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Case #21CV390195
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
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12 RICHARD J. SENSER, an individual, on behalf
13 of the State of California, as a private attorney
14 general, and on behalf of all Aggrieved
Employees, and on behalf of all others similarly
situated,

15 Plaintiff,

16 vs.

17 PROGRESSIVE CASUALTY INSURANCE
18 COMPANY, an Ohio Corporation,

19 Defendant.

Case No. 21CV390195

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

20 The above-entitled matter came on for hearing on Wednesday, March 23, 2022, at 1:30
21 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and
22 considered the written submissions filed by the parties and issued a tentative ruling on Tuesday,
23 March 22, 2022. No party contested the tentative ruling; therefore, the court orders that the
24 tentative ruling be adopted as the order of the court, as follows:

25 **I. INTRODUCTION**

26 This is a putative class and representative action arising out of the alleged failure by
27 defendant Progressive Casualty Insurance Company (“Defendant”) to fully reimburse its current
28 and former employees for their home office expenses in California during the pandemic. The

1 Complaint, filed on November 9, 2021, sets forth the following causes of action: (1) Failure to
2 Reimburse for Business Expenses (Cal. Labor Code section 2802); (2) Unfair Competition Law
3 Violations (Bus. & Prof. Code § 17200); and (3) Penalties Pursuant to PAGA Labor Code
4 § 2699, et seq. for Violations of Labor Code § 2802.

5 The parties have reached a settlement. Plaintiff Richard J. Senser (“Plaintiff”) now
6 moves for preliminary approval of the settlement.

7 **II. LEGAL STANDARD**

8 Generally, “questions whether a settlement was fair and reasonable, whether notice to the
9 class was adequate, whether certification of the class was proper, and whether the attorney fee
10 award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple*
11 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.*
12 (1996) 48 Cal.App.4th 1794 (*Dunk*).)

13 In determining whether a class settlement is fair, adequate and reasonable, the
14 trial court should consider relevant factors, such as “the strength of plaintiffs’
15 case, the risk, expense, complexity and likely duration of further litigation, the
16 risk of maintaining class action status through trial, the amount offered in
17 settlement, the extent of discovery completed and the stage of the proceedings, the
18 experience and views of counsel, the presence of a governmental participant, and
19 the reaction of the class members to the proposed settlement.”
(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801
20 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982) 688 F.2d 615, 624
21 (*Officers*).)

22 “The list of factors is not exclusive and the court is free to engage in a balancing and
23 weighing of factors depending on the circumstances of each case.” (*Wershba, supra*, 91
24 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the
25 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
26 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
27 whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk, supra*, 48
28 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and
reasonable. However “a presumption of fairness exists where: (1) the settlement
is reached through arm’s-length bargaining; (2) investigation and discovery are

1 sufficient to allow counsel and the court to act intelligently; (3) counsel is
2 experienced in similar litigation; and (4) the percentage of objectors is small.”

3 (*Wershba, supra*, 91 Cal.App.4th at p. 245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

4 **III. DISCUSSION**

5 **A. Provisions of the Settlement**

6 The case has been settled on behalf of the following class:

7 All individuals employed in hourly or non-exempt positions by [Defendant] in
8 California for the period of September 12, 2020 through July 27, 2021 (for non-
9 exempt employees who were employed by [Defendant] before August 18, 2019)
and for the period of November 20, 2019 through July 27, 2021 (for non-exempt
employees who began employment with [Defendant] on or after August 18,
2019).¹

10 (Declaration of Craig J. Ackermann in Support of Plaintiff’s Motion for Preliminary Approval of
11 Class Action Settlement (“Ackermann Dec.”), Ex. 1 (“Settlement Agreement”), ¶¶ I.B, I.D, I. F,
12 & I.H.)

13 According to the terms of settlement, Defendant will pay a total non-reversionary amount
14 of \$364,000. (Settlement Agreement, ¶¶ I.Q & III.A.) The total settlement payment includes
15 attorney fees up to \$109,200 (30 percent of the gross settlement fund), litigation costs not to
16 exceed \$15,000, an incentive award of \$5,000 for the class representative, settlement
17 administration costs up to \$15,000, and a PAGA allocation of \$50,000 (\$37,500 of which will be
18 paid to the Labor and Workforce Development Agency). (Settlement Agreement, ¶¶ I.A, I.C, I.J,
19 I.K, & I.W.) The net settlement will be distributed to class members pro rata based on their
20 weeks worked during the class period. (Settlement Agreement, ¶ III.G.) Funds from checks
21 remaining uncashed more than 180 days after mailing will be paid to Bet Tzedek Legal Services
22 as a *cy pres* recipient. (Settlement Agreement, ¶ III.J.10.)

