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Case #17CV319893
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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11
12 KEVIN TYLER, on behalf of himself, all others
similarly situated,

13 Plaintiff,

14 vs.

15 WESTERN MANAGEMENT, LLC, a California
16 limited liability company; and DOES 1 through
17 50, inclusive,

18 Defendants.

Case No. 17CV319893

**FURTHER ORDER RE: MOTION
FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

19 The above-entitled action came on for hearing on Wednesday, December 2, 2020, at
20 1:30 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and
21 considered the written submissions filed by the parties and issued a tentative ruling on Tuesday,
22 December 1, 2020. No party contested the tentative ruling; therefore, the court orders that the
23 tentative ruling be adopted as the order of the court, as follows:

24 **I. INTRODUCTION**

25 This is a putative class action arising out of alleged violations of the Fair Credit
26 Reporting Act (“FCRA”), the California Investigative Consumer Reporting Agencies Act
27 (“ICRAA”), and the California Consumer Credit Reporting Agencies Act (“CCRAA”). Plaintiff
28 also alleges violations of the Labor Code and Business and Professions Code.

1 The First Amended Complaint sets forth the following causes of action: (1) Violation of
2 15 U.S.C. § 1681b(b)(2)(A) (FCRA); (2) Violation of 15 U.S.C § 1681d(a)(1) and 1681g(c)
3 (FCRA); (3) Violation of California Civil Code § 1786, et seq. (ICRAA); (4) Violation of
4 California Civil Code § 1785, et seq. (CCRAA); (5) Failure to Provide Meal Periods; (6) Failure
5 to Provide Rest Periods; (7) Failure to Pay Hourly Wages; (8) Failure to Provide Accurate
6 Written Wage Statements; (9) Failure to Timely Pay all Final Wages; (10) Unfair Competition;
7 and (11) Civil Penalties.

8 The parties have reached a settlement. Plaintiff Kevin Tyler (“Plaintiff”) moves for
9 preliminary approval.

10 This motion was previously set for November 18, 2020, but was continued so that
11 supplemental briefing could be provided regarding conditional certification and the *cy pres*
12 recipient. That information has been provided and the court will now rule on the motion.

13 **II. LEGAL STANDARD**

14 Generally, “questions whether a settlement was fair and reasonable, whether notice to the
15 class was adequate, whether certification of the class was proper, and whether the attorney fee
16 award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple*
17 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48
18 Cal.App.4th 1794.)

19 In determining whether a class settlement is fair, adequate and reasonable, the
20 trial court should consider relevant factors, such as “the strength of plaintiffs’
21 case, the risk, expense, complexity and likely duration of further litigation, the
22 risk of maintaining class action status through trial, the amount offered in
settlement, the extent of discovery completed and the stage of the proceedings, the
experience and views of counsel, the presence of a governmental participant, and
the reaction of the class members to the proposed settlement.”

23 (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, *supra*, 48
24 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982) 688
25 F.2d 615, 624.)

26 “The list of factors is not exclusive and the court is free to engage in a balancing and
27 weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple*
28 *Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed

1 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
2 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
3 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*,
4 quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n,*
5 *etc., supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

6 The burden is on the proponent of the settlement to show that it is fair and
7 reasonable. However “a presumption of fairness exists where: (1) the settlement
8 is reached through arm’s-length bargaining; (2) investigation and discovery are
sufficient to allow counsel and the court to act intelligently; (3) counsel is
experienced in similar litigation; and (4) the percentage of objectors is small.”

9 (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48
10 Cal.App.4th at p. 1802.)

11 **III. DISCUSSION**

12 **A. Provisions of the Settlement**

13 The case has been settled on behalf of the following classes:

14 Wage and Hour Class:

15 All persons who, from November 30, 2013, to the date the Court grants
16 preliminary approval of this settlement, have previously been or currently are
17 employed in California by Defendant, whether directly or through an employment
agency or a professional services organization, as a non-exempt or hourly
employee.

