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Attorneys for Plaintiffs and the Settlement Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]

POSTMATES CLASSIFICATION CASES

Included Actions:

Winns v. Postmates, Inc., No. CGC-17-562282 (San Francisco Superior Court)

Rimler v. Postmates, Inc., No. CGC-18-567868 (San Francisco Superior Court.)

Brown v. Postmates, Inc., No. BC712974 (Los Angeles Superior Court)

Santana v. Postmates, Inc., No. BC720151 (Los Angeles Superior Court)

Vincent v. Postmates, Inc., No. RG19018205 (Alameda County Superior Court)

Altounian v. Postmates, Inc., No. CGC-20-584366 (San Francisco Superior Court)

CASE NO. CJC-20-005068

CASE NO. CGC-18-567868

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: November 3, 2021
Time: 2:00 p.m.
Judge: Hon. Suzanne R. Bolanos

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 3, 2021 at 2:00 p.m., or on such other date or time as this matter may be called, in Department 303 of San Francisco Superior Court, located at 400 McAllister Street, San Francisco, California, 94102, Plaintiffs, on behalf of themselves and all other similarly situated settlement class members, will and hereby do, move for an order finally approving the Class Action Settlement described herein. The motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support thereof submitted herewith, the Declarations of Shannon Liss-Riordan and Lindsay Kline and exhibits thereto, submitted herewith, and such other filings and arguments that may be submitted for the Court's consideration, as well as all documents and records on file in this matter.

Plaintiffs' Motion is made pursuant to Cal. Code Civ. P. § 382 and Civil Code § 1781(f), on the grounds that the proposed settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class.

Dated: October 12, 2021

LICHTEN & LISS-RIORDAN, P.C.

By: _____
Shannon Liss-Riordan

Attorney for Plaintiffs and the Settlement Class

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I. INTRODUCTION

As set forth in Plaintiffs' Motion for Preliminary Approval, Plaintiffs have reached a landmark settlement with Defendant Postmates, Inc. ("Postmates"), which will resolve all Released Claims against Postmates arising from its alleged misclassification of California drivers as independent contractors from June 3, 2017 through January 1, 2021. Under the terms of this agreement, Postmates has agreed to pay a total of $32,000,000 in a non-reversionary settlement.

This Court previously granted preliminary approval, finding this proposed settlement to be fair, reasonable, and adequate. See Prelim. Approval Order (August 12, 2021). The Court reached this conclusion after multiple rounds of supplemental briefing requested by Judge Massullo and this Court. The Court has already carefully considered the settlement and reviewed it at the preliminary stage with the same rigor applicable at the final approval stage. See Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016) ("courts should review class action settlements just as carefully at the initial stage as they do at the final stage…rather than kicking the can down the road.").

Although the notice process has not yet concluded, its results thus far show that the vast majority (99.9%) of the class successfully received notice, and to date, settlement class members have submitted claims representing 26% of the settlement fund (assuming a 100% claims rate, as explained further below), there is just one objection, and there are only 17 requests for exclusion. See Declaration of Lindsay Kline ("Kline Decl.") at ¶¶ 11, 21-22, 25. This robust response confirms that the Court was correct in finding the settlement to be fair, reasonable, and adequate. As the notice period does not end until November 2, 2021, Plaintiffs will provide an updated accounting of the claim rate prior to the hearing on November 3.

Accordingly, the Court should grant final approval of the settlement. In a separately filed motion, Plaintiffs also request that the Court award attorneys' fees and costs and class representative service awards under the terms of the settlement.

II. FACTUAL BACKGROUND AND RESULTS OF THE NOTICE PROCESS

A. Litigation History

Plaintiffs briefly recount, for the Court's convenience, the history of this action as previously described in their Motion for Preliminary Approval. Plaintiffs have alleged in this case that Postmates delivery drivers have been misclassified as independent contractors rather than employees and that Postmates has violated California law by failing to provide expense reimbursement and failing to pay minimum wage and overtime (among other alleged violations). On July 5, 2018, Plaintiff Jacob Rimler brought claims on behalf of the state of California and other similarly situated aggrieved drivers under the PAGA. A First Amended Complaint adding Giovanni Jones was filed on July 11, 2018. Postmates filed a motion to compel arbitration, arguing that the United States Supreme Court's decision in Epic Systems Corp. v. Lewis (2018) 138 S.Ct. 1612 overruled the California Supreme Court's holding in Iskanian v. CLT Trans Los Angeles, Inc. (2014) 59 Cal. 4th 348, that representative action waivers of PAGA claims are unenforceable, and that plaintiffs' individual claims must be compelled to arbitration. Judge Mary Wiss denied the motion to compel on January 2, 2019, and Postmates filed an appeal to the California Court of Appeal (Cal. Ct. of Appeal, No. A156450).[1]

Meanwhile, other plaintiffs represented by the same counsel filed a putative class action complaint in San Francisco Superior Court, which similarly alleged that Postmates misclassifies couriers and violated California state and local law, including the Labor Code, as a result (see Lee v. Postmates, Inc., Case No. CGC-18-566394 (San Fran. Sup. Ct.)), and which was removed to the United States District Court for the Northern District of California (No. 3:18-cv-3421-JCS (N.D. Cal.)). In the Lee case, Postmates moved to compel arbitration of the claims of two of the three named plaintiffs, Dora Lee and Kellyn Timmerman. Plaintiffs argued that they were exempt from arbitration pursuant to the transportation workers' exemption from the

[1] On December 9, 2020, the Court of Appeal affirmed the trial court's decision. As noted below, infra note 9, Postmates has filed a petition for a writ of certiorari to the U.S. Supreme Court.

