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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF SAN FRANCISCO**

13 JACOB RIMLER, GIOVANNI JONES,
14 DORA LEE, KELLYN TIMMERMAN, and
15 JOSHUA ALBERT on behalf of themselves
16 and others similarly situated and in their
17 capacities as Private Attorney General
18 Representatives,

19 Plaintiffs,

20 v.

21 POSTMATES, INC.,

22 Defendant.

Case No. CGC-18-567868

**PLAINTIFFS' SUPPLEMENTAL
BRIEFING IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Department 304
Hon. Anne-Christine Massullo

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1 **I. Introduction**

2 Plaintiffs and Postmates have reached a significant \$11.5 million class settlement, in
3 which Postmates has agreed to resolve the claims of couriers who used the Postmates
4 application between June 3, 2017, and October 17, 2019. This settlement provides for almost
5 **twice** the recovery as the California portion of the previous settlement in Singer v. Postmates,
6 Inc., Case No. 15-1284 (N.D. Cal.), which covered a six year period and was approved by the
7 federal court.
8

9 Although a few objectors have criticized the settlement, it is well within the range of
10 what state and federal courts have regularly approved. The objections, which have been
11 rejected in numerous comparable settlements, are a transparent effort to extract a portion of the
12 attorneys’ fees in this case. Most of the other plaintiffs’ lawyers who have filed these
13 objections filed copycat cases against Postmates after this case (and others filed by Plaintiffs’
14 counsel) were filed. Plaintiffs’ counsel is well-recognized as the leading attorney to wage the
15 misclassification battle against the “gig economy”, having begun these cases, having obtained
16 the first (and only) class certification order to date, having brought the first (and only) case to
17 trial, having obtained the first (and only) summary judgment ruling on behalf of plaintiffs
18 applying Dynamex, having litigated Dynamex issues on appeal with a case now pending at the
19 California Supreme Court, and having obtained a host of legal rulings that have advanced the
20 rights of gig economy workers, as well as a number of settlements that have been approved.¹
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24 ¹ See O’Connor v. Uber Techs., Inc., (N.D. Cal., Sept. 1, 2015), 2015 WL 5138097 rev’d,
25 904 F.3d 1087 (9th Cir. 2018) (first and only class certification order); Lawson v. GrubHub,
26 Inc., (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir. No. 18-15386 (first and
27 only “gig economy” trial); Johnson v. VCG-IS, LLC (San Diego Super. Ct. Sept. 5, 2018) (first
28 and only summary judgment ruling under Dynamex, granting summary judgment to plaintiff
strippers on their claim that they have been misclassified under the “ABC” test); Vazquez v.
Jan-Pro Franchising Int’l, Inc., (Cal. Supreme Court) Case No. S258191 (appeal pending
regarding Dynamex retroactivity).

1 She is well aware of the state of the law in this area and brought this significant experience to
2 bear in concluding what would be a fair and adequate settlement here.²

3 The question for the Court is not whether other counsel believes that more should have
4 been obtained, or even could have been obtained. The issue is whether the settlement is fair,
5 reasonable, and adequate. As explained below, the settlement reached in this case is based on
6 and is structured in the same way as numerous gig economy settlements that have been
7 approved. See, e.g., O'Connor v. Uber Technologies, Inc. (N.D. Cal. Sept. 13, 2019) 2019 WL
8 4394401 (granting final approval); Singer v. Postmates, Inc., (N.D. Cal.) Case No. 15-cv-1284
9 (final approval granted April 25, 2018); Marciano v. DoorDash, Inc., (San Francisco Superior
10 Court) Case No. CGC-15-548101 (final approval granted July 12, 2018); Cotter v. Lyft, Inc.,
11 (N.D. Cal.) Case No. 13-cv-4065 (final approval granted March 16, 2017).

12 It is not surprising, although it is unfortunate, that other plaintiffs' attorneys would want
13 to inject themselves into these cases (and into settlements) by throwing a host of objections
14 against the wall to see what might stick. However, the Court should bring order to this process,
15 recognize the tactics of the objectors for what they are, and allow this settlement to proceed to
16 the notice period and then final approval.³

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20 ² Plaintiffs' counsel has been litigating cases under the Massachusetts "ABC" test, which
21 was adopted in Dynamex, for twenty years. She has developed much of the case law under this
22 test and has won a number of ground-breaking victories. See cases cited in footnote 4 of
23 Plaintiffs' Motion for Preliminary Approval (filed October 8, 2019).

24 ³ Plaintiffs' counsel is well aware of what settlements are not fair. They have objected to
25 patently unfair objections, containing multiple terms that reveal their inadequacy, and have
26 recently won an important appeal denying approval for a settlement that recovered less than 4%
27 of the value of the primary claims in the case, was reversionary, and in which the plaintiffs'
28 counsel would have obtained more than the class members. See Roes, 1-2 v. SFBSC Mgmt., LLC, 944 F.3d 1035 (9th Cir. 2019). None of those issues are present in this case. Plaintiffs would never have agreed to a settlement with such unfair terms. It is ironic that other counsel are second-guessing and criticizing counsel's having reached this settlement, which is eminently fair and adequate, showing that any settlement is vulnerable to objections by opportunistic lawyers.

