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' RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

The Court held a hearing on the above-captioned matter on June 23, 2020. The Court issued a tentative ruling prior to the oral argument. The Court authorized Defendant to submit a supplemental filing after the hearing. That supplemental filing was due on June 30, 2020. Defendant ultimately did not submit the supplemental filing. Accordingly, the Court took the matter under submission on June 30, 2020. Having reviewed and considered the argument and written submissions of all parties and being fully advised, the Court denies the motion.[1]

[1] As noted by the Court during the hearing, the analysis of the proposed resolution has been made based on the objective facts presented in the motions for preliminary approval. Nothing said by this Court is intended to indicate any failure on the part of either Plaintiffs' counsel or the Defendant. At the end of the day, the terms of the settlement fail to meet the legal requirements for this Court to determine that the settlement is fair, adequate and reasonable. To the extent the parties renegotiate a settlement to address the inherent problems presented herein, they are free to file another motion for preliminary approval.

LEGAL STANDARD

I. Class Certification for Settlement Purposes

Before granting preliminary approval, a court must determine that the proposed settlement presents a proper class for settlement purposes. In general, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Super. Ct.* (2012) 53 Cal. 4th 1004, 1021; Cal. Code of Civ. Proc., § 382.)

In the settlement context, class certification is properly subjected to a lesser standard of scrutiny because: (1) to the extent the class certification requirements are designed to keep a lawsuit manageable for trial, that purpose is inapposite in the settlement context; and (2) to the extent the class certification requirements are designed to protect the interests of non-representative class members, that purpose is addressed through the Court's fairness analysis. (See *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19.) However, class certification for settlement purposes still must be appropriate. (See, e.g., *Vu v. Fashion Institute Design & Merchandising* (C.D. Cal. Mar. 22, 2016) 2016 WL 6211308, at *7-*8 [denying preliminary approval of ERISA settlement on alternate ground that class treatment was improper].)

II. Fairness Review

Before approving a class action settlement, the Court must determine that the terms of the settlement are "fair, adequate and reasonable." (*Dunk*, 48 Cal.App.4th at 1801.) In making this determination, there is a "presumption of fairness . . . 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." (*Id.* at 1802.) To grant final approval, the trial court must "independently [satisfy] itself that the consideration . . . received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129.)

FACTUAL BACKGROUND

I. Procedural History

Plaintiff Tanika Turley filed a contested motion for class certification in this action. The Court granted the motion in part, certifying a limited class to pursue a wage statement theory covering a limited time period. (Nov. 2, 2018 Order, 1, 8-16, 23-24.) Thereafter, with briefing concerning, *inter alia*, the scope of Turley's PAGA claim pending, the parties agreed to a settlement. The basic settlement concept is to revive and release all class wage and hour claims that were or could have been pursued in this action and to release certain PAGA claims.[2]

II. The Value of the Claims Being Released

In the present iteration of the motion, Plaintiffs have provided a summary of the maximum verdict value of the claims being released. (See *Kullar*, 168 Cal.App.4th at 133 [trial court cannot conduct analysis necessary to evaluate whether settlement should be approved "if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise"].)

The claims can be divided as follows: (1) Pre-August 2014 Settlement Class Member claims; (2) Post-August 2014 Settlement Class Member claims; and (3) PAGA claims. According to Plaintiffs, the maximum verdict value of (1) the Pre-August 2014 Settlement Class Member class claims is about $12,260,075; (2) the Post-August 2014 Settlement Class Member class claims is about $64,241,021; and (3) the PAGA claims is more than $120,000,000. (See Alan Harris Decl. ¶¶ 4-5(j) at pp. 4-15.)

III. The Settlement Framework

First, Defendant is required to make a money payment of $2,250,000. (See Proposed Settlement §§ I ¶ 1(r), V(A) ¶ 2.) That money payment will be used to cover the attorney's fees (for which Plaintiffs will request $1,067,500); litigation costs (for which Plaintiffs indicate they will request $25,000); administrative costs (which may be $231,129 or $191,160); enhancement awards (for which Plaintiffs will request a combined total of $5,000, divided equally); and an LWDA payment in connection with the PAGA claims ($10,000.) (*Id.* at §§ I ¶ 1(r), V(A) ¶¶ 2-4, 6-7, V(B) ¶ 11, V(C) ¶ 17; Motion, 2 n.2;

[2] The parties have narrowed the PAGA release to cover only claims raised in Turley's LWDA letter.

