SHANNON LISS-RIORDAN (SBN 310719)
sliss@llrlaw.com
ANNE KRAMER (SBN 315131)
akramer@llrlaw.com
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801

Attorneys for Plaintiffs



**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN FRANCISCO**

JACOB RIMLER and GIOVANNI JONES, on behalf of themselves and others similarly situated and in their capacities as Private Attorney General Representatives,

Plaintiffs,

v.

POSTMATES, INC.,

Defendant.

Case No. CGC-18-567868

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Department 304
Hon. Anne-Christine Massullo

Hearing Date: October 17, 2019
Hearing Time: 9:15 am

Complaint Filed: July 5, 2018
TRIAL DATE: NONE SET

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on October 17, 2019, at 9:15 a.m., or on such other date or time as this matter may be called, in Department 304 of San Francisco Superior Court, located at 400 McAllister Street, San Francisco, CA 94102, Plaintiffs Jacob Rimler, Giovanni Jones, Dora Lee, Kellyn Timmerman, and Joshua Albert, on behalf of themselves and all other similarly situated class members and in their capacities as Private Attorney General representatives, will and hereby do move for an order preliminarily approving the Class Action Settlement described herein and ordering that notice be issued to the Settlement Class.[1] The motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support thereof, the Declaration of Shannon Liss-Riordan and exhibits thereto, 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 8, 2019

LICHTEN & LISS-RIORDAN, P.C.

By: _____
Shannon Liss-Riordan

Attorneys for Plaintiffs

[1] When Plaintiffs originally filed this motion on September 24, 2019, the signature line on the Notice of Motion was inadvertently left blank, and the motion was rejected by the clerk's office on October 7, 2019. Plaintiffs now file this corrected motion executed with counsel's signature. Plaintiffs have also removed Dora Lee, Kellyn Timmerman, and Joshua Albert from the case caption, as they were informed by the clerk's office that they could not add additional parties to the caption until the Court grants leave to file the Second Amended Complaint adding these plaintiffs as parties to this case. No substantive changes to the motion have been made.

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## I. INTRODUCTION

Plaintiffs have alleged that Defendant Postmates Inc. ("Postmates") misclassified couriers in California as independent contractors and violated California state and local law, including the California Labor Code, as a result, including by failing to reimburse couriers for their necessary business expenses. Plaintiffs bring class action claims as well as claims on behalf of the state of California and other similarly situated aggrieved employees pursuant to the Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2699, et. seq.

This PAGA case was filed in early July 2018 and asserts that Postmates misclassifies couriers as independent contractors instead of employees. Plaintiffs filed their PAGA letter the same day that the California Supreme Court issued the decision in Dynamex Operations W. v. Superior Court (2018) 4 Cal. 5th 903, 416 P.3d 1, reh'g denied (June 20, 2018), and then immediately filed in court once the statutory period had run. 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 Postmates' motion to compel arbitration (see January 2, 2019, Order), and Postmates filed an appeal to the California Court of Appeal (Cal. Ct. of Appeal, No. A156450).

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, 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 Federal

Arbitration Act, 9 U.S.C. § 1 et seq., 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, No. 19-15024 (Ninth Cir.).) 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, No. 3:18-cv-7592-JCS (N.D. Cal.).)

The parties participated in a full-day mediation with a professional and experienced private mediator, which led to 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[2] and October 17, 2019. Plaintiffs Rimler and Jones (along with Lee, Timmerman, and Albert, who are being added to this case in the concurrently filed Second Amended Complaint ("SAC")) seek approval of this global, class and representative action settlement and request that the Court allow notices to be distributed to the class. Under the terms of this proposed settlement, Postmates will pay a non-reversionary total of $11,500,000, and couriers will release claims against Postmates related to the claims in the SAC, including the alleged misclassification as independent contractors.[3] For the reasons set forth below, the settlement is more than fair, reasonable, and adequate, and the Court should grant preliminary approval and allow notice to issue to the Settlement Class in the form attached as Exhibit A to the Settlement Agreement, which is itself Exhibit 1 to the Declaration of Shannon Liss-Riordan filed concurrently with this motion.

