

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

MICHAEL SCHMITZ, MIN DUONG, and
RYAN WINTERS, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

HEALTHIQ RE, INC., a California corporation;
HI.Q, INC. Which Will do Business in California
as Health IQ, a California corporation; and DOES
1 through 25,

Defendants.

Case No. 2018-1-CV-337951

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

The above-entitled matter came on for hearing on Friday, June 28, 2019, at 9:00 a.m. in Department 5 (Complex Civil Litigation), the Honorable Thomas E. Kuhnle presiding. Having reviewed and considered the written submissions filed by the parties, and having listened carefully to arguments of counsel, the Court rules as follows:

I. INTRODUCTION

This is a putative class action arising out of various alleged wage and hour violations. The Second Amended Complaint, filed on May 24, 2019, sets forth the following causes of action: (1) Violation of Labor Code section 510; (2) Violation of Labor Code sections 226.7(b) and 512(a) and the Applicable Wage Order; (3) Violation of Labor Code section 226; (4) Violation of Labor Code sections 201 and 202; (5) Violation of Labor Code section 2802;

(6) Violation of Business and Professions Code section 17200, et seq.; and (7) Violation Of Private Attorney General Act ("PAGA") (Cal. Lab. Code § 2698, et seq.).

The parties have reached a settlement. Plaintiffs Michael Schmitz, Min Duong, and Ryan Winters (collectively, "Plaintiffs") now move 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 non-PAGA portion of the case has been settled on behalf of the following class:

6 [A]ll employees of Defendants who worked as a Sales and/or Operations Person
7 . . . in California at any time during the Non-PAGA Class Period and who have
not previously settled and released all wage and hour claims against Defendants.

8 (Joint Stipulation of Class Action and California Labor Code Private Attorneys General Act
9 Settlement and Release (“Settlement Agreement”), ¶ 17(C).) The PAGA class is defined as
10 “those individuals who worked Qualifying Workdays during the PAGA Class Period and who
11 have not previously settled and released their wage and hour claims against Defendants and are
12 part of the PAGA claims in the Action.” (*Id.* ¶ 17(FF).)

13 Pursuant to the settlement, defendant HealthIQ Re, Inc. and Hi.Q, Inc. (collectively,
14 “Defendants”) will pay a total amount of \$1,000,100.02 plus the employer’s share of payroll
15 taxes. (Settlement Agreement, ¶ 5.) The settlement is split into a PAGA portion and non-PAGA
16 portion. For the non-PAGA portion Defendants will pay \$831,674.54 and for the PAGA portion
17 Defendants will pay \$168,425.48. (*Ibid.*) The settlement amounts will be paid in two
18 installments, the first 21 days after the “Effective Date” and the second six months later. (*Ibid.*)

19 Out of the non-PAGA portion of the settlement, disbursements will be made of \$5,250
20 for settlement administration costs, \$277,224.85 for attorneys’ fees, up to \$5,000 for costs, and
21 \$3,500 for each class representative (\$10,500 total).¹ (Settlement Agreement, ¶ 15.) Out of the
22 PAGA portion of the settlement, disbursements will be made of \$5,250 for settlement
23 administration costs, \$56,141.83 for attorneys’ fees, up to \$5,000 for costs, and \$76,525.24 to the
24 Labor and Workforce Development Agency (“LWDA”). (*Id.* at ¶ 13.)

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26
27 ¹ In the memorandum of points and authorities and the class representative declarations it is stated Plaintiffs are
28 requesting \$2,500 for each representative. (See Plaintiffs’ Unopposed Motion for Preliminary Approval of Class
Action Settlement, p. 4:16-17.) At the hearing, however, Plaintiffs’ counsel clarified that each class representative is
requesting \$3,500.

1 For checks that are not cashed within 60 days of disbursement, the settlement
2 administrator will attempt to contact each individual to advise them to cash their checks and
3 offer to replace any checks reported as lost or stolen. (Settlement Agreement, ¶ 78.) Checks not
4 cashed within 180 days will be void and the funds represented by the uncashed checks will be
5 disbursed one-half each to Bet Tzedek and the American Diabetes Association as *cy pres*
6 beneficiaries. (*Id.* at ¶ 79.)