1 The Court has requested additional briefing related to a number of these arguments,
2 which Plaintiffs are happy to provide. Answers to the court's inquiry, and further discussion, is
3 provided here. Plaintiffs are also happy to answer any further questions at the preliminary
4 approval hearing.

5 **II. Class Certification for Settlement Purposes**

6 The Court requested declarations from Plaintiffs setting forth the basic material facts
7 about their work for Postmates, whether they worked in each of the municipalities that impose
8 civil penalties that are being released, and whether they received consideration for the release
9 “of their individual claims because that bears on their adequacy.” Order at 2. The requested
10 declarations are being filed concurrently with this supplemental briefing. See Declarations of
11 Jacob Rimler, Giovanni Jones, Dora Lee, Kellyn Timmerman, and Joshua Albert, filed
12 concurrently.
13

14 The Court also requested an explanation of “why it is proper to release class members’
15 local-ordinance claims that [the Plaintiffs] do not themselves possess.” Order at 2. As fully
16 discussed infra Section V, class action releases commonly include claims that stem from the
17 same facts as the claims alleged in the complaint., which would include all local ordinances,
18 even for municipalities in which named Plaintiffs have not worked. See, e.g., Cotter v. Lyft,
19 Inc., (N.D. Cal. 2016) 193 F. Supp. 3d 1030, 1038 (in independent contractor misclassification
20 case, approving settlement where recovery was based primarily on potential reimbursement
21 damages but release included other wage claims related to misclassification, noting “What
22 matters is whether the released claims arise from the same facts as those alleged in the lawsuit,
23 and whether the settlement as a whole is reasonable in light of the strength and value of all the
24 claims being released.”).

25 The Court asked the Plaintiffs to disclose whether they received any consideration for
26 the release of their individual claims that bears on their adequacy to serve as class
27 representatives. As their declarations attest, the service awards are the only consideration they
28

1 would receive in exchange for their execution of a general release. See Declaration of Jacob
2 Rimler ¶ 9; Declaration of Giovanni Jones ¶ 8; Declaration of Dora Lee ¶ 8; Declaration of
3 Kellyn Timmerman ¶ 9; Declaration of Joshua Albert ¶ 8. The service awards being requested
4 as part of this settlement, in addition to recognition for Plaintiffs’ efforts throughout this
5 litigation, are partially in consideration for the general release the Plaintiffs are executing as part
6 of this settlement. California courts routinely find that such awards can serve as consideration
7 for a general release. See, e.g., Wilson v. Tesla, Inc., (N.D. Cal. July 8, 2019) 2019 WL
8 2929988, at *15 (awarding service award where plaintiffs executed a general release, which was
9 not required of other class members), Bennett v. SimplexGinnell LP (N.D. Cal. Sept. 3, 2015)
10 2015 WL 12932332, at *8 (same), Jefferson v. Chase Home Finance (N.D. Cal. Feb. 23, 2009)
11 2009 WL 10702540, at *3, (awarding service award “as an incentive award and in exchange for
12 a general release of all claims [Plaintiff] may have against [Defendant]”); Eddings v. Health
13 Net, Inc., (C.D. Cal. June 13, 2013) 2013 WL 3013867, at *7 (approving service award where
14 plaintiff executed a general release). Courts routinely recognize that class action cases would
15 never be brought without lead plaintiffs, and service awards are a necessary incentive for them
16 to do so.

17 18 **III. Reasonableness of the Settlement Consideration**

19 **A. Maximum Value of the Settlement**

20 The Court stated that it believes that Plaintiffs are required to provide full valuation of
21 all released claims and an explanation of how they valued the claims, and it invited Plaintiffs to
22 provide argument if Plaintiffs do not agree that such an explanation is required. Order at 2.
23 Plaintiffs do not believe that the law requires settling parties to estimate the maximum value of
24 all released claims. As the Court of Appeal recognized in Villacres v. ABM Industries, Inc.,
25 (Cal. Ct. App. 2010), 189 Cal. App. 4th 562, 586:

26 [A] clause providing for the release of claims may refer to all claims raised in
27 the pending action, *or* it may refer to all claims, both potential and actual,
28 that *may have been raised* in the pending action with respect to the matter in
controversy... [A] court may release not only those claims alleged in the

1 complaint and before the court, but also claims which *could have been*
2 *alleged* by reason of or in connection with any matter or fact set forth or
3 referred to in' the complaint. ... And it has been held that even when the court
4 does not have power to adjudicate a claim, it may still approve release of that
5 claim as a condition of settlement of [an] action [before it].