Lawrence Decl. ¶ 11.) If all requested disbursements are approved, the remaining $951,340 or $911,371 will be apportioned and mailed to the Pre-August 2014 Settlement Class Members, which the parties have represented includes about 7,000 individuals. (Proposed Settlement § I ¶ 1(c), (r); Harris Decl. ¶ 4 at p. 3.) The total average payment would be between $130 and $140, assuming all requested disbursements are approved and the estimated number of Pre-August 2014 Settlement Class Members is fairly accurate.

Second, Defendant is required to send either $12 vouchers or $6 payments to the approximately 74,000 Post-August 2014 Settlement Class Members. (See Harris Decl. ¶ 4 at p. 3 [declaring that there are about 74,000 Post-August 2014 Settlement Class Members]; but see Proposed Settlement § I ¶ 1(c), (r) [indicating that the number is closer to 70,000].) Vouchers are the default, money payments will be made if validly requested. Assuming there are 74,000 Post-August 2014 Settlement Class Members then, depending on the number of such class members who affirmatively opt to receive money payments, the monetary face-value of the voucher/money mix will be between $888,000 (all vouchers) and $444,000 (all money).

DISCUSSION AND ANALYSIS

Fundamentally, the Court's role, as a fiduciary to the class, is to ensure that the class receives fair value for the release. (*Kullar*, 168 Cal.App.4th at 129.) Under the Proposed Settlement, Post-August 2014 Class Members will not receive fair value for the release of their claims. Moreover, the Court is not persuaded that the Post-August 2014 Class can be certified for settlement purposes. Accordingly, the settlement is not within the range for which final approval may be granted. Preliminary approval is denied on that independent ground.[3]

[3] Because the settlement can only be approved or disapproved in whole, the settlement must be rejected if Plaintiffs did not secure adequate consideration for either subclass. (See *Kullar*, 168 Cal.App.4th at 129-34 [discussing fairness determination]; *Myles v. Allied Barton Services, LLC* (N.D. Cal. Nov. 12, 2014) 2014 WL 6065602, at *3 [court cannot modify a settlement, only reject it].) In denying preliminary approval, the Court does not find that the consideration provided to the Pre-August 2014 Class Members is so small as to preclude preliminary approval. The Pre-August 2014 Class issues differ from the Post-August 2014 Class issues in two respects: (1) There is a certified wage statement claim, although the balance of the claims were not certified; and (2) There is substantially more consideration per class member, although the settlement discount is still quite deep. While a settlement and release tailored to the certified claims would present fewer concerns, the Court's concerns regarding the Pre-August 2014 Class do not run so deep as to make them a separate ground for denial of the preliminary approval motion. As to the third component, the PAGA claims, further argument regarding the value of the claims encompassed by the scope of the release may help clarify the issues.

As noted above, Plaintiffs valued the Post-August 2014 class claims at about $64,241,021. If there are 74,000 Post-August 2014 Class Members, this implies that the average maximum verdict value of the individual claim released by this settlement, as to the Post-August 2014 Class Members, is $868.12. The face value of the voucher is about 1.4% of the average claim. The cash payment option is about .7% of the average claim. Plaintiffs have not given the Court any information about the variance between individual class members. (Compare Mar. 26, 2020 Order, 3; Feb. 24, 2020 Order, 2.)

To justify the settlement discount as to the Post-August 2014 Class Members, Plaintiffs take the position that the reasonable verdict value of these class claims is $0 because Plaintiffs would never be able to get the class certified. (See Harris Decl. ¶¶ 11-11(v) at pp. 35-46; Motion, 9-10.) Something being better than nothing, Plaintiffs argue that this settlement is reasonable. (Motion, 9-10.) Recognizing, as they must, that individuals could bring individual actions against Defendant, Plaintiffs argue that any putative class members who think they can do better on their own can opt out of the settlement and pursue an individual action. (*Id.* at 10.) Plaintiffs argue that the act of sending out notice alone will be a service to these putative class members because the notice will educate them about their wage and hour claims and prompt them to opt out of this case to file individual arbitrations. (*Ibid.*)

The Court agrees with two premises of Plaintiffs' argument. First, the Court agrees that there is a significant risk that the claims could not be certified – such a conclusion is inescapable in a case where Turley brought a motion to certify a subset of those claims, presumably those as to which she felt she had the strongest chance of success, and had that motion denied in relevant part. (Nov. 2, 2018 Order, 1, 23-24.) Second, the Court agrees that difficulties maintaining class status are one form of risk that is properly considered in assessing a reasonable settlement discount. (See *Kullar*, 168 Cal.App.4th at 129.)