## II. FACTUAL BACKGROUND

Defendant Postmates is a San Francisco-based company, which contracts with couriers

[2] That is the end date of the class period for a prior settlement that Plaintiffs' counsel reached with Postmates for claims in Singer v. Postmates, Inc., Case No. 15-1284 (N.D. Cal.).

[3] The Singer settlement, which covered a six-year period and was approved by the federal court in April 2018, was for a nationwide class in the amount of $8.75 million. The portion of that settlement allocated to California couriers was $6 million. This settlement, which covers just over a two-year period and California couriers only, is for almost twice as much as the California portion of the prior Singer settlement.

across the state of California who deliver food and other merchandise to customers at their homes and businesses. See SAC. at ¶ 12. Customers request a delivery through the Postmates Application, and couriers pick up the items and deliver them to their destination. See SAC at ¶ 13. Postmates processes the customers' payments and pays the couriers, after deducting its own percentage fee from every delivery. Id. at ¶ 20. Postmates tracks the estimated mileage from pick-up to drop-off, the amount paid to the driver, and time spent from pick-up to drop-off.

Plaintiffs have alleged in this case, and in other cases that Plaintiffs' counsel has filed against Postmates, that Postmates couriers have been misclassified as independent contractors rather than employees and that Postmates has violated California state and local law by failing to reimburse these individuals for their necessary business expenses and failing to pay minimum wage and overtime (among other violations). See SAC. Plaintiffs in this case brought claims on behalf of the State of California and other similarly situated employees.[4] In companion cases in federal court, three other plaintiffs brought class and PAGA claims based on the same theory of misclassification and violations of the Labor Code and other California state and local law. Postmates has denied all of Plaintiffs' allegations and denies that it has violated California law.

On July 19, 2019, counsel mediated this case, along with the Lee and Albert cases. The parties engaged an experienced mediator, Francis J. "Tripper" Ortman. After exchanging substantial data and engaging in extensive discussion, the parties agreed to a global settlement of the claims in all three cases.

## III. THE PROPOSED SETTLEMENT AGREEMENT

### A. Monetary Relief

The Settlement Agreement provides that Postmates will pay $11,500,000 to fully resolve all the claims in the Actions. See Ex. 1 at ¶ 4.1. This amount is non-reversionary and thus will

[4] Plaintiffs' counsel filed a PAGA letter with Postmates and the Labor & Workforce Development Agency (LWDA) on behalf of Plaintiff Rimler on April 30, 2018. Plaintiffs later added a second plaintiff, Giovanni Jones, in their First Amended Complaint and filed a PAGA letter on his behalf. On September 24, 2019, Plaintiffs' counsel filed amended PAGA letters on behalf of Plaintiffs regarding additional Labor Code allegations alleged in the SAC.

be paid out in full to the benefit of settlement class members, less the following categories of expenses to be paid out of the Total Settlement Amount: claims administration (currently estimated at $500,000); attorneys' fees and costs (which Plaintiffs' counsel will request at final approval in the amount of 1/3 of the Total Settlement Amount); service award (in the amount of $5,000 each for the five named plaintiffs); and PAGA payment to the LWDA (the settlement allocates $250,000 to the PAGA claims, so 75% of this amount would be paid to the LWDA).

**B. The Proposed Plan of Distribution of Settlement Fund**

Upon preliminary approval by the Court, the third-party Settlement Administrator selected by the parties will email settlement class members the proposed notice and claim form to the last known email addresses, and if the email is not successfully delivered, will mail the proposed notice and claim form to the last known mailing addresses of all settlement class members, as defined by the Settlement Agreement. See Ex. 1 (Settlement Agreement) at ¶¶ 6.1-6.5. The notice informs settlement class members about the allegations in this case and the terms of the settlement. See Ex. B to Ex. 1. It informs class members how they can submit a claim to participate in the settlement. (Claims can be submitted online or by mail.) The notice will inform the settlement class members of their right to individually exclude themselves from the settlement or to object to the settlement if they choose, and it will identify the date and time of the final approval hearing.