7 **B. Fairness of the Settlement**

8 Plaintiffs state the proposed settlement is the result of settlement negotiations at a
9 mediation after months of informal discovery. Plaintiffs assert class members will recover an
10 average of approximately \$13,684.60 per class member, with some class members receiving as
11 much as approximately \$31,000. Overall, the Court finds the settlement is fair. It provides for a
12 significant recovery for class members and eliminates the risk and expense of further litigation.

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

14 Plaintiffs request class representative incentive awards of \$3,500 for each of the three
15 class representatives – Michael Schmitz, Min Duong, and Ryan Winters.

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

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

The class representatives have submitted declarations to support the incentive award
request. They state they stayed in touch with class counsel and provided documents, answered
questions, prepared for possibility of being deposed, risked paying legal costs, risked a stigma
for filing the lawsuit, reviewed the settlement agreement, and gave a general release.

1 (Declaration of Michael Schmitz in Support of Plaintiffs' Unopposed Motion for Preliminary
2 Approval of Class Action Settlement, ¶ 14; Declaration of Min Duong in Support of Plaintiffs'
3 Unopposed Motion for Preliminary Approval of Class Action Settlement, ¶ 14; Declaration of
4 Ryan Winters in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class
5 Action Settlement, ¶ 14.) The Court finds incentive awards are warranted.

6 The Court also has an independent right and responsibility to review the requested
7 attorneys' fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
8 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel
9 requests attorneys' fees in the amount of \$333,366.68 (one-third of the total settlement) and costs
10 of up to \$10,000. Plaintiffs' counsel should submit lodestar information (including hourly rates
11 and hours worked) prior to the final approval hearing so the Court can compare the lodestar
12 information with the requested fees. Plaintiffs' counsel should also submit information
13 regarding actual costs incurred.

14 **D. Conditional Certification of Class**

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

24 The "community-of-interest" requirement encompasses three factors: (1) predominant
25 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
26 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
27 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the
28 probability that each class member will come forward ultimately to prove his or her separate

1 claim to a portion of the total recovery and whether the class approach would actually serve to
2 deter and redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
3 The plaintiff has the burden of establishing that class treatment will yield “substantial benefits”
4 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
5 381, 385.)

6 As explained by the California Supreme Court:

7 The certification question is essentially a procedural one that does not ask whether
8 an action is legally or factually meritorious. A trial court ruling on a certification
9 motion determines whether the issues which may be jointly tried, when compared
10 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.

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

13 The settlement agreement states there are approximately 170 class members. (Settlement
14 Agreement, ¶ 17(C).) The motion papers, however, state there are approximately 39 individuals.
15 (Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, p. 11:27.)
16 At the hearing Plaintiffs’ counsel clarified there are 39 members of the non-PAGA class, and
17 170 members of the PAGA class. Plaintiffs’ counsel also noted that all of the non-PAGA class
18 members are included in the PAGA class.

19 Class members can be ascertained from Defendants’ records. There are common issues
20 in this case regarding whether the alleged classwide wage and hour violations took place. No
21 issue has been raised regarding the typicality or adequacy of Plaintiffs as class representatives.
22 In sum, the Court finds the proposed class should be conditionally certified, subject to an
23 explanation regarding the number of class members.

24 E. Class Notice


25 The content of a class notice is subject to court approval. (Cal. Rules of Court, rule
26 3.769(f).) The notice generally complies with the requirements for class notice. (See Settlement
27 Agreement, Ex. A.) It provides basic information about the settlement, including the settlement
28 terms, and procedures to object or request exclusion. However, the notice states objections must

1 be written and mailed to both the settlement administrator and the Court. The notice must be
2 changed to make clear that class members may appear at the final approval hearing to object
3 without filing or serving any papers and without providing any advance notice. The amended
4 notice shall be provided to the Court for approval prior to its mailing.

5 **F. Conclusion**

6 The motion for preliminary approval of class settlement is GRANTED, subject to the
7 modification to the notice. The final approval hearing is set for October 4, 2019, at 9:00 a.m. in
8 Department 5.

9
10 Dated: June 28, 2019


Thomas E. Kuhnle
Judge of the Superior Court