6 Id. (internal citations and quotations omitted); see also Williams v. Boeing Co. (9th Cir. 2008)
7 517 F.3d 1120, 1134 (release could properly bar “subsequent claims relying upon a legal theory
8 different from that relied upon in the class action complaint, but depending upon the same set of
9 facts”). Moreover, Plaintiffs have not located any case law requiring valuation of *every* released
10 claim. But see Lane v. Facebook, Inc., (9th Cir. 2012) 696 F.3d 811, 823 (holding that “the
11 district court acted properly in evaluating the strength of the plaintiffs’ *case* in its entirety rather
12 than on a claim-by-claim basis”) (emphasis in original); In re Oracle Sec. Litig., 829 F. Supp.
13 1176, 1182 (N.D. Cal. 1993) (“settlement approval does not require aggregate damages to be
14 determined with mathematical precision”); In re Toyota Motor Corp. Unintended Acceleration
15 Mktg., Sales Practices, & Products Liab. Litig., 2013 WL 3224585, *7 (C.D. Cal. June 17,
16 2013) (“Because absolute precision is impossible, ‘ballpark valuations’ are [] permissible,
17 especially when reached after mediated negotiation among noncollusive parties.”).

18 Here, in the Declaration of Shannon Liss-Riordan filed with their Motion, Plaintiffs have
19 already provided their counsel’s valuation of the expense reimbursement, minimum wage, and
20 overtime claims, along with their best estimates of the released claims related to itemized wage
21 statements, meal and rest breaks, one-in-seven day’s rest, unlawful terms, sick leave, reporting
22 time, accurate records, and unfair/unlawful business practices. Courts have approved a number
23 of gig economy misclassification settlements reached by Plaintiffs’ counsel in which Plaintiffs’
24 counsel similarly provided valuation for only those claims she believed to be valuable. See,
25 e.g., O’Connor v. Uber Technologies, Inc., Case Nos. 13-cv-3826; 15-cv-262 (N.D. Cal.);
26 Singer v. Postmates, Inc., (N.D. Cal.) Case No. 15-cv-1284; see also Marciano v. DoorDash,
27 Inc., (San Francisco Superior Court) Case No. CGC-15-548101; Cotter v. Lyft, Inc., (N.D. Cal.)
28 Case No. 13-cv-4065.

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Moreover, it is impracticable for Plaintiffs to estimate a maximum value for each of the released claims that Plaintiffs have properly valued as worthless. For example, because couriers can log on and off the Postmates app whenever they wish, without reporting to Postmates, claims for meal break violations (Labor Code § 512) and violations of the prohibition against seven consecutive days of work (Labor Code §§ 551, 552) appear to have no value at all. Providing a maximum value of claims is equally, if not more challenging, when considering those claims Plaintiffs are likely unable to certify on a class-wide basis. For example, there is at least some evidence that couriers may not only log on and off whenever they wish, but may also leave the Postmates app while engaging in personal or work-related activities unrelated to any Postmates delivery. If true, this creates a substantial risk that identifying a class for meal and rest breaks, sick leave violations, and even overtime and minimum wage are unascertainable. See Yucesoy v. Uber Techs., Inc., Case No. 15-cv-262-EMC, 2015 WL 6955140, at *3 (N.D. Cal. Nov. 10, 2015); Yucesoy v. Uber Techs., Inc., Case No. 15-cv-262-EMC, 2016 WL 493189, at *5-6 (N.D. Cal. Feb. 9, 2016) (dismissing overtime and minimum wage claims under the Massachusetts “ABC” test due to difficulties in alleging facts to show why waiting time is compensable for driver who could log on and off of app at will). Finally, of course, if any couriers preferred not to release these claims in this settlement because they would like to pursue them on an individual basis, they are free to do so by opting out of the settlement. The notice makes clear that they have the right to do that.

25 26 27 28

B. The Settlement Discount

The Court asked for justification for the \$250,000 PAGA allocation.⁴ As discussed in

⁴ Courts have routinely approved minimal – and far smaller – allocations for PAGA penalties when they are reached together with class settlements. 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).

1 Plaintiffs’ earlier briefing, Plaintiffs have calculated the maximum theoretical recovery penalty
2 on the expense reimbursement PAGA claim as approximately \$274 million. See Mot. for
3 Prelim. Settlement Approval at p. 12 (October 8, 2019). As explained in the accompanying
4 Declaration of Shannon Liss-Riordan, this number was calculated by multiplying the penalty for
5 the initial PAGA pay period violation under §2699(f)(2) (which is \$100) by the number of
6 couriers who worked during the PAGA period (to represent the initial pay period violation).
7 Counsel then added multiplied the penalty for subsequent violations (\$200) by the remaining
8 number of PAGA pay periods. See Liss-Riordan Decl. ¶ 2.

9 Plaintiffs respectfully submit that when PAGA claims are settled in conjunction with
10 class settlements, it is not necessary for the Court to compare the PAGA allocation to the
11 maximum PAGA penalty. This is because “in evaluating the adequacy of a settlement of a
12 PAGA claim, courts may employ a sliding scale, taking into account the value of the settlement
13 as a whole. Thus, where a settlement for a [] class is robust, the statutory purposes of PAGA
14 may be fulfilled even with a relatively small award on the PAGA claim itself...” Viceral v.
15 Mistras Grp., Inc., (N.D. Cal. Oct. 11, 2016) 2016 WL 5907869, at *9. In Viceral, in light of
16 the fact that PAGA claims were being settled as part of a class action settlement, the court
17 approved a settlement of less than 1% of the verdict value of the PAGA claims. And in Price v.
18 Uber Techs., which was a *PAGA-only case* in which the court was evaluating the settlement
19 amount against the maximum PAGA penalty, the court approved a \$7.75 million settlement
20 where the PAGA penalties were valued at over \$3 billion. Price v. Uber Techs., Inc., (Los
21 Angeles Super. Ct.) Case No. BC554512. Similarly, earlier this month the court approved a \$15
22 million PAGA-only settlement where the plaintiffs’ counsel had estimated the PAGA penalties
23 to be *at least* \$7.6 billion (representing approximately 0.2% of the PAGA penalties). Turrieta v.
24 Lyft. Inc. (Los Angeles Super. Ct.) Case No. BC714153.