The Court does not agree with the conclusion Plaintiffs reach from those premises. Specifically, the Court does not agree that an extreme certification risk justifies an extreme settlement discount, at least in this case. Instead, at least in this case, the extreme certification risk (1) justifies denial of class certification for settlement purposes as to the Post-August 2014 Class; and (2) precludes a finding that the settlement consideration provided fair value for the release as to the Post-August 2014 Class.

First, when Turley brought her contested class certification motion, she was unable to demonstrate

the existence of a community of interest between the class members because the liability analysis would turn on predominant individualized inquiries. (See Nov. 2, 2018 Order, 8-16.) At present, there remains no persuasive evidence that the putative class members, who may have worked one or more shifts and at one or more location for a fast-food chain with operations throughout California, have similar substantive claims either in their nature or their magnitude.[4] Accordingly, whether the $12 meal voucher or $6 cash payment constitutes the fair value of a release from a member of the Post-August 2014 Settlement Class is not a common question.

Second, it would twist the Court's review and approval of a proposed class action settlement beyond recognition to say that the absence of a community of interest is an issue common to the class that supports a decision to discount the settlement to zero. This would turn the very reason that a class action settlement cannot be approved into a reason to abdicate the Court's role in the fairness analysis entirely.[5]

Third, Plaintiffs' solution – which is to point out that if there are any Post-August 2014 Class Members who think their claims are worth more than a burrito,[6] those class members may opt out – does

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[4] The statements made by defense counsel at oral argument underscore this problem. During oral argument, defense counsel discussed the outcomes in a subset of contested arbitrations that were filed in connection with another arbitration. In those comments, defense counsel suggested that Defendant has had success in the arbitral process, but also that Defendant makes individualized determinations as to whether to settle claims, and for how much, based on the claims themselves. While Defendant did not file any evidence regarding the outcomes of arbitral proceedings against it, although Defendant was given leave to do so, the representations defense counsel made to the Court suggest that there is significant variance in the nature and magnitude of the individual claims that would be resolved under this settlement.

[5] This point is most stark when Plaintiffs argue that it is appropriate to discount the settlement because of the risk that a court faced with a contested class certification motion would adjudge them inadequate to represent the interests of the class. (See Harris Decl. ¶¶ 11(p), (s), (u) at pp. 43, 45.) To the extent that Plaintiffs point to an independently sufficient reason that a class could not be certified – widespread arbitration agreements containing class action waivers – the upshot of this argument is that in any case where an employer has a policy of requiring new employees to accept an arbitration agreement with a class action waiver as a condition of employment, the employer may, upon the filing of an impermissible class action complaint, elect between compelling individual arbitration or securing a release of all wage and hour claims from all of its workforce (except those belonging to employees that affirmatively opt out) with no judicial intervention so long as the plaintiff and his or her counsel go along with it and the consideration provided to the class is better than nothing. The Court does not agree that factoring in the certification risk justifies such a result – i.e., the Court does not agree that the individual claims belonging to a class of people should be treated as categorically worthless, regardless of their individual amount or individual circumstances, because they cannot be pursued on a collective basis.