Federal Arbitration Act, 9 U.S.C. § 1, but the Court held otherwise and granted Postmates' motions compelling arbitration. Plaintiffs Lee and Timmerman filed an appeal to the Ninth Circuit, which remains pending. See Lee v. Postmates, Ninth Cir. No. 19-15024. The claims of the third named plaintiff, Joshua Albert, who had opted out of Postmates' arbitration agreement, were severed into a separate, individual (non-class) PAGA case in the Northern District. (See Albert v. Postmates, Inc., No. 3:18-cv-7592-JCS (N.D. Cal.). [2]

In July 2019, the parties participated in a full-day mediation with Tripper Ortman, a professional and experienced private mediator, and reached a global, class-wide settlement agreement to resolve both the PAGA and class claims for individuals who used the Postmates platform as couriers in California between June 3, 2017 and October 17, 2019. Soon thereafter, the plaintiffs in Winns v. Postmates, Inc., No. CGC-17-562282 (San Francisco Superior Court) and Vincent v. Postmates, Inc., No. RG19018205 (Alameda County Superior Court) joined the Rimler settlement. On June 17, 2020, after multiple rounds of suppemental briefing Judge Anne-Christine Massullo granted the motion of the plaintiff in Santana v. Postmates, Inc., No. BC720151 (Los Angeles Superior Court) to coordinate certain state court cases that had been

[2] These cases were filed following the California Supreme Court's decision in Dynamex Operations W. v. Superior Court, (2018) 4 Cal. 5th 903, 956 n. 23, 416 P.3d 1, 34, reh'g denied (June 20, 2018), where the California Supreme Court adopted an "ABC" test for employee-status (which it borrowed from Massachusetts). Plaintiffs believe that California Postmates drivers' misclassification claims were particularly strong on the merits. Class Counsel has been extremely active representing "gig economy" workers in misclassification cases in California, both before and after Dynamex, and being from Massachusetts, she has more than 15 years' experience litigating misclassification cases under the "ABC" test that the Supreme Court has now adopted in Dynamex. In California, she obtained the first ruling applying Dynamex, in which the Orange County Superior Court (Judge Claster) granted summary judgment to plaintiffs on their claim that they have been misclassified under the "ABC" test. See Johnson v. VCG-IS, LLC (San Diego Super. Ct. Sept. 5, 2018) Case No. 30-2015-00802813, Ruling on Motions for Summ. J. (Ex. E to Liss-Riordan Decl.). Moreover, Plaintiffs' counsel has received much attention for her work in this area. See Kapp, Diana, "Uber's Worst Nightmare", San Francisco Magazine (May 18, 2016) (Ex. D to Liss-Riordan Decl.) (describing her work on misclassification cases against "gig economy" companies and noting that "Liss-Riordan has achieved a kind of celebrity unseen in the legal world since Ralph Nader sued General Motors"); see also discussion infra, pp. 8-9.

filed against Postmates alleging independent contractor misclassification, and she denied approval of the settlement without prejudice and encouraged the parties to continue negotiating. In fall 2020, the parties reached a new agreement to resolve claims for individuals who used the Postmates platform as couriers in California between June 3, 2017 and January 1, 2021 for a non-reversionary total of $32 million. The plaintiff in Santana subsequently also agreed to join the settlement. On August 12, 2021, this Court granted preliminary approval of the settlement. Since that time, the plaintiffs in the two remaining cases that are part of these coordinated cases, Brown v. Postmates, Inc., No. BC712974 (Los Angeles Superior Court), and Altounian v. Postmates, Inc., No. CGC-20-584366 (San Francisco Superior Court), have also agreed to resolve their claims through this settlement. See Exhibit A to Declaration of Shannon Liss-Riordan. This Motion, along with the concurrently filed Motion for Approval of Attorneys' Fees, Costs, and Class Representative Service Awards, will be uploaded on the settlement website so that settlement class members have notice of this proposed revision to the settlement.[3]

B. Review of Settlement Terms

As described in Plaintiffs' preliminary approval papers, the Settlement Agreement provides that Postmates will pay $32,000,000 to fully resolve the claims. Agreement ¶¶ 2.44, 4.1. This amount is non-reversionary and thus will be paid out in full to the benefit of the settlement class members, less the following categories of expenses to be paid out of the Class Settlement Amount: claims administration (in the amount of $945,000); attorneys' fees and

