FILED

MAR 26 2020

CLERK OF THE COURT

BY: _____ Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

TANIKA TURLEY, ET AL., Plaintiffs, v. CHIPOTLE SERVICES, LLC, ET AL., Defendants.	Case No. CGC-15-544936 ORDER RE PLAINTIFFS' CONTINUED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

The Court held a hearing on the above-captioned matter on February 24, 2020. Thereafter, the Court continued the motion for a supplemental filing. The supplemental filing was timely submitted on March 6, 2020. On March 12, 2020, the Court issued a tentative ruling in advance of the scheduled March 16, 2020 continued hearing. The parties ultimately agreed not to contest the tentative ruling.[1] Consistent with the tentative ruling, the motion for preliminary approval is denied without prejudice. Plaintiffs may submit a complete renewed motion.[2] Those papers should also respond to the issues raised

[1] The parties initially asked to be heard on the tentative ruling. As a result of practical difficulties stemming from the measures undertaken by the Court in response to the COVID-19 pandemic, the parties agreed not to contest the tentative ruling.

[2] The Court will not presently set a deadline for the filing of the renewed motion or a hearing date on the renewed motion. The Court's response to the COVID-19 pandemic have included staffing reductions and hearing continuances that will make scheduling difficult in the immediate future. Accordingly, Plaintiffs are hereby authorized, in this instance only, to notice the renewed motion for hearing without receiving confirmation that the hearing is clear on the Court's calendar. The hearing date should be cleared with

in the tentative ruling, which is reproduced below with only non-substantive alterations.

TENTATIVE RULING

The continued motion is denied without prejudice. Before the motion was continued, the Court issued a tentative ruling indicating its intention to deny the motion without prejudice. Plaintiffs responded by filing two closely similar supplemental declarations before the hearing date. At the parties' request, the Court continued the motion instead of denying the motion without prejudice. Now, the Court clarifies that it intends to deny the motion without prejudice not because it will not consider further requests to secure preliminary approval of this settlement, subject to certain amendments as discussed below, but because the Court wants to facilitate a record that is as clear as possible. Any time the initial moving papers are insufficient to demonstrate that preliminary approval is appropriate, the Court considers whether time can be saved by continuing the motion rather than denying it without prejudice, taking into consideration the layers of complexity that several supplemental filings will add to the record.[3] Here, the Court finds that a cleaner record will be generated if the motion is denied without prejudice and a new motion is filed. In a new motion, the parties should take care to number every paragraph in supporting declarations and use consistent numbering methodologies in the settlement and all supporting documents. The new motion should address all topics related to preliminary approval without relying on the present motion. Several concerns are set forth below for the parties' consideration should they elect to file a second preliminary approval motion.

The parties may submit to this tentative ruling or appear telephonically on Monday, March 16, 2020 given the concerns counsel expressed about travel at this time. If the parties will submit on the tentative ruling, they are to contact the clerk in Department 304 no later than Friday, March 13 at 4:00 p.m.

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Defense Counsel and the parties should email a request for the hearing date to the Court at or before the time the motion is filed, but Plaintiffs need not wait for a response from the Court before filing the motion. If the requested hearing date is ultimately unavailable on the Court's calendar, the Court will contact the parties regarding scheduling.

[3] The complexity of the record is not just a concern for the parties and the Court, but for the approximately 77,000 class members who may wish to review the docket or the documents posted on the settlement website to understand the settlement.

I. Class Certification

The Court raised three substantive[4] issues under the rubric of class certification in its February 24, 2020 Order. First, given the order denying class certification, the Court expressed concern that a settlement could be evaluated on a class-basis. (Feb. 24, 2020 Order, 2 [citing Nov. 2, 2018 Order, 8-16].) Second, the Court flagged the possibility, present in all cases where two distinct class settlements are rolled into one, that one class unfairly benefitted at the expense of the other. (*Ibid.*) Third, the Court flagged the possibility that Carrithers may not adequately represent the 70,000 employees who will be given an option between a $12 meal voucher and a $6 cash payment because she (1) was not added to this case as a party until after the settlement had already been agreed upon; and (2) is asking the Court to grant her a $10,000 enhancement payment vastly in excess of any individual recovery she could secure based on her short-term employment with Chipotle and/or her individual settlement share. (*Id.* at 2 n.2.)