25
26 Moreover, the post-Dynamex legal landscape has been constantly evolving since April
27 30, 2018, as courts, workers, and companies grapple to understand the contours of the
28 decision’s implications. What is clear, however, is that gig economy companies (including

1 Postmates) are aggressively seeking to challenge Assembly Bill 5, which states that it codified
2 Dynamex and went into effect on January 1, 2020. Gig economy companies have been
3 engaging in significant efforts for months in an effort to present an alternative to A.B. 5 through
4 a ballot initiative. See, e.g., Uber, Lyft, DoorDash launch a \$90-million fight against California
5 labor law, LOS ANGELES TIMES, Oct. 29, 2019, available at
6 [https://www.latimes.com/california/story/2019-10-29/uber-lyft-doordash-fight-california-labor-](https://www.latimes.com/california/story/2019-10-29/uber-lyft-doordash-fight-california-labor-law-ab5)
7 [law-ab5](https://www.latimes.com/california/story/2019-10-29/uber-lyft-doordash-fight-california-labor-law-ab5). And, just two days prior to A.B. 5’s effective date, Postmates joined Uber in filing a
8 federal lawsuit seeking an injunction against the law. Olson v. State of California, Case No. 19-
9 cv-10956 (C.D. Cal.). Thus, given this continued uncertainty as to Dynamex’s application to
10 gig workers and based on their counsel’s extensive experience litigating under the
11 Massachusetts “ABC” test, Plaintiffs believe there is a real risk that they may not prevail in the
12 case (even if they could somehow overcome the obstacle of the arbitration clause). See, e.g.,
13 Lawson v. GrubHub (N.D. Cal.) 15-cv-5128 (in the first-of-its-kind trial as to employee status
14 of a gig economy worker, court found plaintiff was properly classified as an independent
15 contractor), appeal pending Ninth Cir. No. 18-15386. In ruling on a motion for preliminary
16 approval, a court is not required to second-guess the amount of the compromise reached in this
17 case, and the question is not whether the Court – or proposed objectors – would have agreed to
18 it. Rather, the question is whether the settlement is fair, reasonable, and adequate in light of the
19 views of extremely experienced counsel who have aggressively litigated these cases for years.

21 The Court also asked Plaintiffs for an evaluation of the factors to be considered in
22 determining the ultimate civil penalty amount under PAGA. Under Cal. Lab. Code §
23 2699(e)(2), “a court may award a lesser amount than the maximum civil penalty amount
24 specified by this part if, based on the facts and circumstances of the particular case, to do
25 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” In
26 Fleming v. Covidien Inc. (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *3-4, the court
27 reduced the PAGA penalty from \$2.8 million to \$500,000 after finding that the defendants were
28 not aware prior to the lawsuit that the wage statements were not in compliance with the law and

1 moved promptly to correct the violation when notified. Here, Plaintiffs cannot predict how the
2 Court would rule, but submit that there is a significant likelihood the Court could drastically
3 reduce the PAGA penalties in light of ongoing uncertainty around the application of Dynamex
4 to gig economy workers, as they anticipate that Postmates would argue that this legal
5 uncertainty meant that punitive penalties are unwarranted. See also Stuart v. Radioshack Corp.,
6 (N.D. Cal. Aug. 9, 2010), 2010 WL 3155645, at *4 (approving a \$50,000 PAGA payment when
7 the damages were calculated as \$3.2 million the Plaintiffs, noting that “[w]hile Plaintiffs could
8 arguably get more than \$3.2 million because they are entitled to penalties under the PAGA, it is
9 not clear that they could get a significant additional amount because the PAGA provides that
10 in any action by an aggrieved employee seeking recovery of a civil penalty available under
11 subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty
12 amount specified by this part if, based on the facts and circumstances of the particular case, to
13 do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”).

14 **C. Investigation and Discovery**

15
16 In the accompanying Declaration of Shannon Liss-Riordan, Attorney Liss-Riordan
17 discloses the nature of the discovery that was received in advance of the Rimler, Lee, and Albert
18 actions, as well as the discovery that was produced in the Albert case before it was stayed and in
19 the Singer case that was settled in 2017. While the parties do not believe it is necessary for the
20 data to be filed with the Court, see, e.g., Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles
21 (2010) 186 Cal. App. 4th 399, 409, if the Court would like to review the data provided to
22 Plaintiffs in advance of mediation, Plaintiffs would be happy to file this data under seal.