[3] As discussed in the Motion for Approval of Attorneys' Fees, Costs, and Class Representative Service Awards, Plaintiffs are still requesting the same 28% of the settlement amount in fees. Two additional named plaintiffs are seeking service awards of $5,000 each. This will not meaningful change the estimated recovery that was listed on settlement class members' notices, particularly as the $250,000 dispute resolution fund was held back from the calculations of settlement class members' estimated recovery that was listed on the notice. As of the filing of this motion, no funds have been allocated from the dispute fund. See Declaration of Lindsay Kline at ¶ 23. Any amount remaining in the dispute fund following the completion of the notice process will be distributed to settlement class members. See Agreement ¶ 5.8.

costs (which Plaintiffs are requesting approval in the amount of 28% of the settlement amount); service awards to the named plaintiffs (in the amount of $5,000 each); and PAGA payment to the LWDA (the settlement allocates $4 million to the PAGA claims, so 75% of this amount would be paid to the LWDA). Id. at ¶¶ 2.35, 2.38, 2.32, 2.23.

After deductions for these payments, the balance of the settlement will be paid to all settlement class members who submitted a valid claim form. Id. at ¶ 5.2. Proceeds of the settlement fund will be distributed to settlement class members in proportion to the estimated number of miles driven while using the Postmates application as a courier between June 3, 2017 and January 1, 2021. See id. at ¶ 5.7. No settlement class member will receive less than $10. See id. at ¶ 5.4. Any remaining funds from uncashed checks will be distributed to all settlement class members who have submitted claims in proportion to their individual distributions (unless their residual distribution would be less than $50). Id. at ¶ 5.8. Any remaining unclaimed funds after the final distribution will be distributed to a *cy pres* beneficiary, Legal Aid at Work. Id. Thus, no portion of the settlement funds will revert to Postmates.

C. Preliminary Approval of the Settlement

The Court preliminarily approved the settlement on August 12, 2021. See Prelim. Appr. Order. Pursuant to Cal. Code Civ. P. 382, the Court certified, for settlement purposes, a class of all individuals who made at least one delivery using the Postmates application in California from June 3, 2017 to January 1, 2021. The Court appointed Plaintiffs in the Rimler, Winns, Vincent, and Santana cases as class representatives and appointed Lichten & Liss-Riordan, P.C. as Class Counsel. The Court also appointed Simpluris as Settlement Administrator. The Court also approved the Settlement Class Notice and the method of distributing the Settlement Class Notice as set forth in the Settlement Agreement. The Agreement, as approved by the Court, established various deadlines, directing the Settlement Administrator to disseminate the Class Notice and setting a claims, opt-out, and written objection deadline of 60 days following the distribution of Class Notice. See id. at ¶¶ 6.2-6.4. Further, Plaintiff informed the LWDA of the settlement, and the LWDA has not submitted any comment or objection to the settlement. See

Liss-Riordan Final Appr. Decl. at ¶ 3.

D. Results of the Notice Process to Date

Pursuant to the Court's Order and Settlement Agreement, Simpluris emailed the Class Notice to 721,619 settlement class members from September 1-3, 2021. See Kline Decl. at ¶ 7.[4] Of the 721,619 emailed class notices, just 13,401 were undeliverable by email. See id. Simpluris was able to obtain mailing addresses and mailed the class notice to 13,321 settlement class members, of which 1,396 were returned as undeliverable and Simpluris was able to find new addresses for 543 of these settlement class members. See id. at ¶ 11. Thus, the notice was successfully delivered to 99.9% of the class. See id. at ¶ 11.[5]

On September 21, 2021, and October 5, 2021, Simpluris emailed reminders to all settlement class members who had not yet submitted claims, id. at ¶ 12, 15, and sent a reminder postcards on the same dates via USPS First Class Mail to settlement class members whose email notices could not be delivered. Id. at ¶ 13, 15. At Plaintiffs' counsel's request, Simpluris will send additional emailed reminder notices to all settlement class members who had not yet submitted claims on a weekly basis October 12 through November 1. Id. at ¶ 17.[6] To date,

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[4] Because of the size of the settlement class, Simpluris was required to send the Notice over several days in order to avoid being flagged by email providers as a sender of spam email. Id. at ¶ 7. All settlement class members received a notice that listed the same deadline for submission of claims, opt-outs, or objections – November 2, 2021, which was 60 days from the last day of the initial email rollout. Id. at ¶ 7 n.1. Thus, all settlement class members had at least 60 days, with portions of the class having had one to two additional days.

[5] Pursuant to paragraph 6.5 of the Settlement Agreement, the notice period is extended for those settlement class members who received a mailed notice in order to allow them a 60 day period to respond. Thus, for these settlement class members, whose notice was mailed on September 10, 2021, see Kline Decl. at ¶ 9, the Notice period extends until November 9, 2021. Counsel will inform the Court if Simpluris receives any objections or opt-outs from this group of settlement class members following the final approval hearing.

