

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

Rene C. Davidson Courthouse

<p>Aaron Aseltine Plaintiff/Petitioner(s) VS. Chipotle Mexican Grill, Inc Defendant/Respondent(s)</p>	<p>No.           RG21088118</p> <p>Date:         01/19/2022 Time:         10:00 AM Dept:         21 Judge:        Evelio Grillo</p> <p>ORDER re: Hearing on Motion - Other For Preliminary Approval of Class Action Settlement and for Class Certification</p>
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The Motion for Preliminary Approval of Settlement filed by Aaron Aseltine on 11/08/2021 is Granted.

The motion of plaintiffs for preliminary approval of class action settlement is GRANTED.

The order of 12/3/21 identified certain concerns with the proposed settlement. The parties have addressed those concerns. (Kaliel Dec filed 1/12/22.)

The complaint alleges that Chipotle Mexican Grill deceptively marketed “free delivery” or “\$1 delivery” on food deliveries ordered through its App and Website, when in reality, Chipotle imposed hidden delivery charges on its customers by assessing an additional “service charge” and marking up menu prices for delivery orders only by 12-15%.

There are approximately 5.6 million total members of the class. The Settlement Class is defined as all persons in the United States who ordered food delivery online.

There are conceptually two settlements – The Rewards Program Class and the Non-Rewards Program Class.

The Rewards Program Class is consumers in the “Rewards Program.” Those persons are arguably bound by arbitration agreements. The Rewards Program claims preliminarily settled for up to \$3,000,000 in free entrée credits. The settlement agreement states there Chipotle will pay attorneys' fees of \$312,000, no costs, a service award of \$5,000 for class representative Aseltine. Persons in the Rewards Program submit claims and get a Chipotle entrée. The value of the settlement to the absent class members (up to \$3,000,000) will not be known until the claims are made within 180 days. The value per class member is the estimated entrée value of \$8.50.

The non-Rewards Program Class is consumers not in the “Rewards Program.” They did not enter

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into arbitration agreements. The non-Rewards Program claims preliminarily settled for \$1,000,000 in cash. The settlement agreement states there will be attorneys' fees of up to \$333,333.33 (33%), costs of up to \$7,423, a service award of \$5,000 for class representative Dundon, and settlement administration costs of up to \$130,000. After these expenses of approximately \$488,333, the class would get \$511,667. Persons in the non-Rewards Program submit claims and get a pro-rata share of the fund. (Agt, p12, Sec IV.D.) The value per class member will vary depending on the number of claims made. If 100 persons make claims then each would get \$5,116. If 10,000 persons make claims then each would get \$51.16.

The proposed class notice form and procedure are adequate. The email notice is appropriate given the amount at issue for each member of the class. The claims process of clicking on the notice email is a reasonable claims process.

The proposed class is appropriate for class certification.

The motion makes an adequate analysis as required by *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.

The scope of the release for the class is appropriate. The Settlement states that the class members release all claims "relating to Defendant's marketing and charges for delivery orders through Defendant's App or Website during the Class Period and the claims alleged in the operative complaint in the Action." (Settlement at p9, para C.1.) That is appropriate and tailored to the claims in the complaint. The release of claims by the class is limited by the "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 named plaintiffs can adequately represent the absent class members on those claims.

The Settlement has been amended to clarify that the Civil Code 1542 applies only to the named plaintiffs in their individual capacities and does not apply to the absent class members. The scope of the release for the absent class members cannot include a Civil Code 1542 release or an equivalent release. (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 640, 645 [trial court would not approve a Civil Code 1542 release in class settlement].) The named plaintiffs could not adequately represent the absent class members on the wide scope of unknown potential claims.

The scope of the release for the named plaintiffs is broader, which is permissible.

The settlement has no provision for unclaimed funds. Counsel therefore does not need to provide a declaration in support of the motion that provides the information regarding Homeboy Industries required by CCP 382.4.

The Court will not approve the amount of attorneys' fees and costs until final approval hearing. The Court cannot award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case. This is the law even if the parties have agreed that

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Defendants will not oppose the motion for fees. (Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 450-451.)

"Because absent class members are not directly involved in the proceedings, oversight to ensure settlements are fair and untainted by conflict is the responsibility of both the class representative and the court." (Mark v. Spencer (2008) 166 Cal.App.4th 219, 227.)

"In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. ... [T]horough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms.' ... " 'The evil feared in some settlements-unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client-can best be met by a careful ... judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee....' " (Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 555-556.)

The court notes that counsel seeks fees of \$333,333, which is 33% of the total cash fund and a lesser portion of the potential total value of the settlement to the class. The court sets out its standard analysis below. Counsel may address that analysis in the fee application.

The Ninth Circuit's benchmark is 25%. (Laffitte v. Robert Half Internat. Inc. (2016) 1 Cal.5th 480, 495.)

This 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.

When considering risk, the court considers there is less risk in a case with fee shifting statutes because counsel's potential fees are not limited by and coupled to the monetary recovery. "The law does not mandate ... that attorney fees bear a percentage relationship to the ultimate recovery of damages in a civil rights case." (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 419.) (See also Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007.)

The Court will not decide the amount of any service award until final approval hearing. Plaintiff must provide evidence regarding the nature of his participation in the action, including a description of his specific actions and the amount to time he committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.) The court's standard service award is \$5,000.

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

The final accounting must provide the court with information about the number of non-Rewards member claims, the amount paid per claim, the number of Rewards member claims, and any data on the number or entrée claims actually used by members of the class.

The Court will set a compliance hearing after the completion of the distribution process for counsel for plaintiff and the Administrator to comply with CCP 384(b) 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 will sign the proposed order, which is modified by this order. Plaintiff must reserve a hearing for the motion for final approval.

Dated: 01/19/2022



**Evelio Grillo / Judge**