SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

TYMUOI HA, ET AL.,

Plaintiffs,

vs.

GOOGLE INC., ET AL.,

Defendants.

Case No.: 16-CV-2890847

ORDER AFTER HEARING ON JUNE 16, 2017

Plaintiffs' Motion for Preliminary Approval of Class Action Settlement

The above-entitled matter came on for hearing on Friday, June 16, 2017 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. The Court reviewed and considered the written submissions of all parties and issued a tentative ruling on June 15, 2017. The Court has also considered the argument presented by the parties at the hearing. The matter having now been submitted, the Court rules as follows:

This is a putative wage and hour class action by contract recruiters hired by defendant Google Inc. through staffing agencies including defendant UrpanTech. Before the Court is plaintiffs' unopposed motion for preliminary approval of a class action settlement.

/ / /

/ / /

I. Allegations of the Operative Complaint

Plaintiffs allege that they were employees of both their staffing agencies and Google, which controlled their wages, hours, and/or working conditions. (Second Amended Complaint ("SAC"), ¶ 27.) Class members worked alongside permanent Google employees who performed the same work they did, were supervised by Google managers within the Google hierarchy, and were subject to Google's policies. (*Id.* at ¶ 29.) Overtime payments were determined by Google policy, even though staffing agencies issued plaintffs' paychecks. (*Ibid.*) Defendants' policy and practice was to restrict the amount of overtime paid to individual contract recruiters, regardless of the amount of overtime these individuals actually worked. (*Id.* at ¶¶ 38-48.) Class members were instructed not to report more than the capped amount of overtime, although they regularly worked twelve or more hours in a workday and worked on weekends. (*Id.* at ¶¶ 42, 45, 46.)

Plaintiff Tymuoi Ha received a one-year contract assignment to work for Google as a contract recruiter and report to a Google manager. (SAC, ¶ 30.) In January 2014, she complained to her manager at Google about defendants' failure to pay contract recruiters for overtime worked. (*Id.* at ¶ 52.) Her manager stated there was nothing he could do, and Ha was then contacted by his boss, who told plaintiff that her complaint was inappropriate and she needed to apologize to her manager. (*Id.* at ¶¶ 52-53.) Shortly thereafter, Ha was fired. (*Id.* at ¶ 55.) Her last day of employment was January 30, 2014. (*Ibid.*)

In the operative SAC, plaintiffs allege the following claims: (1) a class claim for failure to pay overtime wages, (2) a class claim for failure to pay earned wages upon separation, (3) a class claim for failure to furnish accurate wage statements, (4) a class claim for unlawful and unfair business practices, (5) an individual claim by Ha for wrongful termination in violation of public policy, (6) a claim by Ha for retaliation for protected activity, and (7) a class claim for violation of the Private Attorneys General Act ("PAGA"). The parties' settlement addresses the class claims only, leaving Ha's individual claims unresolved.

///

///

II. Legal Standard for Approving a Class Action Settlement

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, internal citations and quotations omitted.)

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 v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, 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."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is

in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

III. Settlement Process

The initial complaint in this action was filed on behalf of plaintiff Ha in January 2016. According to the declaration of plaintiffs' counsel Michael D. Palmer, counsel began to investigate the class claims before filing the action, and engaged in over a year of negotiations with the defendants after filing. Beginning in April 2016, counsel engaged in regular discussions regarding the claims in this action, discovery, the production of extensive electronically stored information ("ESI"), the timing and scope of defendants' litigation holds, the scope of the class, and the possibility of mediation.

Google argued that any settlement discussions should be limited to a small number of contract recruiters who, like Ha, worked in its "Channels Organization." Plaintiff argued that all contract recruiters were subject to the policies alleged, and provided declarations by the other class representatives--Austin Bonner, David Rabil, and Raymond Roberts—to support this argument. These individuals have now joined the action as additional plaintiffs.

Google subsequently agreed to produce class-wide data, and over 14,000 pages of documents and 20 million timestamp entries (corresponding to two randomly-selected weeks from each quarter during the class period) were produced. Both plaintiffs and Google retained experts to analyze the timestamp data. The parties exchanged mediation briefs, and plaintiffs' expert provided a damages estimate. Plaintiffs indicate that in their best-case scenario, they believe they could prove that class members were owed $17 million in overtime and double-time.

On February 28, 2017, the parties engaged in a full day of mediation with Mark S. Rudy, an experienced class action mediator. All of the class representatives attended the mediation. While the parties were unable to reach a settlement that day, they continued to work with Mr. Rudy towards a resolution, and agreed to a settlement in principle of $5.5 million on March 10.

/ / /

IV. Provisions of the Settlement

The non-reversionary settlement includes a $75,000 payment to the California Labor and Workforce Development Agency associated with plaintiffs' PAGA claim. Attorney fees of up to $1,833,333 (one-third of the gross settlement), expenses not to exceed $50,000, and administration costs estimated at $20,000 will also be paid from the gross settlement. Plaintiff Ha will petition the Court for an incentive award of $25,000, while the other named plaintiffs will seek incentive payments of $5,000 each.

The remaining net settlement of approximately $3,481,667 will be distributed to class members pro rata based on their weeks worked and billing rates during the class period, without the need for class members to submit a claim. This will result in an average recovery of $4,380 to each of the 795 estimated members of the class. Funds unclaimed after six months will be redistributed among class members who timely negotiated their payments, and any funds remaining unclaimed after this process will be paid to the Legal Aid at Work (formerly Legal Aid Society-Employment Law Center) as a cy pres beneficiary.