With respect to the first two issues, Plaintiffs' argument seems to be that the common basis for the settlement discount, as to each subclass, was predicated on the certification risk. (See Second Supp. Harris Decl., 3-4.) This argument can be addressed on a common basis. At present, however, as detailed below, the Court does not have sufficient information to inform a fairness analysis. The present denial without prejudice is not based on a finding that the settlement cannot be evaluated on a class basis. The Court will revisit the issue in connection with any further preliminary approval motion.

With respect to the third issue, Plaintiffs argue that Carrithers is an adequate class representative because (1) short-term employment is not a bar to service as a class representative; (2) Carrithers is aware that the Court may not grant her requested enhancement payment; and (3) Carrithers understands and intends to fulfill her duties as a class representative. (See *id.* at 7-8.) This response does not, standing alone, persuade the Court that Carrithers is adequate to represent the Omnibus Class. The inherent issue

[4] The Court also noted that the "Wage Statement Class" is a misnomer. (Feb. 24, 2020 Order, 1-2.) In spite of this, Plaintiffs and their retained expert continue to conflate the Wage Statement Class with the certified class in this action. (Compare Proposed Settlement § I ¶ 1(c) [defining settlement class]; Nov. 2, 2018 Order, 3-4, 23 [discussing parameters of certified class]; with Second Supp. Harris Decl., 3-4 [describing the Wage Statement Class as the certified class] [the second supplemental declaration is the second declaration that was submitted on February 23, 2020, a Sunday]; Supp. Moses Decl., 4-8 [damages analysis based on understanding that Wage Statement Class Period is 26 weeks, when the class period is more than ten times that length].) The fact that Plaintiffs' own expert was misled demonstrates that the name of the Wage Statement Class is misleading.

with signing up a class representative after the case is settled and pursuing an enhancement award that far outstrips the payment that such a class representative could achieve in any other way is that it creates a reasonable inference that the class representative is serving as such in hope of securing an enhancement payment, not protecting the interests of the class. The fact that the hoped-for enhancement payment may not be obtained does not mean that the class representative protected the interests of the class. However, the Court's concern may be ameliorated by a demonstration that the settlement is itself fair. Accordingly, the Court will consider Carrithers' adequacy in connection with the fairness analysis in any further preliminary approval motion.

II. Fairness

A. Class Claims

The Court instructed that parties to provide the "maximum potential verdict value of the claims the class is releasing." (Feb. 24, 2020 Order, 2-3.) The parties did not do so.[5] Accordingly, the Court still cannot find that the settlement is within the range for which final approval may be granted.

In addition, as noted above, the fairness of the settlement allocation between two distinct classes requires consideration of the claims that were presented on behalf of each class. Plaintiffs appear to have recognized this insofar as they presented an analysis of the Wage Statement Class' damages. (See Supp. Moses Decl., 4-8.) However, as noted above, that analysis is both erroneous, because it does not address the true class period, and incomplete, because it does not address all of the claims being released in this action.

B. PAGA Claims

The Court asked the parties to provide "the verdict value of all of the PAGA claims that are being resolved through this settlement." (Feb. 24, 2020 Order.) As set forth in the release, that means "any"

[5] Instead, the parties provided the class-wide value of only the rest break, meal break, and overtime claims and the Wage Statement Class value of the same claims, plus the wage statement claim. (See Second Supp. Harris Decl., 9-13; Supp. Moses Decl., 4-8.) The release encompasses several other claims. (See Proposed Settlement § X(A) ¶ 62.) The only apparent basis for the parties decision to value only those claims, rather than all of the class claims, is the fact that the Court included a subsequent paragraph in its order that included the following language: "In addition, the Court needs to understand the verdict value of all of the PAGA claims that are being resolved through this settlement. Violations related to meal periods, rest periods, overtime, and minimum wages are, at least arguably, separate PAGA claims." (Feb. 24, 2020 Order, 3 [footnote omitted].) The order was clear. Plaintiffs' partial compliance could be construed as an attempt to mislead the Court.