23 **D. Dispute Resolution Fund**

24 The Court asked for a justification of setting aside \$250,000 as a Dispute Resolution
25 Fund, which is separate from the \$450,000 set aside for claims administration. The \$450,000
26 set aside for claims administration is an administrative fund that will cover the settlement
27 administrator’s costs for distributing notices and checks, maintaining databases of class
28 members, tracking the submission of claim forms, opt-outs and objections, answering class

1 member questions, and the like. None of the \$450,000 claims administration costs will be
2 disbursed to the class. By contrast, the Dispute Resolution Fund is designed to provide a
3 separate allocation of funds that can be disbursed to class members mistakenly excluded from
4 the class.⁵

5 **IV. Notice**

6 **A. LWDA**

7
8 The Court asked counsel to attest to compliance with Cal. Lab. Code § 2699(1)(2), which
9 requires a proposed PAGA settlement to be submitted to the LWDA. Such a notice is typically
10 provided to the LWDA *after* a court grants preliminary approval of the class action settlement,
11 so that the LWDA has an opportunity to weigh in prior to the *final* approval hearing. See Liss-
12 Riordan Decl. ¶ 4. However, in compliance with the Court’s request, Plaintiffs’ counsel filed
13 the proposed settlement agreement (as modified in compliance with the Court’s November 25,
14 2019, Order) with the LWDA. See Liss-Riordan Decl. ¶ 5.

15 **B. Process**

16 Plaintiffs respond to the Court’s inquiries regarding the notice process below.

17 i. Method of notice

18 The parties agreed to have the Settlement Administrator distribute notice using the
19 email addresses couriers use to sign up on the Postmates App. Because these are the email
20 addresses that couriers use to perform work on the Postmates App, email is the optimal means
21 of distributing notice of the settlement. Moreover, email is the commonly used method of
22 providing notice in gig economy settlements, and it generally successfully reaches almost 100%
23 of the class. In the Singer v. Postmates, Inc., settlement, for example, only 3,313 of the 264,294
24

25
26 ⁵ Moreover, uncashed checks can also be used to resolve unanticipated issues that arise
27 before the residual distribution. In the experience of Plaintiffs’ counsel, who has administrated
28 numerous similar settlements, the \$250,000 set aside as a Dispute Resolution Fund (together
with the ability to use uncashed checks) is an appropriate amount for a settlement of this size
and should be adequate to serve its purpose. See Liss-Riordan Decl. ¶ 7.

1 notices sent by email (or approximately 1%) were undeliverable. See Singer v. Postmates, Inc.,
2 (N.D. Cal.) Case No. 15-cv-1284, Dkt. 92-1 (attached as Ex. E to Decl. of Shannon Liss-
3 Riordan); see also Marciano v. DoorDash, Inc., (San Francisco Superior Court) Case No. CGC-
4 15-548101 (306 of 33,695, or less than 1%, of emailed notices undeliverable) (Decl. of
5 Settlement Administrator attached as Ex. F to Liss-Riordan Decl.); Cotter v. Lyft, Inc., (N.D.
6 Cal.) Case No. 13-cv-4065, Dkt. 271-1 at 2-3 (attached as Ex. G to Liss-Riordan Decl.) (4,190
7 of 202,030, or 2%, of emailed notices undeliverable). There is no reason to deviate from
8 emailed notice, given the highly successful use of this method in prior gig economy settlements.

9 California courts have permitted notice to issue through email for well over a decade.
10 See, e.g., Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43, 56. As online communications
11 become the norm, distributing notice via email is the most effective means of ensuring that class
12 members receive actual notice of the settlement and their opportunity to opt-out and object.
13 Indeed, “using the capability of the Internet” is a “sensible and efficient way of providing
14 notice”—especially where “the class members conducted business with defendant over the
15 Internet, and can be assumed to know how to navigate” the Internet in a manner that will
16 promote actual notice. Id. at 58.

17 The parties decided to distribute notice to class members via postal mail only if their
18 emails are returned undeliverable. Undeliverable notices are typically received almost
19 immediately after an email is sent, meaning the Settlement Administrator could immediately
20 begin to locate mailing information for these particular individuals.

21 The parties decided to not provide notice via the Postmates App for several reasons.
22 First, not all settlement class members who continue to use the App may use it between the date
23 notice issues and the Exclusion/Objection Deadline. Many couriers use the App intermittently.
24 And settlement class members who no longer use the App would not receive notice because
25 they no longer access the App to perform work on Postmates’ platform. But in today’s world,
26 people are constantly on their phones and receiving emails. As noted above, there is a greater
27 likelihood that email notice is optimal because the email addresses to which notices will be sent
28

1 are the same email addresses that couriers used to sign up for and use the App. Finally, notice
2 via the Postmates App may confuse settlement class members as it will appear to be a
3 communication from Postmates and not from the settlement administrator or the Court. The
4 parties agreed that notice would only be issued by the settlement administrator.

