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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SANDRA SUMMERS and DARIIA FELDENHEIMER, individually and on behalf of all other similarly situated aggrieved employees,

Plaintiffs,

v.

CROSS COUNTRY HEALTHCARE, INC., TRAVEL STAFF, LLC and DOES 1-50, inclusive

Defendants.

Case No. CGC-23-611080

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR (1) CERTIFICATION OF A SETTLEMENT CLASS; (2) PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT; (3) APPROVAL OF NOTICE AND NOTICE DISSEMINATION PLAN; AND (4) APPROVAL OF A SCHEDULE FOR THE FINAL APPROVAL PROCESS.

Date: October 11, 2024
Time: 11:00 a.m.
Dept.: 304
Judge: Hon. Ethan P. Shulman

Complaint Filed: December 13, 2023

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I. INTRODUCTION

In Plaintiffs' opening brief in support of preliminary approval of this class action and PAGA settlement (filed August 13, 2024), Plaintiffs presented the Court with a $2,345,000 non-reversionary settlement that will make significant payments to class members (nearly $7,000 on average net of fees and expenses) with no claims process and a release tailored to the facts alleged in the Complaint. Plaintiffs also addressed the procedural history of the litigation, the nature of the claims, class certification, and the fairness of the settlement.

In response to the Court's Order continuing the preliminary approval hearing (filed September 5, 2024), Plaintiffs and Cross Country have modified the Settlement Agreement and Notice to address the Court's concerns. The First Amended Class Action and PAGA Representative Action Settlement Agreement ("Settlement Agreement") is attached to the Supplemental Declaration of Alexander T. Ricke as **Exhibit 1**. The revised Notice is **Exhibit A** thereto. In this brief, Plaintiffs address only those issues on which the Court ordered supplemental briefing, including exposure analysis and damages calculations, and otherwise stand on their opening brief. Plaintiffs also submit supporting declaration testimony from Plaintiff Summers, Plaintiff Feldenehimer, and Richard W. Simmons, President of Analytics Consulting LLC, the parties' chosen settlement administrator.

This is an excellent result for class members in the face of legitimate risks in litigation—for example, the possibility of individual arbitration and the untested nature of the Labor Code § 970 bait-and-switch claims. The settlement should be preliminarily approved as fair and reasonable.

II. THE RESERVE FUND AND EXPLANATION OF SETTLEMENT PAYMENTS

A. The Parties Increased the Reserve Fund to $50,000.

The revised Settlement Agreement increased the reserve fund from $5,000 to $50,000. Ex. 1, Settlement Agreement at ¶ II.jj. The Court's point on this issue was well-taken—a $5,000 reserve fund could have been insufficient to address more than a handful of settlement payment allocation inquiries considering that estimated settlement payments average nearly $7,000. Order at pp. 1-2.[1]

Plaintiffs are, however, confident that the $50,000 reserve fund will be more than sufficient to address class members' questions, if any, regarding their estimated settlement payments. Plaintiffs' counsel have collectively secured and overseen dozens of class and collective action wage settlements. In Plaintiffs' counsel's experience, it is uncommon to have more than a handful of class members dispute their estimated settlement payments after receiving direct notice informing them of the size of the fund, an estimated settlement payment, and an explanation of how the estimated settlement payment was calculated. This is true even when the settlement payments are in the many thousands of dollars and there are many thousands of class members. It is even more uncommon to have the settlement allocation be incorrect when, like here, the individual allocations are calculated based on individual wage records. In sum, Plaintiffs' counsel are confident that the $50,000 reserve fund will adequately address any concerns from class members regarding their estimated settlement payments here where there are only 209 class members[2] and the individual settlement payments are based on the wage and hour records Cross Country is required to keep under federal law, 29 C.F.R. Part 516. Ricke Decl. at ¶¶ 6-7.

B. The Notice Provides Significant Information Regarding the Settlement Payments.

The Notice (Exhibit A to the Settlement Agreement) provides class members with an easy-to-understand explanation of the settlement so that they can make an informed decision about whether to request exclusion, participate, or object. The Notice provides more than what California law requires and, in Plaintiffs' counsel's view, provides what class members most want to know

[1] Any part of the $50,000 reserve fund that is not used to augment class members' individual settlement payments will simply return to the settlement fund for distribution to class members following final approval. Settlement Agreement at ¶ II.jj.

[2] The parties have amended the Settlement Agreement to reflect that there are 209 class members and not the original 212, which is due to, as Plaintiffs' counsel understands it, three class members working under multiple employee IDs. *See* Ex. 1, Settlement Agreement at II.1.oo. This, along with the reduction in Settlement Administration expenses, results in estimated *per capita* settlement payments going up to $6,947.40. Ricke Decl. at ¶ 5.