[6] Settlement class members eligible for double points, either because they opted out of arbitration, initiated arbitration, or demonstrated in writing an interest an arbitration against Postmates prior to January 1, 2021, are receiving one additional reminder on October 22, as called for in the settlement agreement. Agreement ¶ 6.7.

106,778 settlement class members have submitted claims, accounting for an estimated 26% of the settlement fund (were there a 100% claim rate).[7] See id. at ¶ 25. Only one objection has been filed, and there have been only 17 requests for exclusion. See id. at ¶¶ 21-22. All unclaimed settlement funds will be distributed to settlement class members who have submitted claims. See Agreement ¶ 5.8.

As provided by the Settlement Agreement, settlement class members have been permitted to submit claims online or by mail. See id. at ¶ 5.3. Additionally, Simpluris has maintained a website including court filings and important dates and has in place a mechanism for responding to calls from settlement class members regarding the settlement. See Kline Decl. at ¶¶ 3, 26.

III. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT

Rule 3.769 of the California Rules of Court (CRC) sets forth the procedures for settlement of class actions in California. A two-step process is required: first, the court preliminarily approves the settlement and the settlement class members are notified as directed by the court. CRC 3.769(c)-(f). Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. CRC 3.769(g). If the court approves the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the judgment. CRC 3.769(h). Many courts in California, including this one, have adopted a "front loaded" approach to settlement approval, where settlements are carefully reviewed at the preliminary stage, and final approval is generally reserved for review of the results of the notice period, and the reaction of the class to the settlement. See Cotter v. Lyft, Inc. (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037 ("courts should review class action settlements just as carefully at

[7] Settlement class members are receiving payments in proportion to their estimated miles driven during the relevant period. Because the settlement is non-reversionary, all funds will be distributed to settlement class members who do submit claims. Therefore, settlement class members' actual payments will depend on how many other settlement class members submit claims in the settlement. To date, settlement class members have claimed approximately $4,633,362.52, or 26% of the estimated $17,790,000 available for distribution to the class.

the initial stage as they do at the final stage…rather than kicking the can down the road.").

A. The Presumption of Fairness at the Final Approval Stage

"[A] presumption of [a class action settlement's] 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. (2001) 91 Cal.App.4th 224, 245. The settlement that has been reached here is the product of significant effort and tenacious negotiations by the parties and their counsel. The settlement was reached after mediations held on July 19, 2019 and October 29, 2020, with Tripper Ortman, an experienced mediator of wage-and-hour class actions. See Liss-Riordan Prelim. Appr. Decl. at ¶ 6. The parties have conducted research, investigation, and exchange of information, including a review of damages data. Id. Lichten & Liss-Riordan has a great deal of experience in wage and hour class action litigation and has been widely recognized for its work challenging alleged independent contractor misclassification, including against numerous "gig economy" companies, raising similar issues to those raised here.[8]

[8] Plaintiffs' counsel has received much attention for her work in this area. She was appointed class counsel in the first (and only to date) certified class action on behalf of "gig economy" workers in California challenging their classification as independent contractors. See O'Connor v. Uber Techs., Inc. (N.D. Cal. Sept. 1, 2015) 2015 WL 5138097, rev'd on other grounds, (9th Cir. 2018) 904 F.3d 1087 (certifying class of 240,000 Uber drivers on misclassification claim). She took the first "gig economy" misclassification case to trial in California. See Lawson v. GrubHub, Inc. (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir. Appeal No. 18-15386. She obtained a ruling from the California Supreme Court that the Dynamex decision applies retroactively. Vazquez v. Jan-Pro Franchising Int'l, Inc., (Jan. 14, 2021), 10 Cal. 5th 944. She obtained the first ruling applying Dynamex, in which the Orange County Superior Court (Judge Claster) granted summary judgment to plaintiffs on their claim that they have been misclassified under the "ABC" test. See Johnson v. VCG-IS, LLC (San Diego Super. Ct. Sept. 5, 2018) No. 30-2015-00802813, Ruling on Motions for Summ. J. (attached as Ex. 5 to Liss-Riordan Prelim. Appr. Decl.).

Plaintiffs' counsel has handled many other similar cases and is well known for her aggressive and successful litigation on behalf of low wage workers, particularly those claiming misclassification. See Kapp, Diana "Uber's Worst Nightmare", San Francisco Magazine (May 18, 2016) (attached as Ex. 4 to Liss-Riordan Prelim. Appr. Decl.) (describing her work on (*cont'd*)

After robust issuance of notice to the class, there has been just one objection and just 17 opt-outs so far. See Kline Decl. at ¶¶ 21-22. Taken together, these factors clearly establish the presumption of fairness.

