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Clerk of Court
Superior Court of CA,
County of Santa Clara
16CV293998
Reviewed By:R. Walker

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

GAVIN MCCARTHY, an individual, SANDRA VILLANUEVA, and individual, and YESENIA ORTIZ, an individual, on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

MARRIOTT HOTEL SERVICES, INC., a Delaware Corporation, MARRIOTT INTERNATIONAL, INC., a Delaware Corporation, and DOES 1 through 25, inclusive,

Defendants.

Case No. 2016-1-CV-293998

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

The above-entitled matter came on regularly for hearing on Friday, July 7, 2017, at 9:00 a.m. in Department 5 (Complex Civil Litigation), the Honorable Thomas E. Kuhnle presiding. The Court reviewed and considered the written submissions of all parties and issued a tentative ruling on July 6, 2017. No party contested the tentative ruling; therefore, the Court orders the tentative ruling be adopted as the Order of the Court, as follows:

I. INTRODUCTION

This is a putative class action lawsuit arising out of various alleged Labor Code violations. The First Amended Complaint ("FAC"), filed on June 27, 2016, sets forth the

1 following causes of action: (1) Failure to Provide Meal Periods; (2) Failure to Authorize and
2 Permit Rest Periods; (3) Failure to Provide Wages When Due; (4) Failure to Comply with
3 Itemized Employee Wage Statement Provisions; (5) Violation of California Business and
4 Professions Code § 17200, et seq.; and (6) Violation of Private Attorney General Act.

5 The parties have now reached a settlement. Plaintiffs move for preliminary approval of
6 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, citing *Dunk v. Ford Motor Co.* (1996)
12 48 Cal.App.4th 1794.)

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
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.”

17 (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*,
18 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.* (9th Cir. 1982)
19 688 F.2d 615, 624.)

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

28 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

1 arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel
2 and the court to act intelligently; (3) counsel is experienced in similar litigation; and
(4) the percentage of objectors is small."

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

5 **III. ANALYSIS**

6 **A. Provisions of the Settlement**

7 In the FAC, plaintiffs Gavin McCarthy, Sandra Villanueva, and Yesenia Ortiz
8 (collectively, "Plaintiffs") define the proposed class as "current and former California employees
9 of Defendants who . . . worked at Defendants' hotels as non-exempt hourly-paid loss prevention
10 officers/security guards or non-exempt hourly-paid loss prevention supervisors, including any of
11 Defendants' job positions with similar duties and/or job titles." (FAC, ¶ 15.) However,
12 Plaintiffs have settled this action only on behalf of approximately 62 California current and
13 former non-exempt Loss Prevention Officers and Loss Preventions Supervisors (collectively,
14 "LPOs") at defendants Marriot Hotel Services, Inc. and Marriot International, Inc.'s
15 (collectively, "Defendants") LA Live location in Los Angeles, California. Plaintiffs assert the
16 settlement only resolves the claims of LPOs employed at Defendants' LA Live location because,
17 as part of Plaintiffs' investigation of class members' claims, Plaintiffs discovered LA Live is a
18 unique location with various levels of supervisors, different policies and practices, and a
19 different management style than Defendants' other locations in California.

20 Since McCarthy was employed at Defendants' Santa Clara location, the parties settled his
21 claims individually and he is requesting dismissal of his class claims without prejudice. The
22 parties also seek leave of Court to file a Second Amended Complaint that will modify the class
23 definition to only include LPOs employed at Defendants' LA Live location. The parties have
24 stipulated to the filing of the Second Amended Complaint.

25 Generally, "whenever the dismissal of a class action stems from a defendant's grant of
26 benefits to the representative plaintiffs, which are not provided to the class as a whole, the court
27 may not dismiss the action without notice to the class." (*La Sala v. American Sav. & Loan Assn.*
28 (1971) 5 Cal.3d 864.) If a court has not ruled on class certification, however, notice of a

1 proposed dismissal may be given in the manner specified by the court, or “the action may be
2 dismissed without notice to the class members if the court finds that the dismissal will not
3 prejudice them.” (Cal. Rules of Court, rule 3.770(c).) Plaintiffs have explained the reason for
4 settling the action only on behalf of the employees at the LA Live location. Further, the parties
5 assert no action has been taken to publicize the claims of the putative class members. (Plaintiffs’
6 Notice of Errata re Exhibit 1 to the Declaration of David R. Markham Filed in Support of
7 Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, Ex. 1
8 (“Settlement Stipulation”), Ex. A (Joint Stipulation Seeking Leave to Amend Plaintiffs’
9 Complaint, and [Proposed] Order.) Accordingly, the Court finds notice to the putative class
10 members from non-LA Live locations is not necessary because they will not be prejudiced from
11 the dismissal of their claims without prejudice.