(*e.g.*, estimated settlement payments and how the fund is allocated) without unduly confusing the issue with metrics that are foreign to most workers (*e.g.*, regular rate inputs).

The Notice informs class members that the total settlement value is $2,345,000. Notice at § 4. The Notice then spends one-and-a-half pages explaining the specific dollar amount of each class member's estimated settlement payment and how it was calculated and informs them that they may contact the settlement administrator and Plaintiffs' counsel if they have questions about any aspect of the settlement. *Id*. at §§ 5, 14. The Notice goes on to explain in plain language that class members "do not have to do anything" to be paid and what they are giving up in exchange for the settlement payment. *Id*. at §§ 6-7. Further, to the extent they do not want to participate or want to object to any aspect of the settlement, the Notice explains how the class member can do so either by U.S. Mail or electronically. *Id*. at §§ 8-9. Finally, the Notice is replete with references to the settlement website (which will contain the Settlement Agreement and will also contain this and related settlement briefing) and directs class members to phone numbers and email addresses for the settlement administrator and Plaintiffs' counsel, should class members require further information or have additional questions. *Id*. at § 14. This Notice well-surpasses California's notice requirements.

The California Rules of Court provide basic due process guardrails for class action notice, which the proposed Notice here clearly satisfies. *See* Rule 3.769(f); Rule 3.766(d) (setting out the content of a notice, all of which are satisfied here). The California appellate authority on the sufficiency of settlement notices as to settlement payments largely focuses on whether a notice must provide even an estimated settlement payment at all and holds it need not. *See, e.g., Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393, 113 Cal. Rptr. 3d 510, 520 (2010), *as modified* (July 27, 2010) (affirming settlement approval as to sufficiency of notice because "the … notice identified the total amount of the common fund recovery, the nature of the costs and fees to be deducted from the common fund, and the fact that the balance of the fund would be allocated among qualified class claims.").[3] The Court in *Cellphone Termination Fee* summarized its holding

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[3] *See also Duran v. Obesity Rsch. Inst., LLC*, 1 Cal. App. 5th 635, 644, 204 Cal. Rptr. 3d 896, 904–05 (2016) ("A class action settlement notice should present information neutrally, simply, and understandably. The notice should allow class members to evaluate a proposed settlement. Notice

by citing with approval to a Ninth Circuit opinion holding that, so long as the notice informs class members of the "aggregate amount available to all claimants was specified and the formula for determining one's recovery was given. Nothing more specific is needed." *Marshall v. Holiday Magic, Inc*. (9th Cir. 1977) 550 F.2d 1173, 1178.

As the Ninth Circuit's *Marshall* opinion indicates, relevant federal authority interpreting Federal Rule of Civil Procedure 23's notice requirements are in accord.[4] *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 567–68 (9th Cir. 2019) (cleaned up) ("A settlement notice need not provide an exact forecast of the award each class member would receive, let alone a detailed mathematical breakdown; it merely must give class members enough information so that those with adverse viewpoints could investigate and come forward and be heard.").

Further, "class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members." *Bautista v. Harvest Mgmt. Sub LLC*, 2013 WL 12125768, at *17 (C.D. Cal. Oct. 16, 2013). Here, the Notice gives class members their estimated settlement payments, a comprehensive breakdown for how those payments are calculated, electronic access to all settlement documents, and contact information for Plaintiffs' counsel and the administrator if class members have questions. Providing each class member with the entire underlying metrics used to calculate their individual settlement payments is almost certain to confuse class members in this context given that the relevant inputs for, in particular, the regular rate are likely to be foreign to most class members. In Plaintiffs' counsel's opinion, the Notice far surpasses the baseline requirements under California law and is the best notice practicable under the circumstances. Ricke Decl. at ¶¶ 8-9.

III. PLAINTIFFS SATISFY TYPICALITY AND ADEQUACY

The Court ordered Plaintiffs Summers and Feldenheimer to submit evidence that they satisfy the adequacy and typicality requirements for class certification. Order at p. 2. First, both

should describe the formula or plan for computing individual settlement class member recoveries.").

[4] "California courts may look to federal authority for guidance on matters involving class action procedures.' [Citations.]" *Apple Computer, Inc. v. Superior Court*, 126 Cal.App.4th 1253, 1264, fn. 4, 24 Cal.Rptr.3d 818 (2005).