B. The Kullar Factors at the Final Approval Stage

In determining whether a class settlement should be approved – viewed through the prism of the presumption of fairness – trial courts evaluate (1) the strength of plaintiffs' case; (2) the risk, expenses, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery contemplated and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the settlement class members to the proposed settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 128. 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 a case. Wershba, 91 Cal.App.4th at 245.

1. The Strength of Plaintiffs' Case

"The merits of the underlying class claims are not a basis for upsetting the settlement of a class action[,] [and] [t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." Wershba, 91 Cal.App.4th at 246. "In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement was reasonable under all of the circumstances." Id. at 250.

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misclassification cases against "gig economy" companies and noting that "Liss-Riordan has achieved a kind of celebrity unseen in the legal world since Ralph Nader sued General Motors"). She has won a number of ground-breaking wage cases across a variety of industries at trial and has also won numerous appeals on behalf of employees in wage and hour cases. See Liss-Riordan Prelim. Appr. Decl. at ¶ 3. She has won significant cases on appeal for misclassified workers throughout the country, including in California. See e.g., Vazquez v. Jan-Pro Franchising Int'l, Inc. (9th Cir. 2021) 986 F.3d 1106 (holding that Dynamex applies to franchisees claiming misclassification).

Nonetheless, Plaintiffs have provided "a meaningful and substantial explanation of the manner in which the factual and legal issues have been evaluated." Kullar, 168 Cal. App. 4th at 132-33. Plaintiffs have discussed in detail the nature and magnitude of the claims at issue in this litigation and Plaintiffs' basis for concluding that the settlement is a reasonable compromise. See Mot. for Prelim. Appr. of Settlement. For the convenience of the court, Plaintiffs have summarized their valuation of the claims as previously outlined in the Declaration of Shannon Liss-Riordan in Support of Plaintiff's Motion for Preliminary Approval. Plaintiffs calculated the maximum theoretical recovery for the expense reimbursement claim, which Plaintiffs believe to be the strongest claim, to be approximately $213 million using the IRS fixed rate. See Liss-Riordan Prelim. Appr. Decl. (Dec. 14, 2020) at ¶ 20. As described further infra III.B.4, Postmates would argue for a much lower IRS rate, which would lead to potential expense damages of $67 million, meaning the $32 million settlement would represent 48% of potential damages.

2. The Risks of Continued Litigation

In reaching this settlement, Plaintiffs reasonably considered certain risks. Chief among these risks was the risk of enforcement of Postmates' arbitration agreement. While this Court denied enforcement of the agreement as it relates to Plaintiffs' PAGA claims, and various appellate decisions have confirmed that ruling, there have been ongoing attempts by defendants to present this issue to the U.S. Supreme Court.[9] Moreover, Plaintiffs likely would have been compelled to arbitration for any non-PAGA, class claims. Enforcement of Postmates' arbitration provision would make it impossible to obtain the meaningful classwide relief that has been made available through this settlement.

[9] Indeed, Postmates has filed a writ of certiorari to the Supreme Court of the appellate court's decision *in this case*. See Postmates, LLC fka Postmates, Inc. v. Rimler, Supreme Court Case No. 21-119. Though Plaintiffs expect the petition will be moot once this Court approves the settlement, counsel is aware of at least two other cert petitions on this same issue that are also pending. See, e.g., Viking River Cruises, Inc. v. Moriana, Supreme Court Case No. 20-1573; Coverall N. America, Inc. v. Rivas, Supreme Court Case No. 21-268.

Second, while Plaintiffs were very confident regarding the merits of this case in light of the California Supreme Court's Dynamex decision, there is still a lot of ongoing litigation regarding issues pertaining to the decision, including questions of what Labor Code claims it will apply to. At the time the settlement was reached, it was also an open question as to whether Dynamex applied retroactively to the time period before it was issued in April 2018, and the question of whether Dynamex applies to claims for reimbursement of expenses under Labor Code § 2802 has not been resolved.[10] While Plaintiffs believe their claims are strong under Dynamex, it was possible that a court would conclude that Dynamex did not apply to certain of their claims.

Additionally, although the Dynamex decision was codified into statutory law through the legislature's enactment of Assembly Bill 5, that result was thrown into doubt by the successful campaign by Postmates and other gig economy companies to pass a ballot referendum, Proposition 22, which specifies that Postmates' delivery drivers can be lawfully classified as independent contractors under California law if certain conditions are met. See Cal. Bus. & Prof. Code, § 7448, et seq. Gig economy defendants, including Uber (which now owns Postmates), have argued that Proposition 22 abated AB5 and therefore wipes out any pending claims of misclassification by its drivers, even for the time period prior to December 17, 2020, when Proposition 22 went into effect. While the Ninth Circuit recently rejected that argument in Lawson v. Grubhub, Inc. (9th Cir., Sept. 20, 2021) 2021 WL 4258826, that ongoing six-year-