Individual settlement payments will be distributed to settlement class members in proportion to the total estimated number of miles driven by each courier from the location where a delivery offer is accepted to the location a delivery is dropped off during the relevant time period. No class member who submits a claim will receive less than $10. See Ex. 1 at ¶¶5.4, 5.7. Any class members who either opted out of arbitration, initiated arbitration, or demonstrated in writing an interest in initiating an arbitration demand prior to the date of the mediation will have their miles doubled for purposes of this distribution formula (to account for, from plaintiffs' perspective, these drivers' greater likelihood of having their claims pursued, in light of Postmates' arbitration clauses). Following final approval, checks would be mailed to all

settlement class members who submit a claim form, with a portion held back to account for any late submitted claims or to resolve any disputes that may arise with respect to the settlement distribution. Id. at ⁋⁋2.9, 5.6. Any remaining funds from uncashed checks or the held-back portion of the settlement would be re-distributed to all settlement class members who submitted claims, in proportion to their initial distributions (unless their residual distribution would be less than $50). Id. at ⁋ 5.8. Any remaining unclaimed funds after the final distribution would be distributed to a *cy pres* beneficiary, Legal Aid at Work. Id. Thus, the total proceeds of the settlement (less service awards for the Plaintiffs, settlement administration costs, the PAGA payment, and attorneys' fees and costs) will be paid out to settlement class members. No portion of the settlement funds will revert to Postmates.

## IV. LEGAL STANDARD

It is well established that courts favor settlements of lawsuits over continued litigation. See Williams v. First Nat'l Bank (1910) 216 U.S. 582, 595; Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276 (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); Bell v. American Title Ins. Co. (1991) 226 Cal.App.3d 1589, 1607; Newberg on Class Actions, §11:41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy"). The advantages of settlements are particularly apparent in the compromise of class actions, which are "often complex, drawn out proceedings demanding a large share of finite judicial resources," Mayfield v. Barr (D.C. Cir. 1993) 985 F.2d 1090, 1092, and "where one proceeding can resolve many thousands…of claims that might otherwise threaten to swamp the judiciary." 2 McLaughlin on Class Action § 6:3.

At preliminary approval, a court must "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms …." See Cal. Rules of Court, rule 3.769(c) (g); see also Manual for Complex Litigation (Fourth) § 21.63. The Court should grant preliminary approval if the proposed settlement has no obvious deficiencies and falls within the range of possible approval. See Chavez v. Netflix, Inc. (Cal. Sup. Oct. 27, 2005)

2005 WL 3048041. A presumption of fairness attaches to the proposed settlement where: (1) the parties reached settlement after arm's-length negotiations; (2) investigation and discovery were sufficient to allow counsel and the court to act intelligently; and (3) counsel is experienced in the litigation. Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1802. Courts also weigh the risk, expense, and complexity of continued litigation. Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 245. As set forth below, an examination of these factors here demonstrates that the proposed settlement is fair, reasonable, and adequate and should be approved

## V. ARGUMENT

### A. THE PROPOSED SETTLEMENT IS ENTITLED TO A PRESUMPTION OF FAIRNESS

#### 1. The Settlement Was Negotiated At Arm's Length

For the parties "to have brokered a fair settlement, they must have been armed with sufficient information about the case to have been able to reasonably assess its strengths and value." Acosta v. Trans Union, LLC (C.D. Cal. 2007) 243 F.R.D. 377, 396; see also Dunk, 48 Cal.App.4th at 1802 ("[A] presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; [and] (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently…"). Thus, adequate discovery and the use of an experienced mediator support a finding that settlement negotiations were both informed and non-collusive. See Villegas v. J.P. Morgan Chase & Co. (N.D. Cal. Nov. 21, 2012) 2012 WL 5878390, *6. Here, the settlement was clearly the product of arms-length bargaining, as Plaintiffs' counsel and Defendant's counsel participated in a full-day mediation session with experienced wage-and-hour mediator, Francis J. "Tripper" Ortman. See Satchell v. Fed. Express Corp. (N.D. Cal. Apr. 13, 2007) 2007 WL 1114010, *4; see also Marquez Amaro v. Gerawan Farming, Inc, (E.D. Cal. Aug. 8, 2019) 2019 WL 3772804, at *4. This factor indicates the settlement should be presumed fair.