12 Pursuant to the stipulation of the parties, the Court GRANTS leave for Plaintiffs to file
13 their Second Amended Complaint within one business day and for Defendants to file the Answer
14 to the Second Amended Complaint within seven days. Accordingly, the case has been settled on
15 behalf of the following class:

16 [A]ll persons employed as non-exempt Loss Prevention Officers and Loss
17 Prevention Supervisors at Defendants’ LA Live location in Los Angeles,
18 California, from April 18, 2012 through the date of preliminary approval of this
19 Settlement or October 7, 2017, whichever occurs earlier.

19 (Settlement Stipulation, ¶ 14.)

20 Pursuant to the settlement, Defendants will pay a total of \$650,000. (Settlement
21 Stipulation, ¶ 24.) This amount includes \$216,666 for attorneys’ fees, costs up to \$25,000, a
22 PAGA payment of \$10,000 (of which \$7,500 will be paid to the California Labor and Workforce
23 Development Agency), claims administration costs of \$6,000¹, and incentive awards of \$5,000 to
24 each class representative (Villanueva and Ortiz). (*Id.* at ¶¶ 43-46.) The settlement is non-claims
25 made and non-reversionary. (See *id.* at ¶¶ 48-49.)

26 Payments to class members will be calculated by dividing the individual shifts worked by
27 each class member by the total estimated shifts worked by all class members and then multiplied

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¹ The parties have chosen Simpluris, Inc. as the claims administrator.

1 by the net fund value. (Settlement Stipulation, ¶ 48.) Plaintiffs contend the average recovery for
2 each class member will exceed \$5,000. Checks that are uncashed will escheat to the State of
3 California Unclaimed Wage Fund in the name of the settlement class member. (*Id.* at ¶ 49.)

4 **B. Fairness of the Settlement**

5 The parties participated in an all-day mediation session on April 7, 2017 and, at the
6 conclusion of the session, settled the case in principle. After several weeks of additional
7 arms'-length negotiations, the parties finalized the terms of the Settlement Stipulation.

8 Plaintiffs assert the total potential exposure for all Plaintiffs' claims on behalf of LPOs
9 employed at the LA Live location is \$1,962,890. (Declaration of David R. Markham in Support
10 of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, ¶ 14.)

11 Therefore, the total settlement amount is approximately 33% of the total potential recovery.

12 Settlement before trial removes any uncertainty and the possibility of loss, and also
13 reduces the litigation expenses of the parties. Moreover, Plaintiffs have achieved a significant
14 result, with an average recovery for each class member exceeding \$5,000. Overall, the Court
15 finds the settlement is fair.

16 Plaintiffs will seek a class representative incentive award of \$5,000 for each class
17 representative (Villanueva and Ortiz).

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

25 (*Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks,
26 brackets, ellipses, and citations omitted.) Prior to the final approval hearing, Villanueva and
27 Ortiz shall submit declarations detailing their participation in the case. The Court will review the
28 declarations to make a determination regarding the incentive awards.

1 The Court also has an independent right and responsibility to review the requested
2 attorneys' fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
3 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will
4 seek attorneys' fees of \$216,666 (1/3 of the total settlement fund) (plus costs and expenses up to
5 \$25, 000). While 1/3 of the common fund for attorneys' fees is generally considered reasonable,
6 Plaintiffs' counsel should submit lodestar information (including hourly rates and hours worked)
7 prior to the final approval hearing in this matter so the Court can compare the lodestar
8 information to the requested fees.

9 **C. Conditional Certification of Class**

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

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

1 As explained by the California Supreme Court,

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

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

10 Class members can be ascertained from Defendant's records. Common issues in this case
11 include whether Defendants' on-duty meal break agreement was lawful, whether rest breaks
12 were interruptible due to Defendants' policies and practices, whether Defendants' engaged in
13 unfair business practices, and whether class members are entitled to injunctive relief. No issue
14 has been raised regarding the typicality or adequacy of Villanueva or Ortiz as class
15 representatives. In sum, the Court finds that the proposed class should be conditionally certified.

16 **D. Class Notice**

17 The content of a class notice is subject to court approval. "If the court has certified the
18 action as a class action, notice of the final approval hearing must be given to the class members
19 in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).) The notice generally
20 complies with the requirements for class notice. (See Settlement Stipulation, Ex. C.) It provides
21 basic information about the settlement, including the recovery for the class, and procedures to
22 object or request exclusion. However, the notice states that class members who wish to object to
23 the settlement must deliver a written objection to the settlement administrator by a certain date.
24 (*Ibid.*) The language of the notice must be changed to clarify that class members who want to
25 object can appear and speak at the final approval hearing without submitting any written
26 objection or providing any advance notice.

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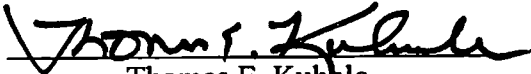
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E. Conclusion

Subject to the modification of the notice, the motion is GRANTED. The final approval hearing is set for October 13, 2017 at 9 a.m. in Department 5.

Dated: July 7, 2017


Thomas E. Kuhle
Judge of the Superior Court