[10] On January 14, 2021, the California Supreme Court ruled that Dynamex does apply retroactively. Vazquez v. Jan-Pro Franchising Int'l, Inc., (Jan. 14, 2021), 10 Cal. 5th 944. Even so, a number of California courts have held that Dynamex does not apply to Section 2802 claims for expenses. See, e.g., Haitayan v. 7-Eleven, Inc., (C.D. Cal. Feb. 8, 2021) 2021 WL 757024, at *5; Henry v. Central Freight Lines, Inc., (E.D. Cal. June 13, 2019) 2019 WL 2465330, at **7–8; Rosset v. Hunter Engineering Co., (Cal. Ct. App. Sept. 27, 2018) 2018 WL 4659498, at *3 n.2; Karl v. Zimmer Biomet Holdings, Inc., (N.D. Cal. Nov. 6, 2018) 2018 WL 5809428, at *3. While Plaintiffs believe these cases were wrongly decided, Plaintiffs recognize that there is a significant body of caselaw that holds to the contrary, and there is a very real chance that this Court would agree with those courts that have held that Dynamex does not apply to expense claims.

old case shows the delays and never-ending risks of these cases, as the defendant in that case has now vowed to continue fighting the misclassification issue, as well as penalties that may be assessed, back in the district court in litigation that could still continue for a number of years. While another court recently ruled Proposition 22 to be unconstitutional, Castellanos v. State, (Cal. Super.) 2021 WL 3730951, at *1, that decision is now on appeal. In short, these issues are very much live and unresolved; depending on the ultimate fate of Proposition 22 and other arguments that gig companies continue to raise in opposition to misclassification claims, there is a very real possibility that Plaintiffs could have no claims at all and no right to any recovery whatsoever.

Finally, Plaintiffs faced significant risks in proving many of their Labor Code claims on the merits and/or certifying these claims on a class-wide basis. As set forth infra, in the next section, Plaintiffs faced numerous risks in proving the other claims in this case on the merits and/or certifying these claims on a class-wide basis. See also April 28, 2020, Supplemental Briefing at pp. 3-6.

In light of these risks, Plaintiffs' counsel believes that the settlement reached is an excellent result and is certainly fair and adequate.

3. The Risks of Maintaining Class Action Status through Trial

As noted, there were significant risks associated with maintaining class action status through trial, including enforcement of Postmates' arbitration agreement, or, even if Plaintiffs were able to overcome that obstacle, the risk of an adverse order on an opposed motion for class certification. Additionally, even if Plaintiffs were successful on a motion for class certification, Postmates would likely argue for decertification on various grounds.

4. The Amount Offered in Settlement

The monetary component of the settlement is, of course, a compromise; and, in this case is a favorable one given the value of Plaintiffs' claims. The settlement provides $32 million to fully resolve the claims in this case. Here, based on the data that Postmates provided, Plaintiffs calculated the maximum theoretical recovery for the expense reimbursement claim to be

approximately $213 million. See Liss-Riordan Prelim. Appr. Decl. (Dec. 14, 2020) at ¶ 20. Plaintiffs calculated their potential expense reimbursement damages by multiplying the total estimated miles by the average of the IRS fixed rate during the applicable time frame (which ranged from 54 to 58 cents per mile), which is what Plaintiffs would argue applied at trial. Postmates would argue, however, that the IRS variable rate for mileage should apply which ranged from 17 to 20 cents per mile during the applicable period. If the lower rate were used, the potential expense damages would be approximately $67 million, meaning the $32 million settlement would represent 48% of potential damages. This is an excellent result considering the significant risks outlined above, at III.B.2.

Further, the $4 million allocation for PAGA penalties is in line with, and indeed exceeds, the PAGA allocations routinely approved by courts. See, e.g., del Toro Lopez v. Uber Techs., Inc. (N.D. Cal. Nov. 14, 2018) 2018 WL 5982506, *8 (granting final approval of $50,000 PAGA payment out of $10 million settlement fund).

5. The Extent of Discovery Completed and the Stage of Proceedings

Plaintiffs here had the information they needed to determine that this is a reasonable settlement, as the Court recognized by granting preliminary approval. First, Plaintiffs received more than sufficient class- and PAGA- related data, which counsel used to calculate approximate damages in order to negotiate a fair, adequate, and reasonable settlement. See Liss-Riordan Prelim. Appr. Decl. (Dec. 14, 2020) at ¶ 6.

Second, based on her extensive experience challenging gig economy companies, Class Counsel is familiar with the strengths and weaknesses of Postmates' arguments regarding misclassification and settlement class members' claims.