18 FCRA Class:

19 All persons who, from November 30, 2012, to the date the Court grants
20 preliminary approval of this settlement, applied for and gained employment with
21 Defendant and for which a background check was performed in the United States.

22 (Declaration of Shaun Setareh in Support of Plaintiff’s Motion for [Preliminary] Approval of
23 Class Action Settlement and Certification of Settlement Class (“Setareh Decl.”), Ex. 1
24 (“Settlement Agreement”), ¶ 23.)

25 According to the terms of settlement, defendant Western Management (“Defendant”) will
26 pay a maximum amount of \$500,000. (Settlement Agreement, ¶ 15.) The total settlement
27 payment includes attorney fees of \$166,666.66, costs up to \$30,000, a service award of \$10,000,
28 settlement administration costs of \$10,000, and a PAGA allocation of \$150,000 (\$112,500 of

1 which will be paid to the Labor Workforce Development Agency). (*Id.* at ¶ 16.) Of the
2 remaining net settlement, 75% will be allocated to the wage and hour class and 25% will be
3 allocated to the FCRA class. (*Id.* at ¶ 17.)

4 The settlement agreement states that funds from checks not cashed for 180 days after
5 distribution to a class member will be paid to the sent to the Controller of the State of California
6 to be held pursuant to the Unclaimed Property Law for the benefit of that class member.
7 (Settlement Agreement, ¶ 45.) In the moving papers for the November 18 hearing, however,
8 Plaintiff asserts that these funds will be distributed as follows: (1) 25% to the State Treasury for
9 deposit in the Trial Court Improvement and Modernization Fund; (2) 25% to the State Treasury
10 for deposit into the Equal Access Fund of the Judicial Branch; and (3) 50% to the Santa Clara
11 County Bar Foundation.

12 Plaintiff now states in the supplemental brief that the parties have designated the Legal
13 Aid Society of Santa Clara County as the *cy pres* recipient. The court approves the designation
14 of the Legal Aid Society of Santa Clara County as the *cy pres* recipient.

15 **B. Fairness of the Settlement**

16 Plaintiff contends that the settlement is fair and was reached through arm's-length
17 settlement negotiations with the aid of an experienced mediator. Plaintiff states that the
18 maximum he could recover would be \$1,837,298.31 for the non-PAGA claims and
19 \$4,005,301.32 for PAGA penalties.

20 Overall, the Court finds that the settlement is fair. The settlement is in a reasonable range
21 given the maximum recoverable amount. It provides for some recovery for each class member
22 and eliminates the risk and expense of further litigation.

23 **C. Incentive Award, Fees, and Costs**

24 Plaintiff requests an incentive award of \$10,000.

25 The rationale for making enhancement or incentive awards to named plaintiffs is
26 that they should be compensated for the expense or risk they have incurred in
27 conferring a benefit on other members of the class. An incentive award is
28 appropriate if it is necessary to induce an individual to participate in the suit.
Criteria courts may consider in determining whether to make an incentive award
include: 1) the risk to the class representative in commencing suit, both financial
and otherwise; 2) the notoriety and personal difficulties encountered by the class
representative; 3) the amount of time and effort spent by the class representative;

1 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
2 enjoyed by the class representative as a result of the litigation. These “incentive
3 awards” to class representatives must not be disproportionate to the amount of
time and energy expended in pursuit of the lawsuit.

4 (*Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks,
5 brackets, ellipses, and citations omitted.)

6 Prior to the final approval hearing, the class representative shall submit a declaration
7 detailing his participation in the action. The court will make a determination at that time.

8 The court also has an independent right and responsibility to review the requested
9 attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
10 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff’s counsel will
11 seek attorney fees of \$166,666.66 (1/3 of the total settlement fund). Plaintiff’s counsel shall
12 submit lodestar information (including hourly rates and hours worked) prior to the final approval
13 hearing so the court can compare the lodestar information with the requested fees. Plaintiff’s
14 counsel shall also submit evidence of actual, incurred costs.