5 ii. Exclusion/Objection Deadline

6 As the Court notes, the Exclusion/Objection Deadline is defined in the agreement as 60
7 days after the Mailed Notice Date. Paragraph 2.20 of the settlement agreement previously
8 submitted to the Court defined “Mailed Notice Date” as the date of the initial distribution of the
9 Notice to Settlement Class Members. In an effort to provide further clarity as this initial
10 distribution is being done via email (with mailed notices to follow to any Class Member whose
11 email was undeliverable), the parties have revised this term throughout the Settlement
12 Agreement from “Mailed Notice Date” to “Notice Distribution Date”. The parties have also
13 corrected the discrepancy between paragraphs 3.1 and 6.2 and revised paragraph 6.2 to reflect
14 that the Notice Distribution Date is twenty (20) days after the entry of the Preliminary Approval
15 Order, not thirty (30) days.

16 The “initial distribution” refers to distribution by electronic mail. The parties have
17 modified Paragraph 6.5 of the settlement agreement to require prompt mailing of notices if an
18 emailed notice is returned as undeliverable and to provide that individuals receiving their notice
19 by mail will have the same 60 days to participate in (by submitting a claim for or objecting) or
20 opt-out of the settlement.

21 iii. Non-wages and Form 1099

22 The Court expressed concerns about the fact that all payments under the settlement will
23 be excluded from IRS reporting requirements. However, the payments are not being excluded
24 from IRS reporting requirements; rather, the payments will be reported via IRS Form 1099.
25 The reason for this is that Postmates uses 1099s to pay its couriers. As part of this settlement,
26 Postmates has not agreed to make a change to its classification for couriers for wage purposes or
27 tax purposes. Thus, there is no reason that settlement payments would need to be made with W-
28

1 2 forms issued. Indeed, in the numerous gig economy misclassification settlements in which
2 Plaintiffs’ counsel has been involved, the settlement payment has always been issued with 1099
3 forms. See Liss-Riordan Decl. ¶ 6.⁶

4 iv. Opt outs

5 The Court inquired into why the Settlement Agreement does not permit counsel opt out
6 on behalf of their clients, either individually or as a group, or to assist with submitting an opt
7 out. The Court’s concerns appear to stem from the arguments advanced by several proposed
8 interveners in this case, who contend that the opt-out procedure interferes with an individual’s
9 right to use their counsel of choice and is too onerous. But as discussed below, the opt-out
10 process is specifically designed to protect each class member’s ability to individually choose
11 whether to participate in the settlement, and to prevent class members from being opted out of
12 the settlement without their knowledge or informed consent by a lawyer who may or may not
13 actually represent them. See Hanlon v. Chrysler Corp. (9th Cir. 1998) 150 F.3d 1011, 1024
14 (“The right to participate, or to opt-out, is an individual one and should not be made by the class
15 representative or the class counsel.”).

16 Moreover, nothing about the Settlement’s opt-out procedure prevents counsel (a) from
17 reviewing the Settlement with the client, and (b) from advising the client on whether
18 participating in or opting out of the Settlement is in the client’s (as opposed to counsel’s) best
19 interest. See Settlement Agreement ¶ 7.1. Thus, to opt out, all a Settlement Class Member
20 must do is (a) sign the request and (b) mail or email the request to the Settlement Administrator.
21 All this can be done using a smartphone, which each Settlement Class Member necessarily has
22 and uses, as it is required to use the Postmates app.

23 Indeed, these very opt-out procedures were recently approved by Judge Chen in
24 O’Connor v. Uber Technologies, Inc. (N.D. Cal. Sept. 13, 2019) 2019 WL 4394401. Judge
25 Chen approved a settlement agreement which similarly required that opt-out requests be
26

27 ⁶ Additionally, the law applicable to questions of employee status under the California
28 Labor Code differs from the federal tax standard, which has not been raised in this case.

1 submitted by the settlement class member, even if the class member was represented by
2 counsel. O'Connor v. Uber Technologies, Inc., Case Nos. 13-cv-3826; 15-cv-262 (N.D. Cal.),
3 Dkt. 916.01 ¶ 182. Other courts have approved similar provisions. For instance, in Bellows v.
4 NCO Financial Systems, Inc., (S.D. Cal. July 13, 2009) 2009 WL 10725741, the settlement
5 agreement provided that “[t]o be effective, the written request for exclusion must be signed by
6 the Class Member and state: the Class Member’s full name, address, and telephone number.” Id.
7 at *1. The court granted preliminary approval, and an attorney sought to opt-out 62 class
8 members by submitting a letter on the class members’ behalf requesting that all 62 individuals
9 be excluded from the class. Id. at *1. The court rejected the letter because it was in clear
10 violation of the settlement agreement’s requirement (which the court had approved) that
11 requests for exclusion be signed personally by the class member. Id. at *2. The court also noted
12 that the attorney had not discussed or conferred with any of his clients about opting out of the
13 settlement, id. *which is the very concern the parties seek to mitigate here* by requiring class
14 members to sign opt-out forms themselves. And in Camp v. Maplebear, Inc. d/b/a Instacart,
15 (Los Angeles Super. Ct. Jan. 12, 2018) Case No. BC 652216, the court found that, in light of
16 settlement agreement’s requirement that each class member submit an opt-out personally, a
17 class representative in a second case against the same defendant could not submit an opt-out on
18 behalf of class members in that case.