Finally, Plaintiffs are confident that, had they somehow overcome the arbitration provision, they would have had enough information to defeat a motion for summary judgment on the misclassification issue. Indeed, under the "ABC" test, which has now been held to be retroactive, Plaintiffs' counsel has little doubt that Plaintiffs would have been entitled to summary judgment on employee status. Plaintiffs' counsel has heavily litigated this issue in

very similar cases. See, e.g., Lawson v. GrubHub, Inc. (N.D. Cal. July 10, 2017) 2017 WL 2951608, *1 (denying defendant's motion for summary judgment on misclassification-based claims); O'Connor v. Uber Techs., Inc. (N.D. Cal. 2015) 82 F.Supp.3d 1133 (same); Cotter v. Lyft, Inc. (N.D. Cal. 2015) 60 F.Supp.3d 1067 (same). The tremendous amount of work performed in those other cases against "gig economy" companies significantly aided counsel's analysis here. When combined with the information relating to potential damages and penalties provided by Postmates in connection with mediation, and informal discovery and investigation concerning the merits, Plaintiffs had ample information to make a thorough evaluation of the merits of the settlement.

Moreover, early resolution of cases provides at least one obvious benefit for settlement class members – a relatively quick and assured recovery. See California v. eBay, Inc. (N.D. Cal. Sept. 3, 2015) 2015 WL 5168666, *4 ("Since negotiated resolution provides for a certain recovery in the face of uncertainty in litigation, this factor weighs in favor of settlement"); Oppenlander v. Standard Oil Co. (D. Colo. 1974) 64 F.R.D. 597, 624 ("It has been held proper to take the bird in hand instead of a prospective flock in the bush."). Thus, this factor continues to support granting final approval of the settlement.

6. The Experience and View of Counsel

Class Counsel are highly experienced in wage and hour class actions and believe this settlement is a reasonable compromise given the value of the settlement, Plaintiffs' claims, and the risk of further litigation. As outlined supra at note 7, over the last several years, Class Counsel has developed special expertise litigating against numerous "gig economy" companies that have classified their workers as independent contractors.[11] Moreover, in April 2018, the California Supreme Court decided Dynamex and announced a new test for employee-status in

[11] See e.g., Cotter, 193 F.Supp.3d 1030; O'Connor, 82 F.Supp.3d 1133; Lawson, 2017 WL 2951608. Counsel was the first to obtain class certification in one of these cases. See O'Connor 2015 WL 5138097, rev'd on other grounds, (9th Cir. 2018) 904 F.3d 1087, and has recently obtained class certification in another similar case, see James v. Uber Techs., (N.D. Cal. Jan. 26, 2021) 2021 WL 254303.

California, which tracks the Massachusetts "ABC" test. Class Counsel is based in Massachusetts and has been litigating cases under this very incarnation of the "ABC" test for more than 15 years, originating much of the caselaw in Massachusetts. Thus, counsel is uniquely situated to appreciate the strengths and potential weaknesses of the claims here.

7. PAGA Allocation Specifically

Here, there is no governmental participation in this action per se. To the extent the state of California is considered to be a governmental participant with respect to the PAGA claim, the fact that the state has not objected to the settlement or the PAGA allocation weighs in favor of granting final approval.

Under the terms of the settlement, the parties allocated $4 million to the PAGA claims. See Agreement at ¶ 2.3. Plaintiffs estimate that these penalties could theoretically reach $3.4 billion. However, as noted in their preliminary approval motion, it is unclear whether "stacking" of penalties for multiple Labor Code violations would be permitted, which would result in a much lower total exposure for this claim. See Mot. for Prelim. Appr. at p. 8, n.8. Moreover, an exact exposure number for the PAGA claim is inherently speculative because of the Court's discretion to reduce a PAGA penalty on the grounds that it is "unjust" or "oppressive." Cal. Lab. Code § 2699 (e)(2). Thus, many courts have routinely approved lesser allocations for PAGA penalties in settlements that provide sufficient class-wide recovery. See e.g., del Toro Lopez 2018 WL 5982506, *8 (approval of $50,000 to PAGA out of $10 million settlement); Martin v. Legacy Supply Chain Servs. II, Inc. (S.D. Cal. Feb. 12, 2018) 2018 WL 828131, *2 (granting preliminary approval of PAGA allocations of $10,000 out of $625,00 settlement fund).[12] Such resolutions provide immediate benefit to settlement class members, as

[12] See also Chu v. Wells Fargo Invs., LLC (N.D. Cal. Feb. 16, 2011) 2011 WL 672642, *1 (approving PAGA settlement payment of $7,500 to the LWDA out of $6.9 million common-fund settlement); Franco v. Ruiz Food Products, Inc. (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, *13 (approving PAGA settlement payment of $7,500 to the LWDA out of $2.5 million common-fund settlement); Viceral v. Mistras Grp., Inc. (N.D. Cal. Oct. 11, 2016) 2016 WL 590789, at *9 ("[W]here a settlement for a Rule 23 class is robust, the statutory purposes of PAGA may be fulfilled even with a relatively small award on the PAGA claim itself, because (*cont'd*)

well as additional funding for the State, and the State of California has not objected to such allocations. Other courts have regularly approved such settlements, including ones with proportionately lower allocations for PAGA penalties.