#### 2. The Settlement Was Negotiated After Sufficient Investigation

There was also a sufficient investigation and exchange of information before and during the litigation and subsequent mediation session to allow counsel to act intelligently in agreeing

to this settlement. Plaintiffs' counsel previously litigated a class action lawsuit against Postmates in federal court. Singer v. Postmates, Case No. 15-1284 (N.D. Cal.). The parties settled the case on behalf of a class of all Postmates couriers across the country, including in the states of California, Massachusetts, New York, and Washington, D.C. Singer v. Postmates, Inc., (N.D. Cal. Sept. 1, 2017) 2017 WL 4842334. Thus, through the Singer litigation, Plaintiffs' counsel was already intimately familiar with Postmates' business model and the facts and legal theories supporting Plaintiffs' claims. Moreover, in this case and the parallel Lee case, Plaintiffs briefed several Motions to Compel arbitration by Postmates (which, in the Rimler case, led to the decision that Plaintiffs Rimler and Jones were not bound to arbitrate; the decision has been appealed by Postmates). In the Albert case, the parties were engaged in significant discovery before the case was stayed pending mediation. See Liss-Riordan Decl. at ¶ 6. Thus, Plaintiffs' counsel believe they are well aware of the legal arguments couriers will need to make to prevail on class certification and summary judgment on their claims, and the strengths and weaknesses of those arguments. Finally, Plaintiffs' counsel received substantial data in advance of the mediation, which allowed them to make calculations of the potential damages, accounting for various theories and the risks associated with these theories. Thus, this factor also weighs in favor of a presumption of fairness.

**3. The Settlement Was Negotiated By Experienced Counsel**

Plaintiffs' counsel is extremely experienced in litigating this type of case. Over the last several years, Plaintiffs' counsel have developed special experience litigating against numerous "gig economy" companies that have classified workers as independent contractors. Plaintiffs' counsel was the first to obtain class certification in one of these cases (see O'Connor v. Uber Technologies, Inc. (N.D. Cal., Sept. 1, 2015) 2015 WL 5138097, (N.D. Cal. 2015) 311 F.R.D. 547 (certifying class of 240,000 Uber drivers on misclassification claim and expense reimbursement and gratuities claims), rev'd, (9th Cir. 2018) 904 F.3d 1087 (enforcing Uber's arbitration agreements and decertifying class). Counsel also brought the first such case to trial (see Lawson v. Grubhub, Inc. (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir.

Appeal No. 18-15386). Counsel has also repeatedly defeated summary judgment motions in cases against other "gig economy" companies on the misclassification issue. See, e.g., Cotter v. Lyft, Inc. (N.D. Cal. 2015) 60 F.Supp.3d 1067; O'Connor v. Uber Techs., Inc. (N.D. Cal. 2015) 82 F.Supp.3d 1133; Lawson v. Grubhub, Inc. (N.D. Cal., July 10, 2017, No. 15-CV-05128-JSC) 2017 WL 2951608, at *1. Counsel is currently litigating many of these cases in state and federal court and has successfully settled a number of them as well. See, e.g., Cotter v. Lyft, Inc. (N.D. Cal. 2016) 193 F.Supp.3d 1030; Singer v. Postmates, Inc. (N.D. Cal., Sept. 1, 2017) 2017 WL 4842334, at *4; Marciano v. DoorDash Inc. (July 12, 2018) CGC-15-548101.

Moreover, at the end of April 2018, the California Supreme Court decided Dynamex Operations W. v. Superior Court (2018) 4 Cal. 5th 903, 956, n.23, reh'g denied (June 20, 2018), and announced a new test for employee-status in California, which tracks the Massachusetts "ABC" test. Plaintiffs' counsel is based in Massachusetts and has been litigating cases under this very incarnation of the "ABC" test for 15 years, originating and developing much of the caselaw under the Massachusetts test. Thus, Plaintiffs' counsel is uniquely situated to appreciate the strengths and potential weaknesses of this case after Dynamex. Plaintiffs' counsel has not hesitated to take cases, including class actions, to trial, and has agreed to a settlement only when she believed doing so was in the best interests of the class.[5] Attorney Liss-Riordan drew on her substantial experience in negotiating this settlement.[6]