Class members who do not opt out of the settlement will release "any and all claims arising at any point from January 27, 2012 until the Preliminary Approval Date, which arise out of the same transactions, series of connected transactions, occurrences or nucleus of operative facts that form the basis of the class claims which were pled or which could have been pled based on the factual allegations contained in the Lawsuit's Operative Complaint," including specified wage and hour claims.

V. Fairness of the Settlement

Counsel believe that the settlement represents a fair and reasonable result for the class, and the Court agrees. The agreement achieves a recovery of almost 1/3 of the maximum value of the case as estimated by plaintiffs, and as they point out, there are difficult issues of proof associated with an off-the-clock action of this nature, particularly where Google will argue it is not even plaintiffs' employer in the first place. The Court further agrees that the average recovery to class members is substantial, especially in light of their short tenures at Google.

Prior to final approval of the settlement, plaintiffs must submit declarations specifically detailing their participation in the case supporting the stipulated incentive payments. The Court also has an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) While 1/3 of the common fund for attorney fees is generally considered reasonable, counsel should submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. Proposed Settlement Class

Plaintiffs request that the following settlement class be provisionally certified: "All persons who worked for Google in California as temporary or contract sourcers, closers, recruiters, or other personnel who performed substantially the same work as workers with those titles or in those roles in Google's People Operations department (including, without limitation, temporary workers assigned to the Channels organization) for at least one day between January 27, 2012 and May 9, 2017." The parties have stipulated to a list of specific job titles that fall within the class for settlement purposes, and these titles are set forth in the class notice.

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." As interpreted by the California Supreme Court, Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence (1) an ascertainable class and (2) a well-defined community of

/ / /

interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 326, 332.)

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

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court (Cotton On USA, Inc.)* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93-94.) However, considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.)

/ / /

/ / /

Here, the estimated 795 class members are easily identified based on Google's records, and the class definition is clear. The Court consequently finds that the class is numerous and ascertainable.

C. Community of Interest

With respect to the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.)* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is 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. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiffs' claims all arise from defendants' wage and hour practices applied to the similarly-situated class members.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.) Here, like other members of the class, plaintiffs were employed in contract recruiter positions and subject to Google's policies. The anticipated

defenses are not unique to plaintiffs, and there is no indication that plaintiffs' interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.*) "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120-121, internal quotation marks omitted.)

Here, there are an estimated 795 members of the proposed class. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits both to the litigants and the Court in this case.

In sum, plaintiffs have demonstrated that this action is appropriate for class treatment.

VI. Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may receive a payment, opt out of the settlement, or object. The gross settlement amount is set forth along with itemized estimated deductions. Individualized estimated payments are provided, as well as each class member's eligible workweeks as reflected by defendant's records. Class members will be given 100 days to submit a request for exclusion from the class, dispute their eligible workweeks, or file an objection.

In its tentative ruling, the Court indicated that the notice was generally adequate, but must state that class members may appear and object at the final fairness hearing without submitting any written objection. In addition the notice must indicate the billing rate or rates used to calculate class members' settlement awards. At the hearing on this matter, plaintiffs' counsel submitted a modified notice for the Court's review. The Court directs plaintiffs to further modify the notice as follows. The first paragraph of section 12 shall read:

> According to Defendants' records, you worked **<<WorkWeeks>>** weeks as a Class Member (as defined in Section 5 above) between January 27, 2012 and [preliminary approval date]. The following is the Straight Time Bill Rate(s) being used for determining your Settlement share: **<<Straight Time Bill Rate(s)>>**. (The "Straight Time Bill Rate" means the rate that Google used to pay your staffing agency for your straight time hours. It thus reflects your hourly rate plus the staffing agency's markup.) If you wish to dispute Defendants' records of your

applicable workweeks and/or Straight Time Bill Rate(s) as a Class Member, you must notify the Settlement Administrator and provide any supporting evidence in writing no later than **[100 days after preliminary approval]**.

The first paragraph of section 22 shall read:

If you wish to object to the Settlement, you may do so by mailing to the Settlement Administrator at the address set forth above (Section 9) a detailed written description of the basis of the objection. Your written objection must be postmarked no later than **[100 days after preliminary approval]**. Alternatively, you may appear at the final fairness hearing and make an oral objection.

Finally, the first sentence of the third paragraph of section 23 shall read:

Regardless of whether you submit a written objection, you may appear at the hearing to raise or explain any objection you have to the Settlement.

Turning to the notice procedure, the parties have selected RG/2 Claims Administration LLC as the settlement administrator. The administrator will mail the notice packet within 40 days of preliminary approval, after using the National Change of Address Database to locate updated addresses for class members. Any notice packets returned as undeliverable will be re-mailed within 3 business days if a forwarding address is provided, or within 3 days of the location of a new address using a skip trace. The administrator will also call and/or email class members using their last known contact information if no forwarding address is provided. These notice procedures are approved.

VII. Conclusion and Order

Plaintiffs' motion for preliminary approval is GRANTED, subject to the modifications set forth in section VI above. The final approval hearing shall take place on **November 17, 2017** at 9:00 a.m. in Dept. 1.

/ / /

/ / /

/ / /

/ / /

/ / /

The following class is provisionally certified for settlement purposes:

All persons who worked for Google in California as temporary or contract sourcers, closers, recruiters, or other personnel who performed substantially the same work as workers with those titles or in those roles in Google's People Operations department (including, without limitation, temporary workers assigned to the Channels organization) for at least one day between January 27, 2012 and May 9, 2017.

IT IS SO ORDERED.

Dated: June 19, 2017

Honorable Brian C. Walsh
Judge of the Superior Court