[6] Defendant operates a chain of fast food restaurants. Unless a Pre-August 2014 Class Member elects to receive a cash payment of $6, which would be insufficient to purchase a regular-sized burrito from Defendant in California, that class member will be sent a meal voucher sufficient to cover, at least in most cases, the full cost of one burrito, perhaps in some cases with enough left over for a side or a drink. There are other menu options, such as tacos, that are less expensive.

not persuade the Court that preliminary approval should be granted. (See Motion, 10 ["If those individuals who executed arbitration agreements believe that they have meaningful claims against Chipotle, they can opt out and pursue those claims in arbitration. For those Post-August 2014 Class Members who do not wish to pursue arbitration, the Voucher Settlement is an unexpected bonus in this time of economic turmoil"].) In effect, Plaintiffs are conceding that if a class member has a claim worth pursuing, the settlement is not in that class member's best interest. The opt-out right does not abrogate the Court's fiduciary responsibility to ensure that the settlement is fair. If it did, then there would be no need to conduct a fairness analysis at all in any case. Even if it could, the Court has serious concerns as to whether even the best practicable notice plan could effectuate actual notice to the entire sub-class of 74,000, including more than 60,000 former employees. (See Harris Decl. ¶ 5 at p. 5.)[7]

The foregoing considerations are sufficient to deny the motion for preliminary approval. As to the Pre-August 2014 Settlement Class, the Court is neither persuaded that the settlement consideration is within the range for which final approval may be granted nor that certification is appropriate. However, the foregoing is not a comprehensive list of all of the Court's fairness concerns. More concerns are briefly described below.

First, the meal vouchers are reversionary in the sense that Defendant will give nothing for the release if the vouchers are not redeemed.[8]

Second, unless Defendant is able to secure an up-to-date mailing address for a class member, meal vouchers may be mailed to, and redeemed by, third parties.

Third, the circumstances in which the settlement was negotiated create an inherent conflict of interest.[9] Defendant defeated the contested class certification motion. Having been beaten, Plaintiffs'

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[7] Plaintiffs' contention that actual notice to class members is itself a benefit of the settlement is unpersuasive. Turley sent a *Belaire* notice to the class prior to the class certification proceedings. (See Jan. 10, 2018 Order, 1-2.) Moreover, if the litigation goes forward, notice of class certification will be sent to the certified class. Assuming that actual notice of pendency of class claims could be viewed as a benefit of a settlement, the Court has not been presented with evidence suggesting that such a benefit would inure to a substantial percentage of the class members.

[8] At oral argument, Plaintiffs stated that the parties were prepared to modify the settlement to make the smaller cash payments the default option to ensure that the settlement is not reversionary. Although this mitigates the extent to which the settlement can be described as reversionary, it also reduces the face value of the settlement. More importantly, it does not cure any of the issues identified above.

[9] To the extent Plaintiffs contend that the settlement is entitled to a presumption of fairness – or will be entitled to such a presumption at final approval if there are no objectors – the Court is unpersuaded. The

Counsel negotiated a settlement for a class that had no representative, then went about finding a class representative. The Court has previously expressed its concern with this process. (See Mar. 26, 2020 Order, 3-4.)[10] In short, (1) Defendant gets a release of all wage and hour claims from approximately 74,000 for pennies, or less than pennies, on the dollar; (2) Plaintiffs' Counsel increases the basis for the fee request by releasing claims that neither they nor their client had an extant right to prosecute; [11] and (3) Thompson, who was an absent class member and nothing more when the settlement was negotiated, [12] gets an opportunity to seek an enhancement award that is worth more than 200 [13] times more than the face value of the meal voucher he could otherwise receive, or more than 400 times more than the cash payment he could otherwise receive by blessing the agreement after it has already been negotiated. (See, generally, *Kakani v. Oracle Corp.* (N.D. Cal. June 19, 2017) 2017 WL 1793774, at *5 [denying preliminary approval of a settlement that would be a "bonanza" for defendant, plaintiffs' counsel, and plaintiffs, but where the absent class members would be the "main losers"]; *Lagos v. Leland Stanford Junior University*

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settlement must be scrutinized because of the conflicts of interest that infected the negotiations.

[10] In amending the Proposed Settlement, the parties have substantially reduced the contemplated enhancement awards. This does not fully address the issue. *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, is instructive. There, the Ninth Circuit addressed incentive agreements made at the point of retention. (*Rodriguez*, 563 F.3d at 959.) The Ninth Circuit explained that these exacerbated the risks already presented by incentive awards. (*Id.* at 960.) In short, the Ninth Circuit recognized that an effort to seek an unreasonably high incentive award may alone indicate that the plaintiff has a conflict of interest that prevents her from adequately representing the class' interests. (*Ibid.*) The Ninth Circuit held that the interest was exacerbated by an ex ante incentive agreement because such an agreement necessarily creates a strong artificial incentive to settle the case. (*Ibid.*) In *Rodriguez*, however, the Ninth Circuit held that the $49 million antitrust settlement was not irretrievably tainted by the incentive agreements because only five of the seven plaintiffs had entered incentive agreements. (*Id.* at 955, 961.) In this Court's view, the process of selecting Thompson to serve as the sole representative of the 74,000 person subclass here is more problematic than the ex ante agreements in *Rodriguez*. Here, when Plaintiff Christopher Thompson was identified for appointment as a class representative, he had a choice – agree to serve as a representative for the chance at a $2,500 incentive award or let someone else jump at the opportunity, at the risk of being left holding only a burrito. Thompson was not in a position where he could adequately represent the subclass in these circumstances.