[5] For example, Ms. Liss-Riordan has won a number of ground-breaking wage cases across a variety of industries at trial: see, e.g., Norrell v. Spring Valley Country Club, Inc. (Mass. Super. 2017), C. A. No. 1482-cv-00283 (verdict for plaintiff class for violation of Massachusetts Tips Law); Calcagno v. High Country Investor, Inc., d/b/a Hilltop Steak House (Mass. Super. 2006) Essex Civ. A. No. 03-0707 (employer violated Tips Law by not paying out full proceeds of service charges to waitstaff employees); Benoit et al. v. The Federalist, Inc. (Mass. Super. 2007) Suffolk Civ. A. No. 04-3516 (same); Travers v. Flight Services & Systems, Inc. (D. Mass. 2014) C.A. No. 11-cv-10175 (jury awarded skycaps approximately $1 million on retaliation claim, though verdict was later reduced by the court); Bradley et al. v. City of Lynn et al. (D. Mass. 2006) 443 F.Supp.2d 145 (verdict for plaintiff class where federal court held following bench trial that Commonwealth's entry level firefighter hiring examination has disparate impact on minorities); DiFiore v. American Airlines, Inc., (D. Mass. 2008) Civ. A. No. 07-10070 (skycaps should have received bag charge for curbside check-in because passengers reasonably believed it was a tip), reversed on preemption grounds, 646 F.3d 81 (1st Cir. 2011).

[6] Plaintiffs' counsel has been extremely active representing "gig economy" workers in misclassification cases in California, both before and after Dynamex, and being from (*cont'd*)

Thus, this settlement is entitled to a presumption of fairness because "(1) the settlement [wa]s reached through arm's-length bargaining; (2) investigation and discovery [we]re sufficient to allow counsel and the court to act intelligently; [and] (3) counsel is experienced in similar litigation." Dunk, 48 Cal. App. 4th at 1802.

**B. OTHER FACTORS ALSO WEIGH IN FAVOR OF GRANTING PRELIMINARY APPROVAL**

**1. The Risks of Continued Litigation Weigh in Favor of The Settlement**

Another "relevant factor" that courts consider in contemplating a potential settlement is "the risk of continued litigation balanced against the certainty and immediacy of recovery from the Settlement." Vasquez v. Coast Valley Roofing, Inc. (E.D. Cal. 2010) 266 F.R.D. 482, 489. Courts "consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." Id. (citing Oppenlander v. Standard Oil Co. (D. Colo.1974) 64 F.R.D. 597, 624. Here, there are at least two risks of going forward with litigation.

First, there was a risk that the favorable ruling Plaintiffs Rimler and Jones received from Judge Wiss in this case regarding the arbitrability of their PAGA claims would be overturned on appeal, thereby preventing their PAGA claims from being pursued in court. Second, while Plaintiffs were very confident regarding the merits of this case in light of the Dynamex decision, at the time this settlement was negotiated and reached in July 2019, there remained many

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Massachusetts, she has 15 years of experience litigating misclassification cases under the "ABC" test that was adopted in Dynamex. In California, she has obtained the first ruling applying Dynamex, in which the Orange County Superior Court (Judge Claster) granted summary judgment to plaintiff strippers 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. Moreover, 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. See O'Connor v. Uber Techs., Inc., (N.D. Cal., Sept. 1, 2015), 2015 WL 5138097 rev'd, 904 F.3d 1087 (9th Cir. 2018). 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 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) (Exhibit 2 to Liss-Riordan Decl.).

unanswered questions regarding issues pertaining to the decision, including questions of what claims it would apply to (as the decision specifically declined to address whether it applies to expense reimbursement claims, which is one of the primary claims Plaintiffs alleged against Postmates),[7] and whether it would apply retroactively.[8] While Plaintiffs believed their claims to be strong, they were well aware that it was possible that a court could conclude that Dynamex did not apply retroactively or did not apply to certain of their claims. In light of these risks, Plaintiffs' counsel believes the settlement is an excellent result and is fair and adequate.

**2. The Settlement Provides Significant Benefits to the Class**

The monetary amount of the settlement relative to the total possible potential damages in this case is likewise fair and reasonable. In preparation for the mediation, Plaintiffs' counsel estimated Plaintiffs' maximum theoretical recovery based primarily on the full amount of expense reimbursement, minimum wage, and overtime damages for all couriers in the State of California. Plaintiffs have subsequently extrapolated to determine the likely total damages through October 17, 2019 (which is the latest that the release of claims can run through under the agreement). See Liss-Riordan Decl. at ¶¶ 17-42. Plaintiffs viewed the most valuable claim in this case as the expense reimbursement claim, given challenges that gig economy workers have faced in pressing minimum wage, overtime, and other claims (particularly in determining what constitutes compensable time). For instance, couriers are not compensated for their time traveling to a pickup location, and Plaintiffs expect Postmates would argue that time couriers spend traveling to a pickup location is not compensable. Moreover, there would have been