23 In exchange for the settlement, class members agree to release “the Released Parties from
24 the Released Claims.” (Settlement Agreement, ¶ III.K.) “Released Parties” are defined as
25 Defendant and “and any of its current, former, and future parent, subsidiary, and affiliated
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27
28 ¹ Plaintiff advises that the class definition takes into account Defendant’s settlement in a prior class action lawsuit:
Gomes v. Progressive Casualty Insurance Company (Sacramento County Superior Court, Case No. 34-2018-
002419799-CU-OE-GDS). In that case, the class release period ran through the date of the final approval order
(September 11, 2020) for all employees employed by Defendant through August 17, 2019.

1 companies, and its/their agents, officers, shareholders, directors, employees, including successors
2 and assigns, related or affiliated companies' predecessors and successors; and, with respect to all
3 such entities, all of its/their past and present employees, officers, directors, stockholders, owners,
4 representatives, assigns, attorneys, agents, insurers, employee benefit programs (and the trustees,
5 administrators, fiduciaries and insurers of such programs) and any other persons acting by,
6 through, under or in concert with any such persons or entities.” (Settlement Agreement, ¶ I.DD.)

7 “Released Claims” are defined as:

8
9 The claims that Plaintiff, the other Participating Class Members, the Allegedly
10 Aggrieved Employees, and all persons purporting to act on their behalf or
11 purporting to assert a claim under or through each or any of them, including but
12 not limited to, their dependents, spouses, attorneys, heirs and assigns,
13 beneficiaries, devisees, legatees, executors, administrators, trustees, conservators,
14 guardians, representatives, agents, and successors-in-interest, whether individual,
15 class, representative, legal, equitable, direct or indirect, or any other type or in any
16 other capacity (collectively, the “Releasing Parties”) are fully and forever
17 irrevocably releasing, in exchange for the consideration provided for by this
18 Settlement, any and all claims, obligations, demands, rights, causes of action, and
19 liabilities (monetary or non-monetary) against Defendant or the Released Parties
20 (as defined below) during the Class Period and the PAGA Period, under Labor
Code Section 2802 and/or PAGA, which either have been asserted or which could
have been asserted in the LWDA Letter or in the Forthcoming Action based on
the facts, claims and/or allegations stated in such documents, including for failure
to provide timely and/or complete reimbursement of business—related
expenditures, for recovery of expenses and/or all penalties under California Labor
Code Section 2802 and California’s Wage Orders, under PAGA, under any other
statute or common law, or for any recovery under California Business and
Professions Code Section 17200 et seq. (the “Released Claims”).
Notwithstanding the above, the Parties understand and agree that the release in
this Settlement does not apply to (i) those rights that as a matter of law cannot be
released and/or waived, including, but not limited to, workers’ compensation
claims; (ii) rights or claims that may arise after the Class Period and/or the PAGA
Period; and (iii) rights or claims regarding enforcement of this Settlement.

21 (Settlement Agreement, ¶ I.CC.) Plaintiff also agrees to a comprehensive general release of
22 claims. (Settlement Agreement, ¶ III.L.)

23 **B. Fairness of the Settlement**

24 Plaintiff asserts that the settlement is fair, adequate, and reasonable given the strength of
25 his claims and the risks of continued litigation. Plaintiff states that the settlement was reached
26 through arm’s-length negotiations facilitated by mediator Steven R. Rottman, Esq. following
27 informal discovery. Plaintiff estimates that Defendant’s maximum total potential exposure for
28 his claims is approximately \$2,426,670. (Ackermann Dec., ¶ 33.) Plaintiff provides a detailed

1 breakdown of this amount for each claim. (*Ibid.*) Plaintiff asserts that the potential value of the
2 claims should be significantly discounted due to the risks inherent in continued litigation and the
3 strength of Defendant’s defenses. (*Ibid.*) Consequently, Plaintiff concludes that Defendant’s
4 realistic, risk-adjusted exposure is approximately \$369,394. (*Ibid.*) Plaintiff estimates that the
5 net settlement amount is approximately \$185,300 and the average net recovery is \$125.03 per
6 class member. (*Id.* at ¶ 36.)

