pertinent to determining whether the proposed settlement is fair, reasonable, and adequate. See Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment. Naturally, the showing of fairness of a proposal will vary from case to case. Bluetooth Headset Prods. Liab. Litig., 654 F.3d at 946. Where a settlement has been negotiated before certification, however, there exists "an even greater potential for a breach of fiduciary duty owed the class during settlement," which means "such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." Id.

In its order denying Lusk's third motion, the Court raised numerous concerns it had

regarding the proposed settlement. Many of these have since been adequately addressed by the parties and warrant no extended discussion here.[3] Because others have not, however, the Court must again address lingering issues regarding the adequacy of class relief and the treatment of putative class members.

1. Adequacy of Class Relief

The relief obtained by the class is often described as the most important part of a class settlement. Carlin v. DairyAmerica, Inc., 380 F. Supp. 3d 998, 1011 (E.D. Cal. 2019). To determine whether proposed relief is fair and reasonable, the court compares the amount that will be recovered with the estimated value of the class claims if they were to be successfully litigated. Id. (cited source omitted). As part of this comparison, the court must gauge the relative strength of the plaintiff's case as "[e]ven a fractional recovery of the possible maximum recovery amount may be fair and adequate in light of the uncertainties of trial and difficulties in proving the case." Millan v. Cascade Water Servs., Inc., 310 F.R.D. 593, 611 (E.D. Cal. 2015) (collecting cases approving settlements that were assumed to be fractions of the maximum potential recovery); see also In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." (quoted source omitted)).

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[3] To make a record, the Court recognizes that Lusk has adequately addressed both the risks attendant to the class claims based on credit reporting statutes and unpaid wages (and assigned nominal or zero value to these claims), and the calculated number of meal and rest period violations in light of permissible recovery under Labor Code § 226.7 for such claims. The parties have also revised the Settlement Notice and the Claim Form to include the credit reporting statutes amongst the extended list of released claims. Doc. No. 76-1 at 29, 35. And Lusk has submitted evidence showing that the proposed settlement, with its latest revisions, was submitted to the California Labor and Workforce Development Agency for purposes of the PAGA claim. Setareh Decl., ¶ 34; Doc. No. 76-2. Finally, as to that claim, the Court remains unconvinced by Lusk's citation to Labor Code § 2699(e)(2)—and the authority it bestows on courts to discretionarily decrease unjust and oppressive PAGA awards—as justification for his substantial reduction of the PAGA claim from a (newly calculated) value of $5,144,450 to $100,000 in the proposed settlement. Lusk's citation to Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016), is also inapt, in so far as the court there approved of a (less) drastic reduction of a PAGA claim while citing § 2699(e)(2) because the case was premised on an employee-independent contractor question for which there was "no straight answer" under California law. Lusk does not draw this case parallel to that aspect of Cotter, and the Court finds no basis for him to have even tried. All that said, the Court finds that the math proposed here will suffice given other case law approving small PAGA awards within a much larger class settlement. See Attia v. Neiman Marcus Grp., Inc., No. 8:16-cv-00504-DOC (FFM), 2019 WL 13089601, at *8 (C.D. Cal. Feb. 25, 2019).

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