[7] See, e.g., Garcia v. Border Transportation Grp., LLC (Cal. Ct. App. 2018) 28 Cal. App. 5th 558 (suggesting that certain Labor Code claims are not covered by the "ABC" test announced in Dynamex); Karl v. Zimmer Biomet Holdings Inc. (N.D. Cal. Nov. 6, 2018) 2018 WL 5809428 *3 (same); but see Johnson v. VCG-IS, LLC (San Diego Super. Ct. July 18, 2018) Case No. 30-2015-00802813, *4-5 (finding that expense reimbursement claim under § 2802 and other Labor Code claims were covered by Dynamex).

[8] The Ninth Circuit ruled that Dynamex would apply retroactively in May 2019, but it subsequently withdrew its opinion and certified the question to the California Supreme Court. See Vazquez v. Jan-Pro Franchising International, Inc. (9th Cir. 2019) 923 F.3d 575, reh'g granted, opinion withdrawn (9th Cir., July 22, 2019, No. 17-16096) 2019 WL 3271969.

challenges in achieving class certification for these claims because many couriers do not have overtime or minimum wage claims. For example, FLSA claims brought on behalf of Uber drivers have not been successful. See Razak v. Uber Techs., Inc., 2018 WL 1744467, *1 (E.D. Pa. Apr. 11, 2018), appeal pending Third Cir. No. 18-1944. See also Yucesoy v. Uber Techs., Inc., 2016 WL 493189, *6 (N.D. Cal. Feb. 9, 2016). Thus, Plaintiffs consider the mileage expense damages the best measure of the value of couriers' claims.[9]

Based on the data that Postmates provided, Plaintiffs calculated the maximum theoretical recovery for the vehicle expense reimbursement claim for the Settlement Class to be approximately $88 million when calculated by multiplying the total estimated miles by the average of the IRS fixed rate during the applicable timeframe (which ranged from 54 to 58 cents per mile). 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. Thus, if the lower rate were used, this damages figure would be $29 million. In light of these potential recoveries, the $11,500,000 total settlement amount is fair, particularly considering the ongoing uncertainties Plaintiffs faced and the certain significant delay that would result through ongoing litigation.[10]

"[I]t is well-settled law that a cash settlement amounting to only a fraction of the

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[9] Courts have consistently endorsed this approach in similar cases involving "gig economy" delivery workers. See, e.g., Cotter v. Lyft, Inc. (N.D. Cal. 2016) 176 F. Supp. 3d 930, 939 (approving settlement where "plaintiffs' counsel assigned a minimal value … to the other claims for damages contained in the lawsuit" apart from expense reimbursement); O'Connor v. Uber Techs., Inc. (N.D. Cal. Mar. 29, 2019) 2019 WL 1437101, at *11; Singer v. Postmates Inc. (N.D. Cal. April 25, 2018) 4:15-cv-01284-JSW, Dkt. 98; Marciano v. DoorDash Inc. (Cal. Sup. Ct. July 12, 2018) CGC-15-548102 (Kahn, J.) (same).

[10] Plaintiffs reached this settlement with Postmates in July 2019, when there was uncertainty as to whether Assembly Bill 5 ("A.B. 5") would pass and whether the Governor would sign the bill. There was also uncertainty as to whether the "gig economy" would obtain a carve-out from the bill, for which it was lobbying heavily. Although A.B. 5 has now passed and has been signed by the Governor, there still remains uncertainty regarding its retroactivity and as to what will occur going forward, given the announcement by several "gig economy" companies that they will spend significant sums next year in support of a ballot measure to exempt these companies from A.B. 5. Given these ongoing uncertainties and the certain delay of continued litigation, balanced against the benefit of obtaining relief for class members now, Plaintiffs determined that the settlement (an amount almost twice as much as the settlement for the California portion of the prior class settlement against Postmates in the Singer case) was a fair resolution of Postmates couriers' claims for the period June 2017 to October 2019.

potential recovery does not per se render the settlement inadequate or unfair." Villegas, 2012 WL 5878390, *6. Here, Plaintiffs achieved far more than a mere fraction of the potential recovery, even in the face of substantial risk that Postmates' arbitration clause would be enforced on appeal and would prevent class-wide treatment of their claims. See also Barbosa v. Cargill Meat Sols. Corp. (E.D. Cal. 2013) 297 F.R.D. 431, 446. Given the potential challenges faced by Plaintiffs, the settlement amount of should be approved as more than fair and adequate.