7 Overall, the court finds that the settlement is fair. The settlement provides for some
8 recovery for each class member and eliminates the risk and expense of further litigation.

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

10 Plaintiff requests an incentive award of \$5,000 for the class representative.

11 The rationale for making enhancement or incentive awards to named plaintiffs is
12 that they should be compensated for the expense or risk they have incurred in
13 conferring a benefit on other members of the class. An incentive award is
14 appropriate if it is necessary to induce an individual to participate in the suit.
15 Criteria courts may consider in determining whether to make an incentive award
16 include: 1) the risk to the class representative in commencing suit, both financial
17 and otherwise; 2) the notoriety and personal difficulties encountered by the class
18 representative; 3) the amount of time and effort spent by the class representative;
19 4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
20 enjoyed by the class representative as a result of the litigation. These “incentive
21 awards” to class representatives must not be disproportionate to the amount of
22 time and energy expended in pursuit of the lawsuit.

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

25 The class representative has submitted a declaration generally discussing his participation
26 in the case. Prior to the final approval hearing, the class representative shall file a declaration
27 providing an estimate of the time spent in connection with his participation in the action. The
28 court will make a determination at that time.

The court also has an independent right and responsibility to review the requested
attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
Angeles Cellular Telephone Co. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff’s counsel
states that they will seek attorney fees in the amount of \$109,200 (30 percent of the total
settlement fund). Plaintiff’s counsel shall submit lodestar information (including hourly rates

1 and hours worked) prior to the final approval hearing so the court can compare the lodestar
2 information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs
3 incurred.

4 Lastly, Plaintiff requests up to \$12,000 for the claims administration fee for Phoenix
5 Class Action Administration Solutions to administer the settlement. Prior to the final approval
6 hearing, the claims administrator shall submit a declaration detailing its actual expenses
7 associated with administering the settlement.

8 **D. Conditional Certification of Class**

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

18 The "community-of-interest" requirement encompasses three factors: (1) predominant
19 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
20 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
21 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the
22 probability that each class member will come forward ultimately to prove his or her separate
23 claim to a portion of the total recovery and whether the class approach would actually serve to
24 deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
25 The plaintiff has the burden of establishing that class treatment will yield "substantial benefits"
26 to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
27 381, 385.)

28 As explained by the California Supreme Court:

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

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

9 Plaintiff states that there are approximately 1,482 class members. Class members can be
10 ascertained from Defendant's records. There are common issues regarding Defendant's
11 reimbursement practices. No issue has been raised regarding the typicality or adequacy of
12 Plaintiff as a class representative. In sum, the court finds that the proposed class should be
13 conditionally certified.

14 **E. Class Notice**

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

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

21 However, the notice refers to an Opt-Out Form and an Objection Form that may be used
22 by class members, but copies of those forms were not provided to the court for review.

23 Additionally, the notice shall be amended to make clear that written objections are not required
24 and that any class member may appear and make an oral objection at the final approval hearing
25 whether or not a written objection has been filed. Finally, the notice shall include the following
26 language regarding appearances at the final approval hearing:

27 Class members may appear at the final approval hearing either in person in the
28 courtroom or by telephone via CourtCall. Class members who wish to appear by
CourtCall should contact class counsel at least three days before the hearing if
possible, to arrange a telephonic appearance. Any CourtCall fees for an
appearance by an objecting class member will be paid by class counsel.

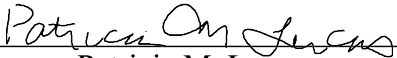
The Opt-Out Form, the Objection Form, and the amended notice shall be provided to the
court for approval prior to mailing.

1 **IV. CONCLUSION**

2 The motion for preliminary approval of the class action settlement is GRANTED, subject
3 to the modification to the notice. The final approval hearing is set for November 23, 2022, at
4 1:30 p.m.

5 The Case Management Conference set for March 23, 2022, is vacated.

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7 Dated: March 23, 2022



Patricia M. Lucas
Judge of the Superior Court

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