Plaintiffs are travel nurses who worked short-term assignments for Cross Country in California as did all other putative class members. *See* Summers Decl. at ¶¶ 2-4; Feldenheimer Decl. at ¶¶ 2-4.

Second, both Plaintiffs attested to workweeks where they earned overtime in California while working for Cross Country and were paid based on a regular rate that did not account for their stipend payments in violation of Labor Code § 510. *See* Ex. 2, Summers Decl. at ¶ 9; Ex. 3, Feldenheimer Decl. at ¶ 9. Third, both Plaintiffs attested to experiencing a bait-and-switch mid-contract rate reduction while working for Cross Country in California in violation of Labor Code § 970. *See* Summers Decl. at ¶¶ 2-8; Feldenheimer Decl. at ¶¶ 2-8.

As to typicality, Plaintiffs meet this requirement because they assert the same claims as the putative class (failure to pay overtime at the correct regular rate and bait-and-switch employment practices) and have suffered the same injury as the putative class (underpayment of overtime in violation of § 510 and underpayment of contract wages in violation of § 970). *Gonzales v. San Gabriel Transit, Inc*., 40 Cal. App. 5th 1131, 1162 (2019) (cleaned up) ("The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.").

In addition, Plaintiffs satisfy the adequacy requirement because they have no interests antagonistic to the class. *McGhee v. Bank of Am*., 60 Cal. App. 3d 442, 450 (Ct. App. 1976) ("Adequacy of representation depends on whether … the plaintiff's interests are not antagonistic to the interests of the class."). Because Plaintiffs possess the same claims and same type of injury as class members, Plaintiffs' interests are and remain fully aligned with class members. *See* Summers Decl. at ¶¶ 1-9; Feldenheimer Decl. at ¶¶ 1-9.

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. Plaintiffs Provide More Information Regarding Their Exposure Analysis.

The Court ordered Plaintiffs to provide a supplemental explanation of how Plaintiffs' counsel calculated exposure on both the overtime and bait-and-switch mid-contract rate reduction claims. Order at pp. 2-3. The exposure outlined in Paragraph 16 of Mr. Ricke's Declaration (dated August 13, 2024) were calculated in the following manner:

As to the overtime damages, Plaintiffs' counsel calculated $5,132,381.01 in actual unpaid overtime damages according to the underlying wage data produced by Cross Country during settlement negotiations. With the inclusion of stipends as wages, the average regular rate of the class members should have been $92.69, based on an average of 42 hours worked per week, an average base pay rate of $57.32, and an average weekly stipend of $1,485.42. With this corrected regular rate, the average hourly amount of unpaid overtime was $51.24 per hour ($139.03 average correct overtime rate minus $87.79 average overtime rate paid), and the average hourly amount of unpaid double time was $69.75 per hour ($185.37 average correct double time rate minus $115.62 average double time rate paid). According to class members' wage and hour records, the average number of overtime and double time hours worked per week was 11.747 and 1.253, respectively, and the average number of weeks worked per nurse was 35.123. Multiplying those corrected figures by the class of 212[5] yields damages of $5,132,381.01 or $689.27 per class member per week. Stated differently, approximately $8.758 million was paid in overtime, but approximately $13.89 million should have been paid in overtime. Ricke Decl. at ¶ 11.

As to Plaintiffs' bait-and-switch damages, Plaintiffs' counsel calculated them as totaling $1,131,521.17 according to the underlying wage data produced by Cross Country during settlement negotiations. These are the difference between the amount of compensation class members would have received at their initial contract rates versus their reduced rates, by multiplying the change in their rates by the relevant hours per week (base or overtime) by the number of weeks remaining in the assignment. The average hourly base rate cut was $19.75 ($73.87 average initial hourly base rate minus $54.12 average reduced hourly base rate), and the average hourly overtime rate cut was $29.62 ($110.80 average initial hourly overtime rate minus $81.18 average reduced hourly overtime rate). The average number of base and overtime hours per week were 29.2 and 12.5, respectively, and the average number of weeks remaining after a rate cut was 5.3. Thus, in total, class members lost $1,131,521.17 or, on average, $5,029 per assignment. Stated differently, approximately $3.094

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[5] As noted above, there are 209 class members after accounting for class members working under multiple Employee IDs (as Cross County explained to Plaintiffs' counsel). Yet, the settlement fund has not been decreased by a corresponding amount. This simply means that class members will receive more *per capita* than had been originally estimated. Ricke Decl. at ¶ 5.

million was paid in wages under these contracts, but approximately $4.225 million should have been paid in wages had the original contracts been honored. Ricke Decl. at ¶ 12.