The parties have allocated $250,000 to PAGA penalties.[11] Courts have routinely approved lesser allocations for such penalties in settlements that provide sufficient class recovery. See, e.g., del Toro Lopez v. Uber Techs., Inc., (N.D. Cal. Nov. 14, 2018) 2018 WL 5982506, *8 (approving $50,000 PAGA payment from $10 million fund); Ahmed v. Beverly Health & Rehab. Servs., Inc., 2018 WL 746393, *10 (E.D. Cal. Feb. 7, 2018) (approving $4,500 PAGA payment from $450,000 fund); Martin v. Legacy Supply Chain Servs. II, Inc., 2018 WL 828131, *2 (S.D. Cal. Feb. 12, 2018) (approving $10,000 PAGA payment from $625,000 fund).

In exchange for these monetary concessions, couriers who fall within the class's definition will release all misclassification, wage and hour, and other claims related to the SAC that have been and could have been brought against Postmates from June 3, 2017, to October 17, 2019, see Ex. 1 at ¶ 2.41. The scope of claims being released is eminently reasonable and the consideration received is excellent in light of the risks and uncertainties of going forward.

### C. CLASS CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE[12]

[11] Plaintiffs calculated the maximum theoretical recovery for their PAGA claim at $274 million for their claim of expense reimbursement. However, calculation of an exact exposure for the PAGA claim is of limited utility and is inherently speculative because of the Court's discretion to reduce a PAGA penalty on grounds that it is "unjust" or "oppressive." Cal. Lab. Code § 2699(e)(2). See Fleming v. Covidien Inc. (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *3-4; Makabi v. Gedalia (Cal. Ct. App. Mar. 2, 2016) 2016 WL 815937, at *2 & n.3. Although Plaintiffs believe Postmates misclassified couriers, this remains a disputed issue, and Plaintiffs recognized that these penalties, if recovered, could be severely discounted. As Plaintiffs obtained such a substantial class settlement, the proposed amount allocated to PAGA penalties is warranted and fair and is in line with substantial California case law. See Harris v. Radioshack Corp. (N.D. Cal. Aug. 9, 2010) 2010 3155645, *3-4; Viceral v. Mistras Group, Inc. (N.D. Cal., Oct. 11, 2016) 2016 WL 5907869, *9.

[12] Postmates reserves all of its objections to class certification for litigation purposes and does not consent to certification of the proposed class for any purpose other than to effectuate (*cont'd*)

The Class in this action should be certified for settlement purposes because it meets all requirements for class certification under applicable law. "Code of Civil Procedure section 382 allows class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." Bufil v. Dollar Financial Group (2008) 162 Cal.App.4th 1193, 1204. Section 382 has been construed to require an ascertainable class and a well-defined community of interest. Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809. To demonstrate that the latter "community of interest" requirement, plaintiff must show: "(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. A plaintiff must also demonstrate that a class action is superior to other forms of litigation. Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1234. Here, all of these factors are met.

**1. The Settlement Class Is Numerous And Ascertainable**

To determine whether a proposed settlement class is ascertainable for purposes of Cal. Code Civ. Proc. §382, courts consider "1) the class definition; 2) the size of the class; and 3) the means available for identifying class members." Reyes v. Board of Supervisors (1987) 196 Cal.App.3d 1263, 1271. Here, the proposed class is ascertainable because it is comprised of all couriers who used the Postmates platform as independent contractor couriers in California since June 3, 2017. Postmates keeps records of the identities of these individuals, their contact information, and the estimated mileage they drove while performing deliveries. Thus, it will be able to readily provide this information for purposes of issuing notice and calculating the settlement distribution. The total class is approximately 380,000. The numerosity requirement is easily satisfied. See Villalpando v. Exel Direct, Inc. (N.D. Ca. 2014) 303 F.R.D. 588, 605-06.[13]

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the settlement. Postmates also reserves all of its objections to plaintiffs' position that the ABC test in *Dynamex* and/or AB5 applies to any or all of the plaintiffs' claims.