claims for PAGA penalties that are "related" to any of the causes of action that were pled, or could have been pled, in any complaint filed in this action. (Proposed Settlement § X(A) ¶ 62.)[6]

Plaintiffs did not provide the requested information. Instead, Plaintiffs argued that only the PAGA claims predicated on the failure to pay final wages are at issue in this case. (See Second Supplemental Harris Decl., 9, 13-16; Supplemental Moses Decl. ¶ 11.) It is true that the letter Plaintiffs sent to the LWDA only referenced the claim for waiting time penalties. (SAC, Ex. 6.) But Turley has argued in this litigation, in connection with a motion on which the Court has not yet ruled, that Turley is pursuing PAGA claims based on all of the causes of action in the FAC. (October 15, 2018 Opposition to MSA, 19.) Accordingly, even if the Court were to look past the language of the release itself, Plaintiffs' representation about the scope of the PAGA claims in this case is irreconcilable with their own litigation position.

At bottom, the parties have two options. They may either narrow the release consistent with Plaintiffs' representations or provide the verdict value of all of the PAGA claims that are being resolved through this settlement. Only once that has been done will the Court be able to intelligently evaluate the rationale for a discount.

III. Notice

A. LWDA

If the parties elect to amend their settlement, the amended settlement should be filed with the LWDA on the same day it is filed with the Court.

B. Class

1. Process

Based on the supplemental filing, it is clear that the Court's order was not sufficiently explicit. (See Feb. 24, 2020 Order, 3-4.) The reason that the Court raised issues about the notice process was because the Court wants the parties to clearly articulate how the notice process will be carried out in one place. To the extent the Court raised issues regarding how the notice process would be carried out as

[6] The Court's reference to certain claims constituting distinct PAGA claims was an effort to head off a supplemental filing that argued that the PAGA claims did not need to be accounted for separately because penalties could not be "stacked." It did not express a limitation on the Court's understanding of the PAGA claims that are being resolved through the settlement.

described in the Proposed Settlement, the Court asks the parties to amend the Proposed Settlement to clarify the issue. The parties have not amended the Proposed Settlement to address the Court's concerns. The Court's present concerns are as follows:

- Mailed and Emailed Notice: The parties have now advised the Court that they intend to send both mailed and emailed notice. (See Second Supp. Harris Decl., 16-17; Third Supp. Harris Decl. ¶ 5.) The Proposed Settlement should be amended to reflect the revised notice process.
- National Change of Address Database Check and Skip-Tracing; Remailing Period: The Court finds the timeline proposed by the parties acceptable, given the corresponding proposed amendments to the notice response deadline in the event of remailing. (See Second Supp. Harris Decl., 17-18.)[7] The Proposed Settlement should be amended to reflect all of these changes.
- Postmark Deadlines: The response deadlines should uniformly be described as postmark deadlines without using words like "file" and "serve." The Proposed Settlement should be amended.
- Workweek Dispute Deadlines: The Proposed Settlement should be amended to contain the deadline to dispute workweek information.
- Workweek Dispute Presumption: Plaintiffs responded to the Court's inquiry regarding whether the presumption that Chipotle's records are correct is rebuttable by quoting the relevant term and underlining the second clause. (Second Supp. Harris Decl., 18.) The problem, which the Court may not have identified with enough specificity for the parties to respond, is that the provision is ambiguous. The first clause says that Chipotle's records are presumed correct. The second clause says that the administrator will "evaluate the evidence submitted by the Class Member" and "make a final determination based on its evaluation of all of the evidence presented." Aside from conclusive presumptions, there are at least two different kinds of evidentiary presumptions, presumptions that effect the burden of proof and presumptions that effect the burden of

[7] The parties note that the NCOA check will be done "prior to mailing." (Second Supp. Harris Decl., 17.) This is ambiguous when the notices may be mailed more than once. The Court understood the most reasonable reading of the passage to be that the NCOA check will only be done prior to the initial mailing, not subsequent mailings. However, the Court included this to encourage the parties to clarify any ambiguity in a revised settlement, especially given the ambiguities about the timing of the skip trace.

production. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 820-21; Cal. Evid. Code, §§ 630, 660.) The Court cannot ascertain the significance of the presumption created here. The Proposed Settlement should be amended to clarify the term.

