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April 18, 2023
Clerk of the Court
Superior Court of CA
County of Santa Clara
21CV387223
By: rwalker

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

RYAN CLAY, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

CONSERVICE, LLC; and DOES 1 through
20, inclusive,

Defendants.

Case No. 21CV387223
Consolidated with Case No.: 21CV391470

Assigned for all purposes to:
Hon. Theodore C. Zayner
Dept. 19

**REVISED ~~PROPOSED~~ ORDER
GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

1 The above-entitled action comes on for hearing before the Honorable Theodore C.
2 Zayner on April 12, 2023 at 1:30 p.m. in Department 19. The court now issues its tentative
3 ruling as follows:

4 **I. INTRODUCTION**

5 This is a consolidated putative class and Private Attorneys General Act (“PAGA”) action
6 arising out various alleged wage and hour violations. The operative Consolidated Class
7 Action Complaint, filed on January 12, 2023, sets forth the following causes of action: (1) Failure
8 to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods;
9 (4) Failure to Permit Rest Breaks; (5) Failure to Provide Accurate Itemized Wage Statements; (6)
10 Failure to Pay All Wages Due Upon Separation of Employment; (7) Failure to Reimburse
11 Necessary Business Expenses; (8) Violation of Business and Professions Code §§ 17200, et seq.;
12 and (9) Enforcement of Labor Code § 2698, et seq. (PAGA).

13 The parties have reached a settlement. Plaintiffs Ryan Clay and Jeffrey Raquel
14 (“Plaintiffs”) now move for preliminary approval of the settlement.

15 **II. LEGAL STANDARD**

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

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

“The list of factors is not exclusive and the court is free to engage in a balancing and

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

7 The burden is on the proponent of the settlement to show that it is fair and
8 reasonable. However “a presumption of fairness exists where: (1) the settlement is
9 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.”

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

11 **III. DISCUSSION**

12 **A. Provisions of the Settlement**

13 The consolidated action has been settled on behalf of the following class:

14 [A]ll non-exempt employees who have worked, or continue to work, for Defendant
15 [Conservice, LLC (“Defendant”)] in California from April 3, 2017 through and
including the date a signed order preliminarily approving the Settlement is filed.

16 (Declaration of Kristy R. Connolly in Support of Motion for Preliminary Approval of Class
17 Action Settlement, Ex. 1 (“Settlement Agreement”), ¶ 1.7.) The class includes a subset of
18 Aggrieved Employees, who are defined as “all non-exempt employees who have worked or
19 continue to work[] for Defendant in California from April 3, 2020 through and including the date
20 a signed order preliminarily approving the Settlement is filed.” (Settlement Agreement, ¶ 1.3.)

21 According to the terms of settlement, Defendant will pay a gross, non-reversionary
22 amount of \$1,200,000. (Settlement Agreement, ¶ 1.21.) The gross settlement amount includes
23 attorney fees not to exceed \$420,000 (35 percent of the gross settlement amount), litigation costs
24 up to \$30,000, service awards in the total amount of \$20,000 (\$10,000 for each class
25 representative), settlement administration costs up to \$6,950, and a PAGA Payment of \$50,000
26 (75 percent of which will be paid to the LWDA and 25 percent of which will become part of the
27 net settlement amount to be distributed to Aggrieved Employees). (Settlement Agreement, ¶¶ 1.2,
28 1.6, 1.21, 1.22, 1.26, 1.30, 5.2, 5.3, 5.4, 5.6.)

1 The net settlement amount that is not attributable to the PAGA Payment will be distributed
2 to class members pro rata based on the number of workweeks worked during the class period.
3 (Settlement Agreement, ¶ 5.6.)

4 Funds from checks that remained uncashed 180 days after issuance will be sent to Legal
5 Aid at Work as a *cy pres* recipient in accordance with Code of Civil Procedure section 384.
6 (Settlement Agreement, ¶ 5.7.)

7 In exchange for the settlement, class members who do not opt out will release Defendant,
8 and related persons and entities, from all claims asserted in the consolidated action as well as any
9 other claims that could reasonably have been asserted based on the facts alleged in the pleadings
10 or Plaintiffs' letters to the LWDA. (Settlement Agreement, ¶ 6.1.) Aggrieved Employees will
11 release Defendant, and related persons and entities, from all PAGA claims during the PAGA
12 Period that were or reasonably could have been brought based on the facts alleged in the pleadings
13 or Plaintiffs' letters to the LWDA. (Settlement Agreement, ¶ 6.1.) Plaintiffs also agree to a general
14 release of claims. (Settlement Agreement, ¶ 6.2.)