19
20 The parties here thus included the requirement that class members opt-out personally in
21 order to ensure that the class members themselves – not their counsel – have an opportunity to
22 review the benefits of the settlement in order to decide for themselves whether or not to
23 participate in the settlement. Allowing class members’ counsel to opt-out on class members’
24 behalf risks a circumstance in which counsel submit hundreds or thousands of opt-out forms
25 simply in order to derail this settlement, without even ensuring that each class member has
26 knowingly chosen to be excluded from the settlement.

27 While these procedures may not be necessary in every case, they are necessary here, as
28 certain proposed interveners’ counsel (namely Keller Lenkner) seemingly seek to deprive their

1 own clients of the opportunity to make this decision individually. The parties are genuinely
2 concerned that Keller Lenkner does not, in fact, have an attorney-client relationship with each
3 of its purported clients. As explained in Plaintiffs' earlier briefing, Keller Lenker claimed to
4 represent Jacob Rimler, the named plaintiff in this case, notwithstanding that he has no
5 recollection of ever agreeing to be represented by Keller Lenkner. See Decl. of Jacob Rimler in
6 Support of Plaintiffs' Opposition to Non-Party LeMaster Objectors' Motion to Intervene (filed
7 November 6, 2019); see also Decl. of Theane Evangelis in Support of Defendant Postmates,
8 Inc.'s Opposition to the LeMaster Objectors' Application for Leave to Intervene (filed
9 November 6, 2019) ("Evangelis Decl.") ¶ 6. Plaintiffs are now submitting declarations from an
10 additional 7 couriers whom Keller Lenker claims to represent, in which these couriers attest that
11 they do not believe they are represented by Keller Lenkner. See Declarations of Paul Bodner,
12 Amanda Boyett, Michael Clark, Gian Claudio, Andrew Harris, Sharawn Laws, and Steven
13 Turner. Thus, it is not at all clear that Keller Lenkner even represents many of the couriers it
14 claims to represent and would ostensibly be seeking to opt out of the settlement, and it is
15 entirely appropriate that the settlement agreement require class members to personally execute
16 their opt-out requests to ensure that class members are able to make such an important decision
17 on their own, rather than allowing a lawyer who may not even represent the class member to do
18 so.
19

20 Additionally, because so many plaintiffs' law firms are currently soliciting gig economy
21 workers to bring individual arbitration cases, many of these workers are confused about what
22 lawyers claim to be representing them and who is sending these solicitations. It has been the
23 undersigned counsel's experience that many of the firm's clients have unknowingly clicked on
24 solicitation emails from other firms, thinking they were responding to a communication from
25 this firm. Then, when another firm claims to be representing these workers, the workers are
26 surprised to hear that another firm believes it represents them. By requiring class members to
27 take action to opt themselves out of the settlement, the settlement ensures that class members
28 are making a knowing choice not to participate in the settlement.

1 The Court also inquired as to how class members can opt out by email. Class members
2 **do not** need to download a form, print it, sign it, and attach it to an email. They can simply opt-
3 out in the body of an email. The parties have chosen to allow opt-outs via mail and email, but
4 not via submission of an opt-out form on an online portal, in order to simplify the claims
5 submission process and ensure that class members do not inadvertently submit a claim form
6 when they intended to opt out and do not inadvertently opt out when they intended to submit a
7 claim form.⁷

8 The parties have modified Paragraph 7.5 as ordered by the Court to reflect that the
9 Court, not the Settlement Administrator, will decide whether a contested opt-out is valid.

10 v. Objections

11 As ordered by the Court, the parties have modified Paragraphs 8.1, 8.2, and 8.4 of the
12 settlement agreement to reflect that objectors are not required to file objections with the Court,
13 and that the parties will ensure that any objections submitted to the Settlement Administrator are
14 filed with the Court. Pursuant to the Court’s direction, the parties have also eliminated the
15 requirement of a notice to intent to appear at the final approval hearing in Paragraph 8.4, the
16 requirement of supporting papers in Paragraph 8.2, and the requirement for a legal basis for the
17 objection in Paragraph 8.3.

18 The parties share the same concerns about allowing counsel to object on behalf of their
19 clients as allowing counsel to opt-out, as discussed above. While counsel can write the
20 objection, a class member needs to affirm that it is their objection.

21 The sentence in Paragraph 8.7 providing that “It shall be Settlement Class Counsel’s
22 sole responsibility to respond” to any objections made with respect to Counsel’s award and
23 Plaintiffs’ service awards is intended to mean that Postmates shall not be required to respond to
24

25
26 ⁷ In Plaintiffs’ counsel’s experience, opt-out forms are often confusing for class members.
27 Some class members have submitted them when they intended to submit a claim form, even
28 when the form clearly stated that it should be used only for opting out. Requiring class
members to state for themselves that they intend to opt-out will ensure that this is what they
actually intend.

1 objections related to the requested attorneys' fees and service awards. In the experience of
2 Plaintiffs' counsel, it is the responsibility of class action plaintiffs' counsel, not defendants, to
3 respond to these types of objections. This makes good sense, as defense counsel is not in a
4 position to know the amount of effort expended by plaintiffs' counsel, nor are they necessarily
5 in a position to fully appreciate the contributions made by each Plaintiff.