[13] Plaintiffs cite authority interpreting federal Rule 23, which closely tracks the factors of § 382. See B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal.App.3d 1341, 1347.

**2. Common Questions of Law or Fact Predominate**

Plaintiffs contend that settlement class members' classification as independent contractors is clearly suited to common determination. In Dynamex, the California Supreme Court expressly adopted the Massachusetts "ABC" test, which requires the alleged employer to establish three factors to prove independent contractor status:

> (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

4 Cal. 5th at 956-57. Plaintiffs allege Postmates couriers perform the same service—making deliveries to Postmates' customers—and that delivery is Postmates' usual course of business. Thus, Plaintiffs expect they would be likely to establish that Postmates couriers are employees under Prong B, and a class can be certified on this basis alone. Costello v. BeavEx, Inc. (7th Cir. 2016) 810 F.3d 1045, 1060. Plaintiffs also contend that the nature of proof needed to establish the usual course of Postmates' business or the work class members perform will not vary.[14]

Postmates disputes Plaintiffs' allegations, disagrees with Plaintiffs' contention that Dynamex applies to all their claims, and believes that S.G. Borello & Sons, Inc. v. Dept. of Industrial Rel. (1989) 48 Cal.3d 341 applies, but consents to certification of the settlement class solely to effectuate the settlement. It otherwise reserves its right to oppose class certification for litigation purposes, to dispute Plaintiffs' allegations, and to contest Dynamex's application.

**3. Plaintiffs' Claims Are Typical of the Class**

"Typicality is present when the named class representatives' interest in the action is

[14] Because the "ABC" test requires the employer to establish all three prongs, Plaintiffs' position is that it is unnecessary to discuss Prongs A or C, Dynamex, 4 Cal. 5th at 963, but Plaintiffs assert that the necessary evidence would be common under Prongs A and C as well. For example, Prong A asks whether the employer has the right to control the worker's performance, which Plaintiffs assert would go to Postmates's *contractual* right to control drivers, which would be common to all class members. Postmates' position is that it is agreeing to the certification of a settlement class for settlement purposes only, and that it would vigorously contest any efforts to certify a class outside the settlement context.

significantly similar to that of the other class members." City of San Diego v. Haas (2012) 207 Cal.App.4th 472, 501. Here, each named Plaintiff performed services in California while classified as an independent contractor during the proposed settlement class period. Plaintiffs' claims therefore are typical of the proposed class.

**4. Plaintiffs Are Adequate Class Representatives**

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450. Here, there is no potential conflict between the named Plaintiffs and other class members as they are challenging practices that Plaintiffs contend are applied uniformly to all couriers. Similarly, Plaintiffs' interests do not differ from the class, as they seek to obtain damages for all class members. Plaintiffs' counsel have extensive expertise and experience in "gig economy" cases.

**5. A Class Action Is Superior To Other Means of Resolving Plaintiffs' Claims**

"A class action also must be the superior means of resolving the litigation, for both the parties and the court." Aguiar v. Cintas Corp. No. 2 (Cal. Ct. App. 2006) 144 Cal.App.4th at 132. In determining whether a class action would be superior, courts consider factors such as judicial efficiency and the need to avoid many "separate, duplicative proceedings", see Sav-On Drug Stores, Inc. v. Superior Court, (2004) 34 Cal.4th at 340, and whether workers are unlikely to come forward to pursue their own individual claims in the absence of a class action, either because of the relatively small individual recoveries or the "desperate financial condition" of putative class members. See Reyes, 196 Cal.App.3d at 1279–1280. Here, there are approximately 380,000 class members, and granting class certification is superior to litigating the individual cases that would remain without certification.

## VI. CONCLUSION

As set forth above, the proposed Settlement is fair, reasonable, and adequate, and provides meaningful relief to the settlement class. The Court should grant preliminary approval, allow the notice to be issued to the class, and schedule a date for a final approval hearing.

Dated: October 8, 2019

LICHTEN & LISS-RIORDAN, P.C.

By: _____
Shannon Liss-Riordan

Attorney for Plaintiffs