B. The PAGA Allocation is Fair, Reasonable, and Adequate.

The Court ordered Plaintiffs to provide supplemental information regarding the fairness of the PAGA Payment, including calculating exposure. Order at pp. 2-3. Cross Country's counsel has confirmed to Plaintiffs' counsel that there are 9,300 PAGA pay periods at issue.[6] Applying a standard penalty of $100 to each pay period pursuant to Labor Code § 2699(f) yields baseline PAGA exposure of $930,000. Ricke Decl. at ¶ 13. After discussion, the parties agreed to increase the PAGA allocation to $10,000. *See* Ex. 1, Settlement Agreement at ¶ II.1.z. Particularly when combined with robust class relief in this case that will also further the same purposes, the PAGA settlement is "fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.". *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (2021), *disapproved other grounds* by *Turrieta v. Lyft*, 16 Cal.5th 664 (2024); *see also, e.g., O'Connor v Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1134-35 (N.D. Cal. 2016) (where "settlement for the Rule 23 class is robust," resolves important questions of law, or contains substantial injunctive relief, a lower PAGA award may be appropriate as long as the settlement as a whole "substantially vindicate[s]" PAGA's goals of protecting the rights of employees, encouraging employers to comply with wage and hour laws, and supplementing the State's enforcement abilities through private action). This ratio of the PAGA Payment to the Gross Settlement Fund is comparable to others approved in hybrid class action and PAGA settlements. *See, e.g., Garcia v. Gordon Trucking, Inc.*, 2012 WL 5364575, at *7, *11 (E.D. Cal. Oct. 31, 2012) (approving a $10,000 PAGA award out of a $3.7 million settlement); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) (approving a $10,000 PAGA award out of a $6.9 million settlement).

[6] To be clear, the scope of the released PAGA penalties is tied to these 9,300 pay periods worked by class members who are also being paid as part of this settlement for the alleged Labor Code violations underpinning the PAGA penalties. *See* Settlement Agreement at ¶ V.A.2.

C. The Named Plaintiffs' General Release

The Court also ordered the parties to provide a copy of the proposed general release for Plaintiffs Summers and Feldenheimer. Order at pp. 3-4. The parties amended the Settlement Agreement to include a form general release to be executed by Plaintiffs following final approval of the settlement and award of the service award. *See* Settlement Agreement at Exhibit C.

V. THE NOTICE EXPLAINS THE OBJECTION AND OPT-OUT PROCESS

The Court ordered the parties to clarify in the Settlement Agreement that objections and requests for exclusion can be submitted both electronically and by U.S. Mail. Order at p. 4. The parties have now done so. Settlement Agreement at ¶ V.D.1. (clarifying that "Notice of Objection must be signed by the Settlement Class Member or may be submitted through the Website"); ¶ V.D.2. (clarifying the same with respect to requests for exclusion). Further, consistent with the Court's instruction, the parties have provided an explanation of how to submit a request for exclusion and objection through the Settlement Website or U.S. Mail. *See* Notice at §§ 8-9 (providing detailed explanation of both electronic and U.S. Mail means of submission).

The parties also made the revisions to the Notice instructed by the Court. *See generally* Notice; *see also* Order at pp. 4-5.

VI. THE SETTLEMENT ADMINISTRATOR IS QUALIFIED

The Court ordered Plaintiffs to submit a declaration from the Settlement Administrator setting out certain information. Order at pp. 5-6. Plaintiffs have now provided the Court with a Declaration from Richard W. Simmons, the President of Analytics Consulting LLC, who attests to a not-to-exceed bid of $8,827 to administer this settlement (lower than the $15,000 that Plaintiffs' counsel originally projected). *See* Simmons Decl. at ¶ 1; s*ee also* Summary of Fees and Expenses attached as Exhibit 1 to the Simmons Decl. Mr. Simmons also estimates that a residual check-mailing would cost approximately $1,612, but, regardless, that contingency is accounted for in the $8,827 not-to-exceed bid. *See* Simmons Decl. at ¶ 2.

Mr. Simmons' and Analytics' qualifications to administer the settlement are detailed in his Declaration, the Analytics' Company Overview (Ex. 2 to the Simmons Decl.), and Mr. Simmons'

CV and list of representative cases (Ex. 3 to the Simmons Decl.). The Court can approve Analytics to act as Settlement Administrator in this case.

VII. PRELIMINARY APPROVAL IS APPROPRIATE

In all other respects (*e.g.*, class certification, fairness), Plaintiffs rest on their opening brief. Plaintiffs urge the Court to grant preliminary approval and certify the class for settlement purposes so that Notice may issue.

Dated: October 4, 2024

Respectfully submitted,

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