15 **D. Conditional Certification of Class**

16 Plaintiff requests that the putative class be conditionally certified for purposes of the
17 settlement. Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an
18 order approving or denying certification of a provisional settlement class after [a] preliminary
19 settlement hearing.” California Code of Civil Procedure Section 382 authorizes certification of a
20 class “when the question is one of a common or general interest, of many persons, or when the
21 parties are numerous, and it is impracticable to bring them all before the court” As
22 interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and
23 (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v.*
24 *Superior Court* (2004) 34 Cal.4th 319, 326.)

25 The “community-of-interest” requirement encompasses three factors: (1) predominant
26 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
27 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
28 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) “Other relevant considerations include the

1 probability that each class member will come forward ultimately to prove his or her separate
2 claim to a portion of the total recovery and whether the class approach would actually serve to
3 deter and redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
4 The plaintiff has the burden of establishing that class treatment will yield “substantial benefits”
5 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
6 381, 385.)

7 As explained by the California Supreme Court,

8 The certification question is essentially a procedural one that does not ask whether
9 an action is legally or factually meritorious. A trial court ruling on a certification
10 motion determines whether the issues which may be jointly tried, when compared
11 with those requiring separate adjudication, are so numerous or substantial that the
12 maintenance of a class action would be advantageous to the judicial process and
13 to the litigants.

14 (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation
15 marks, ellipses, and citations omitted.)

16 There are approximately 522 putative class members. Class members can be ascertained
17 from Defendant’s records. There are common questions regarding whether Defendant subjected
18 class members to common practices regarding certain wage and hour violations. No issue has
19 been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the
20 court finds that the proposed class should be conditionally certified.

21 **E. Class Notice**

22 The content of a class notice is subject to court approval. “If the court has certified the
23 action as a class action, notice of the final approval hearing must be given to the class members
24 in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

25 The notice generally complies with the requirements for class notice. (See Settlement
26 Agreement, Ex. A.) It provides basic information about the settlement, including the settlement
27 terms, and procedures to object or request exclusion.

28 In the tentative ruling, the court expressed the following concern about the notice:

The notice states, however, that objections must be in writing and must be filed and
served by a specific deadline. (Settlement Agreement, Ex. A, pp. 7-8.) It provides that
failure to do so will constitute a waiver of a class member’s right to appear at the final
approval hearing. (*Ibid.*)

1 In the court's prior order in connection with the November 18 hearing, the court stated
2 that the notice had to be changed to make clear that any class member may appear at the
3 final approval hearing whether or not a written objection has been submitted. Plaintiff
4 has submitted a slightly amended notice that states class members may appear at the final
5 approval hearing whether or not a written objection has been submitted. (Plaintiff's
6 Supplemental Brief in Support of Motion for [Preliminary] Approval of Class Action
7 Settlement and Certification of Settlement Class; Memorandum of Points and
8 Authorities, Ex. 2.) However, the language of the objection section of the notice is not
9 clear on this point because it still states that if a class member wants to object the class
10 member "must file a written objection" and that class members "who have not timely
11 filed and served Objections in the manner specified herein shall be deemed to have
12 waived any objections, shall be foreclosed from making any objection to the Settlement,
13 and shall not be heard at the Final Approval Hearing." (*Ibid.*)

14 The objection section and any related portions of the notice shall be amended further to
15 make it clear that class members *may* object by submitting a written objection but also
16 have the option to appear at the final approval hearing whether or not any written
17 objection has been filed. The notice should state that failure to submit a written objection
18 will have no impact on a class member's ability to appear at the final approval hearing to
19 be heard.

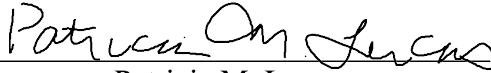
20 The amended notice shall be provided to the court for approval prior to mailing.

21 After the tentative ruling was posted and before the calendar was called, Plaintiff's
22 counsel submitted a revised form of notice which the court has approved.

23 **IV. CONCLUSION**

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

25 Dated: December 2, 2020

26 
27 Patricia M. Lucas
28 Judge of the Superior Court