Moreover, Plaintiffs provided specific notice to the California Division of Labor Standards Enforcement regarding the PAGA allocation and the terms of this settlement on December 14, 2020 and July 15, 2021 (in conjunction with preliminary approval briefing) and again on August 31, 2021 (following entry of the preliminary approval order). Liss-Riordan Final Appr. Decl. at ¶ 3. Despite this specific notice on multiple occasions, the State did not respond to the notice or submit any comments or objections to this settlement. The LWDA has also declined to participate in this litigation pursuant to Plaintiffs' multiple PAGA notice letters. Liss-Riordan Final Appr. Decl. at ¶ 4 (noting that plaintiffs sent PAGA letters on at least eight separate occasions in these coordinated actions). The State's silence on this settlement, despite numerous opportunities to comment, supports the parties' contention here that the PAGA allocation in this class settlement is adequate and weighs in favor of final approval. See Schuchardt v. Law Office of Rory W. Clark (N.D. Cal. 2016) 314 F.R.D. 673, 685 (where state or federal officials are notified of a settlement and do not object, the "governmental participant" factor weighs in favor of final approval).

8. The Positive Reaction of Settlement Class Members Supports Final Approval

Lack of objections and opt-outs from settlement class members is also a significant factor in favor of final approval. See Vasquez v. USM Inc. (N.D. Cal. Feb. 16, 2016) 2016 WL 612906, *3 (citing Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc. (C.D. Cal. 2004) 221 F.R.D. 523, 529 ("the absence of a large number of objections to a proposed class action settlement raises a strong presumption [that] the terms of a proposed class settlement are

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such 'a settlement not only vindicates the rights of the class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA.'").

favorable to the class members"); Carter v. City of Los Angeles, (2014) 224 Cal. App. 4th 808, 822 ("small percentage [of objectors] indicates the settlement was fair".). Here, there is just one *pro se* objection to the settlement.[13] Moreover, only 17 settlement class members have opted out of the settlement. See Kline Decl. at ¶¶ 21-22.

Courts have consistently approved settlements that are fair, reasonable, and adequate, even in the face of far larger numbers of opt-outs than exists here. See e.g., Marshall v. Nat'l Football League (8th Cir. 2015) 787 F.3d 502, 513 ("The fact that less than ten percent of the entire class opted out of the settlement – despite conscious efforts by some class members to persuade the other class members of unfairness – suggests it was favorable to what most members believed their claims were worth."); Jones v. Singing River Health Servs. Found. (5th Cir. 2017) 865 F.3d 285, 299-300; Almond v. Singing River Health Sys. (2018) 138 S.Ct. 1000 (approving settlement where 6.66% of the class objected).

Further, the claims rate to date, in which 26% of the settlement has been claimed so far (by 106,778 settlement class members) is already a significant claim rate for this type of settlement. Plaintiffs expect, however, that the weekly reminder emails that are scheduled to be sent out over the remaining three weeks of the notice period will result in an even higher claim rate between now and the final approval hearing, Indeed, the initial remainder email yielded a significant number of newly submitted claims. Kline Decl. at ¶__. Even the current claim rate is high compared to other wage and hour settlements that have been routinely approved in California. See e.g., Choi v. Mario Badescu Skin Care, Inc., (2016) 248 Cal. App. 4th 292, 297 (affirming approval of class action settlement with 14% claim rate); Barcia v. Contain-A-Way, Inc. (S.D. Cal. Mar. 6, 2009) 563 F.3d 948, 967 (approving class action settlement with 13%

[13] Plaintiffs intend to address this objection at the final approval hearing. In brief, the objection expresses the settlement class member's opinion that Postmates has mistreated its drivers, including by classifying them as independent contractors. The settlement class member also states that she does not believe her settlement amount is fair because her estimated payment from the settlement is less than the amount she earned while working for Postmates, without explaining why she believes this renders the settlement not fair, reasonable, or adequate. See Exhibit D to Kline Decl.

favorable response rate); Rodriguez v. D.M. Camp & Sons (E.D. Cal. 2013) 2013 WL 2146927, *4 (15% claim rate). The claims process will have the added benefit of resulting in more substantial payments to those people who take the time to follow a very simple online claims process. See Miller v. Ghiradelli Chocolate Co. (N.D. Cal. Oct. 2, 2014) 2014 WL 4978433, *4 (reasoning that claims process was appropriate in part because it "directs available funds to those who care most about the alleged deception and thus are willing to file a claim."). In sum, there has been an overall positive reaction to the settlement with nearly all settlement class members having received notice of it multiple times. Accordingly, this factor, along with all other Kullar factors, weighs in favor of final approval.

IV. CONCLUSION

Based upon the foregoing, and the papers filed in support of this Motion and Plaintiffs' Motion for Preliminary Approval, this settlement should be approved. Plaintiffs respectfully request that the Court grant this motion and permit settlement class members to obtain the benefits of this settlement.

Dated: October 12, 2021

LICHTEN & LISS-RIORDAN, P.C.

By: _____
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