

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

**RG21088118: Asetline VS Chipotle Mexican Grill, Inc
09/13/2022 Hearing on Motion for Order Granting Final Approval of Class Action
Settlement and for Attorneys' Fees, Costs and Service Award in Department 21**

Tentative Ruling

The Motion for Final Approval of Settlement filed by Aaron Asetline on 05/16/2022 is Granted.

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

APPROVAL OF THE SETTLEMENT

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 Asetline. 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 Dec of Kierkegaard dated 6/24/22 at para 13 states that 85,008 Rewards Subclass Members have already claimed vouchers, suggesting \$720,000 worth of the vouchers.

The non-Rewards Program Class is consumers not in the “Rewards Program.” They did not enter 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 Dec of Kierkegaard dated 6/24/22 at para 13 states that 7,554 non-Rewards Subclass Members have already submitted claims, suggesting a distribution of \$68 to each person.

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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. There were four opt outs and one objection.

Helfand filed an objection on 4/18/22. Helfand withdrew the objection on 8/5/22.

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.

APPROVAL OF FEES, COSTS, AND SERVICE AWARD

"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

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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.)

Plaintiffs bring this Motion seeking an order awarding attorneys' fees in the amount of \$645,333, of which \$333,333 or 1/3 is requested from the Settlement Fund provided for Non-Rewards Members Subclass and \$312,000 is to be paid separately by Chipotle attributable to the Rewards Members Subclass. (Moving at 9:21-24)

The court awards fees of \$312,000 related to the Rewards Member Settlement. These members received vouchers. Chipotle agreed to pay \$312,000. The court finds this to be reasonable. The court applies a low level of scrutiny because the fees are paid by Chipotle and are not paid from a common fund that would otherwise be distributed to the class.

The court awards fees of \$300,000 related to the non-rewards settlement. This was settled for \$1,000,000 and the members will receive money.

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

When using the percentage of recovery approach, this court's benchmark for fees is 30% of a total fund. Courts have benchmarks ranging from 25% to 33%. 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; Schulz v. Jeppesen Sanderson, Inc. (2018) 27 Cal.App.5th 1167, 1175.) The benchmark suggests fees of \$300,000.

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.

Counsel spent 550 hours on the case, but do not allocate between the two subclasses. The court allocates equally and finds that counsel spent 275 hours on the non-rewards settlement. This is reasonable.

The court finds that a blended rate of \$600 is appropriate for the case. (Meridian Financial Services, Inc. v. Phan (2021) 67 Cal.App.5th 657, 708-709 [blended rate of \$550]; Espejo v. Copley Press, Inc. (2017) 13 Cal.App.5th 329, 337 [blended rate of \$500/hour]; 569 East County

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Boulevard LLC v. Backcountry Against the Dump, Inc. (2016) 6 Cal.App.5th 426, 438-440 fn 14, fn 16 [blended rate of \$275].) Regarding the amount of the blended rate, the court considers the evidence and its own knowledge and familiarity with the legal market. (Meridian Financial Services, Inc. v. Phan (2021) 67 Cal.App.5th 657, 709.) The court takes judicial notice of the rates for counsel in the USAO Attorney's Fees Matrix (<https://www.justice.gov/file/1461316/download>). The court takes judicial notice of the Laffey matrix. (<http://www.laffeymatrix.com/>) The court gives little weight to the anecdotal fee awards of other trial judges. Counsel can selectively present fee awards that indicate the highest hourly billing rates.

This results in a lodestar of \$165,000 on the non-rewards subclass.

The court applies a 1.2 multiplier for risk. 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. With a fee shifting statute, counsel has the risk of proving liability but if counsel proves liability, then the fees shift to the defendant with little to no consideration of the amount of the client's monetary recovery. For example, a nominal damage recovery will result in counsel recovering "reasonable attorneys' fees" that could far exceed the award of damages. (Harman v. City and County of San Francisco (2007) 158 Cal.App.4th 407, 419 [jury awarded plaintiff \$30,300, counsel recovered \$1,113,905.40 in fee-shifted fees]; Heritage Pacific Financial, LLC v. Monroy (2013) 215 Cal.App.4th 972, 1006-1007 [client recovered \$1, counsel recovered \$87,525 in fee-shifted fees].)

There was a CLRA claim and a fee shifting provision. (Civil Code 1780(e).) This results in a multiplier adjusted lodestar of \$198,000.

Considering the percentage analysis fees of \$300,000 and the multiplier adjusted lodestar fees of \$198,000, the court will award fees of \$300,000. The court will award fees at its benchmark.

The total fees are \$312,000 for the Rewards Member subclass and \$300,000 for the rewards subclass, for a total of \$612,000. The award of fees is appropriate to compensate counsel in this case, to incentivize the prosecution of meritorious cases, and does not result in an unreasonable windfall to counsel at the expense of their clients.

The court approves costs of \$7,687.50.

The court approves actual settlement administration costs not to exceed \$130,000.

The court approves a service award of \$5,000 to each plaintiff. Plaintiffs provided evidence regarding the nature of participation in the action, including a description of specific actions and the amount of time committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.)

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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 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(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.

PLEASE NOTE: This tentative ruling will become the ruling of the court if uncontested by 04:00pm the day before your hearing. If you wish to contest the tentative ruling, then both notify opposing counsel directly and the court at the eCourt portal found on the court's website: www.alameda.courts.ca.gov.

If you have contested the tentative ruling or your tentative ruling reads, "parties to appear," please use the following link to access your hearing at the appropriate date and time: <https://alameda-courts-ca-gov.zoomgov.com/my/department21> . If no party has contested the tentative ruling, then no appearance is necessary.