

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

SYLVIA BERNABE, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

899 CHARLESTON, a California corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No. 20CV366465

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

The above-entitled matter came on for hearing on Wednesday, August 18, 2021, at 1:30 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and considered the written submissions filed by the parties and issued a tentative ruling on Tuesday, August 17, 2021. No party contested the tentative ruling; therefore, the court orders that the tentative ruling be adopted as the order of the court, as follows:

I. INTRODUCTION

This is a putative class and representative action arising out various alleged wage and hour violations. The First Amended Class and Representative Action Complaint, filed on July 16, 2021, sets forth the following causes of action: (1) Violation of Labor Code §§ 510, 558, and 1194; (2) Violation of Labor Code § 226, subd. (a); (3) Violation of Labor Code §§ 201-203;

(4) Violation of Business and Professions Code § 17200, et seq.; and (5) Violation of the Private Attorney General Act (“PAGA”), Labor Code § 2698, et seq.

The parties have reached a settlement. Plaintiff Sylvia Bernabe (“Plaintiff”) moves for preliminary approval of the settlement.

II. LEGAL STANDARD

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

In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the 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.” (*Wershba v. Apple Computer, Inc.*, *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.)

“The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.*, *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 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.”

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

3 **III. DISCUSSION**

4 **A. Provisions of the Settlement**

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

6 All current and former non-exempt employees of Defendant in the State of
7 California who were paid shift differential wages, bonuses, and commissions at
8 any time from April 6, 2018, through October 31, 2020.

9 According to the terms of settlement, defendant 899 Charleston (“Defendant”) will pay a
10 total non-reversionary amount of \$250,000. (Declaration of Mai Tulyathan in Support of
11 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, Ex. A (“Settlement
12 Agreement”), ¶ III(B)(1).) The total settlement payment includes attorney fees of \$83,333.33,
13 costs up to \$25,000, an incentive award of \$10,000 for the class representative, settlement
14 administration costs up to \$4,950, and a PAGA allocation of \$20,000 (\$15,000 of which will be
15 paid to the Labor and Workforce Development Agency). (Settlement Agreement, ¶ III(B)(4)-
16 (7).)

17 Checks remaining uncashed more than 180 days after issuance will be void and the funds
18 from those checks will be sent to Asian Americans Advancing Justice – Los Angeles as a *cy pres*
19 recipient. (Settlement Agreement, ¶ III(E)(2).) Code of Civil Procedure section 384 mandates
20 that unclaimed or abandoned class member funds be given to “nonprofit organizations or
21 foundations to support projects that will benefit the class or similarly situated persons, or that
22 promote the law consistent with the objectives and purposes of the underlying cause of action, to
23 child advocacy programs, or to nonprofit organizations providing civil legal services to the
24 indigent.” It is not apparent whether the proposed *cy pres* fits within the boundaries of section
25 384. Plaintiff shall provide additional information prior to final approval regarding how Asian
26 American Advancing Justice – Los Angeles qualifies under Code of Civil Procedure section 384.

27 **B. Fairness of the Settlement**

28 Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the inherent
risks of litigation, including substantial risks relative to class certification and the merits of the

1 claims, the costs of pursuing litigation, and the risks associated with the court's discretion to
2 reduce PAGA penalties. Plaintiff states that the settlement is the result of extensive arm's-length
3 negotiations between the parties and their counsel and was facilitated by an experienced and
4 neutral mediator.

5 Plaintiff states that the potential liability in this case for the non-PAGA claims is
6 approximately \$525,758. Based on the settlement amount, each class member will receive an
7 average payment of \$963.07.

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

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

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

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

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

21 The class representative has submitted a declaration that sets forth some of the ways in
22 which she has assisted in the case. Prior to the final approval hearing, the class representative
23 shall file a declaration more specifically detailing her participation in the action and an estimate
24 of the time spent. The court will make a determination at that time.

25 The court also has an independent right and responsibility to review the requested
26 attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
27 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will
28 seek attorney fees of \$83,333.33 (1/3 of the total settlement fund). Plaintiff's counsel shall

1 submit lodestar information (including hourly rates and hours worked) prior to the final approval
2 hearing in this matter so the court can compare the lodestar information with the requested fees.
3 Plaintiff's counsel shall also submit evidence of actual costs incurred up to the date of the final
4 approval hearing.

5 **D. Conditional Certification of Class**

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

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

25 As explained by the California Supreme Court,

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

1
2 (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation
3 marks, ellipses, and citations omitted.)

4 Plaintiff states that there are approximately 116 class members. Class members can be
5 ascertained from Defendant's records. There are common questions regarding whether
6 Defendant's uniform policies resulted in the alleged wage and hour violations. No issue has
7 been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the
8 court finds that the proposed class should be conditionally certified.

9 **E. Class Notice**

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

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

16 The notice provides information regarding how to appear at the final approval hearing,
17 but states that at this time hearings are being conducted remotely and thus does not reflect the
18 July 7, 2021 General Order Rescinding Portion of May 6, 2020 General Order Concerning
19 Complex Civil Actions. The language shall be modified to state the following:

20 Class members may appear at the final approval hearing either in person in the
21 courtroom or by telephone via CourtCall. Class members who wish to appear by
22 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.

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

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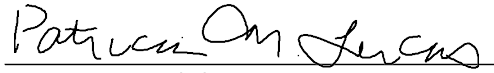
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1 **IV. CONCLUSION**

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 December 8, 2021, at 1:30
4 p.m.

5
6 Dated: August 18, 2021



Patricia M. Lucas
Judge of the Superior Court