- Website: Plaintiffs state that the settlement website will go live on the same date that notice is first disseminated. (See Second Supp. Harris Decl., 18.) That is appropriate. The Proposed Settlement should be amended to clarify that point. To clarify one further point, the Court includes within the requirement to post "all papers filed in connection with preliminary and final approval" a requirement to post all orders denying attempts to secure preliminary approval.

2. Substance

The Court raises the following concerns in connection with the revised notice.

- Notice ¶ 1: The parties advise the Court that if all class members choose food vouchers, Defendant will send a voucher to all of them even though it will result in a cost of greater than $800,000. (Second Supplemental Harris Decl., 20.) First, this change should be incorporated into an amended settlement agreement. Second, the notice should be modified in accordance with that amendment.
- Notice ¶ 7: The summary of the class certification ruling is not entirely accurate because the Court did not decide the parameters of the class definition in that ruling. The summary should be revised.
- Notice ¶ 14: This paragraph should state only: "The Court has not ruled on the merits of the Settlement Class Members' claims. The Court has certified the Settlement Class for settlement purposes only."
- Workweek & Address Correction Form, First Paragraph: Replace "receive" with "be mailed," remove "cash" from "cash payment."
- Workweek & Address Correction Form, Second Paragraph: After stating the deadline, the form should explain that the administrator may be contacted at a later date to update address information, but a delay in updating the address may result in mail or payments being sent to the wrong address.

- Workweek & Address Correction Form § III, Last Paragraph: The form should identify each piece of information that was used to estimate the settlement share. I.e., the individual's workweeks, the class' workweeks, and the net settlement fund.
- Cash Option & Address Correction Form: The form should incorporate all other changes that have been made to the notice and other forms, including the removal of the first sentence of the third paragraph of § 2. The paragraph on the last page, beginning "Again," should be removed or revised.
- Email Notice: (1) The subject line should be "Class Action Settlement Notice – *Turley v. Chipotle*"; (2) Will the long-form notice be attached? If not, the third body paragraph should begin with the word "The." (3) The document should use the same term to refer to the notice, either Notice or Class Notice, throughout.
- Any changes to the proposed settlement should be reflected in the notice.

IV. Distribution

First, the Court asked the parties to consider distributing a second round of checks. (Feb. 24, 2020 Order, 6.) The parties appear to agree that a second round of checks may be appropriate as to the Wage Statement Class. (See Second Supplemental Harris Decl., 23-24.) The Proposed Settlement should be amended to provide for a conditional second distribution. The parties should consider whether to limit the second distribution to individuals who cashed checks in the first round. If the parties take such an approach, it should be disclosed in the notice.[8]

Second, the Court remains unable to assess any fairness issues presented by the differences in the consideration available to the two separate classes. (See Feb. 24, 2020 Order, 7.)

V. Release

The Proposed Settlement should be amended to remove the reference to the Third Amended Complaint from the release, which does not exist. (See Feb. 24, 2020 Order, 7; Second Supp. Harris Decl., 25.) The release of PAGA claims may also be amended, as discussed above.

[8] The parties propose distributing residual funds to the LWDA instead of sending a second round of checks. The Court understood that the parties intended to send residual funds to a cy pres beneficiary. The questions regarding a second round of payments to class members are intended to assess whether as much relief as practicable is being provided to the class members.

VI. Miscellaneous

The Proposed Settlement should be amended consistent with Plaintiffs' representations about the preparation of W-2's and the scope of the claims disputes as to which the Court will have jurisdiction. (See Feb. 24, 2020 Order, 7; Second Supp. Harris Decl., 25-26.)

IT IS SO ORDERED.

Dated: March 25, 2020

Anne-Christine Massullo
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Julie Rumsey, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On March 26, 2020, I electronically served the attached ORDER RE PLAINTIFF'S CONTINUED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: March 26, 2020

T. Michael Yuen, Clerk

By: _____
Julie Rumsey, Deputy Clerk