[11] The parties agreed to value the meal voucher/cash payment option at a maximum of $800,000. Counsel requested 35% of that, or $280,000, as fees. Moreover, because the claims of two discrete classes were resolved in a single settlement, there is a possibility that Counsel could not have obtained the relief it did for the smaller Pre-August 2014 Class unless Counsel agreed to settle the claims of the larger Post-August 2014 Class on the terms that Counsel accepted.

[12] At oral argument, Plaintiffs contended that this assertion is incorrect because Thompson submitted a declaration in support of class certification and was deposed as part of the discovery on the class certification motion. Submitting evidence in support of a class certification motion does not make one a class representative or a representative of a putative class. Thompson simply was not a party to this case when Plaintiffs' Counsel negotiated the settlement for the subclass he now represents.

[13] See Motion, 8 [requested enhancement awards will be $2,500 each].

(N.D. Cal. Mar. 24, 2017) 2017 WL 1113302, at *3-*8 [observing that pre-certification settlements are subject to closer scrutiny due to the heightened risk of collusion before discussing why the settlement discount in that case was deeper than warranted].)

Fourth, the recovery on the PAGA claims is, at least according to one of Plaintiff's valuations, infinitesimal. The $10,000 payment, which implies an allocation of $13,333.33, is less than .001% of the more than $120,000,000 PAGA valuation. Moreover, the explanation for the discount is not apparent. (See Harris Decl. ¶¶ 5(j), 11(i)-(o) at pp. 14-15, 41-43; *Myles*, 2014 WL 6065602 at *4.) As noted above, the parties have narrowed the PAGA release. It may be that the maximum verdict value of all PAGA claims within the scope of the release that are attributable to Labor Code violations is only $1,749,600, with the balance of the figure made up of penalties for violations of a Wage Order and the Business & Professions Code that the parties agree are not actually recoverable. (Harris Decl. ¶¶ 5(j), 11(i) at pp. 14-15, 41.) Even if that is so, the drop from $1,749,600 to $1,000,000 is not explained. (*Id.* at ¶¶ 5(j), 11(k) at pp. 14-15, 42.) Moreover, there is a sizable drop-off from the $500,000 reasonable verdict value, computed with opaque discounting, to the $10,000 settlement payment. (*Id.* at ¶ 11(o) at p. 43.)[14]

CONCLUSION AND ORDER

For the foregoing reasons, the motion is denied.

The parties are instructed to meet and confer regarding the provision of class notice regarding the order granting, in part, class certification prior to the July 6, 2020 Case Management Conference. (See Nov. 2, 2018 Order, 24.)

IT IS SO ORDERED.

Dated: June 30, 2020

Anne-Christine Massullo
Judge of the Superior Court

[14] At oral argument, Plaintiff cited *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576 for the proposition that PAGA penalties can be discounted to zero. In *Nordstrom*, the plaintiffs challenged a discrete practice – the calculation of sales commissions using net sales. (*Nordstrom*, 186 Cal.App.4th at 580.) The class action settlement included $6.405 million in cash, $2.5 million in merchandise vouchers, and prospective changes to the calculation, payment, and reporting of commissions. (*Ibid.*) The settlement did not allocate any portion of the recovery to the PAGA claims. (*Id.* at 589.) The Court of Appeal affirmed settlement approval. (*Ibid.*) But citing that case does not explain why the PAGA allocation is reasonable on the facts of this case.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, William Trupek, 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 July 1, 2020, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: July 1, 2020

T. Michael Yuen, Clerk

By: _____
William Trupek, Deputy Clerk