15 **B. Fairness of the Settlement**

16 Plaintiffs assert that the settlement is fair, reasonable, and adequate, given the inherent
17 risks of litigation, including substantial risks relative to class certification and the merits of the
18 claims, and the costs of pursuing litigation. Plaintiffs state that the settlement is the result of
19 thorough, arm's-length negotiations between the parties and their experienced counsel, after a
20 full-day mediation with David Rotman. Plaintiffs estimate that there are approximately 170 class
21 members. Plaintiffs state that the average net payment is approximately \$3,959 per class member.
22 Prior to mediation, Plaintiffs obtained informal discovery, including their personnel files, policy
23 documents, a sample of the class members' contact information, a sample of class members'
24 timekeeping and pay records, and records from the Department of Industrial Relations regarding
25 Defendant's alternative workweek schedule election. Plaintiffs estimate Defendant's maximum
26 potential liability for each claim is as follows: \$213,866 for unpaid wages; \$648,697 for meal
27 period violations; \$4,300,000 for rest break violations; \$101,481 for necessary business expenses;
28 \$465,614 for waiting time penalties; \$241,350 for wage statement violations; and \$247,800 for

1 PAGA penalties. Plaintiffs explained that they discounted the value of these claims based on
2 Defendant’s defenses, the likelihood of class certification, likelihood of success at trial, and the
3 possibility that the court could reduce the amount of penalties awarded. Plaintiffs estimate that
4 the realistic value of their claims is approximately \$1,151,346. The gross settlement amount
5 represents approximately 19 percent of the potential maximum recovery. The proposed settlement
6 amount is within the general range of percentage recoveries that California courts have found to
7 be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca). Feb. 18, 2022, No. 1:19-cv-00062-
8 DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 4.3 to 25-25
9 percent of the maximum potential exposure].)

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

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

13 Plaintiffs request service awards in the total amount of \$20,000 (\$10,000 for each class
14 representative).

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

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

29 Prior to the final approval hearing, the class representatives shall file declarations
30 specifically detailing how they participated in the action and an estimate of the time spent. The
31 court will make a determination at that time. The court also has an independent right and
32 responsibility to review the requested attorney fees and only award so much as it determines
33 reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123,

1 127-128.) Plaintiffs’ counsel will seek attorney fees of \$420,000 (35 percent of the gross
2 settlement fund) as well as up to \$30,000 in litigation costs. The court notes that the attorney fees
3 sought are a higher percentage of the common fund than is typically awarded. Plaintiffs’ counsel
4 shall submit lodestar information (including hourly rates and hours worked) prior to the final
5 approval hearing in this matter so the court can compare the lodestar information with the
6 requested fees. Plaintiffs’ counsel shall also submit evidence of actual costs incurred as well as
7 evidence of any settlement administration costs.

8 **D. Conditional Certification of Class**

9 Plaintiffs request that the class be conditionally certified for purposes of the settlement.
10 Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an order
11 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 interpreted
15 by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-
16 defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior*
17 *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,*
21 *Inc. 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 claim
23 to a portion of the total recovery and whether the class approach would actually serve to deter and
24 redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff
25 has the burden of establishing that class treatment will yield “substantial benefits” to both “the
26 litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

27 As explained by the California Supreme Court,
28 The certification question is essentially a procedural one that does not ask whether
an action is legally or factually meritorious. A trial court ruling on a certification

1 motion determines whether the issues which may be jointly tried, when compared
2 with those requiring separate adjudication, are so numerous or substantial that the
3 maintenance of a class action would be advantageous to the judicial process and to
4 the litigants.

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

7 Plaintiffs state that there are approximately 170 class members that can be determined
8 from a review of Defendant's records. There are common questions regarding whether class
9 members were subjected to common practices that violated wage and hour laws. No issue has
10 been raised regarding the typicality or adequacy of Plaintiffs as class representatives. Therefore,
11 the court finds that the proposed class should be conditionally certified for settlement purposes.

12 **E. Class Notice**

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

16 Here, the class notice generally complies with the requirements for class notice.
17 (Settlement Agreement, Ex. A.) It provides basic information about the settlement, including the
18 settlement terms, and procedures to object or request exclusion. The Parties have submitted an
19 amended class notice to include the following language:

20 Class members may appear at the final approval hearing remotely using the
21 Microsoft Teams link for Department 19 (Afternoon Session). Instructions for
22 appearing remotely are provided at
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and
23 should be reviewed in advance. Class members who wish to appear remotely are
24 encouraged to contact class counsel at least three days before the hearing if
25 possible, so that potential technology or audibility issues can be avoided or
26 minimize.

27 (*See* Supplemental Declaration of Kristy R. Connolly, Ex. A). The amended class notice is
28 approved for mailing.

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1 **IV. CONCLUSION**

2 The motion for preliminary approval of the class and representative action settlement is
3 GRANTED. The final approval hearing is set for October 11, 2023, at 1:30 p.m. in Department
4 19.

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DATED: April 18, 2023



Honorable Theodore C. Zayner
JUDGE OF THE SUPERIOR COURT

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