6 vi. Exclusion of an Individual

7 The parties have modified the requirement in Paragraph 6.11 that an individual notify
8 the Settlement Administrator that they have been excluded from the class list within "a
9 reasonable amount of time" to require that an individual notify the Administrator within thirty
10 (30) days after distribution of the Class Notice. The parties have added language to the
11 paragraph clarifying that an individual can notify the Administrator via mail, email, or
12 telephone. These individuals must still submit a Claim Form, Objection, or Opt-out by the
13 deadline. It would be logistically quite difficult for each individual to have a separate deadline.

14 The Court posed a hypothetical in which a mistakenly excluded individual submits a
15 Claim Form after the Dispute Resolution Fund has been exhausted. Plaintiffs' counsel has
16 never encountered a circumstance in which an individual who was mistakenly excluded was
17 unable to be paid. As long as such an individual made themselves known prior to final
18 disbursement, funds remaining from uncashed checks could also be used as a source of
19 payment. See Liss-Riordan Decl. ¶ 7. If such a situation were to occur, however, the parties
20 agree that the individual would be permitted to opt-out of the settlement.

21 vii. Claim Form

22 The Court indicated that the term "Bar Date" – the deadline by which to submit a claim
23 form – is not defined in the Settlement Agreement. The parties respectfully direct the Court's
24 attention to Paragraphs 2.3 and 2.20, which define "Bar Date". The parties have modified this
25 Paragraph to clarify that, like the Exclusion/Opt-out Deadline, the Bar Date is sixty (60) days
26 after the Notice Distribution Date. Notwithstanding the formal "Bar Date", the parties will
27 allow claims to be submitted as long as is feasible prior to distribution.
28

1 In response to the Court's inquiry regarding submission of the Claim Form, the Form
2 may be submitted via mail, email, or online portal. The parties have revised Paragraph 5.3 to
3 clarify this point.

4 viii. Reminders

5 As the Court notes, Paragraph 6.7 calls for reminders to be sent to the settlement class.
6 The parties have modified the language of Paragraph 6.7 to clarify that these reminders will be
7 sent to Settlement Class Members who have not yet submitted a Claim Form, an Objection, or
8 an Opt-out Form. The parties have also clarified that these notices will be sent via email to
9 Settlement Class Members whose initial emails were not undeliverable and shall be sent via
10 mail to Settlement Class Members who received a Notice Form via mail pursuant to Paragraph
11 6.5.

12 The parties will determine when to issue these reminders but anticipate that the
13 reminders will be sent approximately 20 and 40 days into the 60-day claims period. Pursuant to
14 the agreement, the parties will agree to any further reminders that may be reasonably necessary
15 to assure adequate opportunity for class members to participate in the settlement. The
16 reminders will contain the same information as the Settlement Class Notice.

17
18 ix. Settlement Share Disputes

19 The parties have modified the Notice to explain that Class Members can dispute the
20 information upon which their share of the Settlement will be calculated through a letter sent via
21 U.S. email or an email. The parties will evaluate the documentation provided by the Class
22 Member on a case-by-case basis.

23 **C. Substance**

24 i. Language of Notice

25 The Postmates App, which couriers are required to use in order to work for Postmates, is
26 available in English and Spanish. However, as Postmates has informed Plaintiffs that 99% of
27 couriers nationwide use the English version of the App, the parties believe English language
28 notice is appropriate in this case. While the parties are not opposed to issuing notice in Spanish

1 if the Court believes that Spanish language notice is required, this would likely incur substantial
2 additional settlement administration costs.

3 ii. As directed by the Court, the parties have made the following revisions to the
4 Notice:

- 5 a. Notice Summary Paragraph: The parties have modified the summary
6 paragraph to provide the estimated total of the \$11,500,000 that will be
7 available for distribution to the settlement class.
- 8 b. Page 1-2: The parties have modified the summary of the recipient’s options
9 as directed.
- 10 c. Section 2: The parties have modified this Section to include a brief
11 discussion of the Lee and Albert actions.
- 12 d. Page 3, third paragraph: The parties have added the word “preliminarily” in
13 references to approval of the class representatives and class counsel.
- 14 e. Section 3: The parties have modified this section to add that the settlement
15 amount includes a Dispute Resolution Fund of \$250,000, and that the
16 Administration Costs are capped at \$450,000, rather than “estimated” at
17 \$450,000.
- 18 f. Section 4: The parties have modified the language in this section to clarify
19 that a class member is participating in the settlement either by submitting a
20 timely claim form or by objecting. The parties have modified the language
21 regarding the release as directed by the Court.
- 22 g. Section 5: The parties have modified the notice form to disclose (1) the
23 estimated net settlement amount available for distribution to class members;
24 (2) that certain factors may impact each class member’s settlement payment
25 (e.g. the number of claims submitted, the number of class members who opt-
26 out, the amount of attorneys’ fees and service awards ultimately awarded);
27 (3) the estimated delivery miles for that class member; (4) whether the class
28

1 member can expect to have his or her points doubled; and (5) a notification
2 that the class member can contest the number of miles and/or whether their
3 points should be doubled. The parties are unable to comply with the Court's
4 request to add information as to the class member's estimated recovery per
5 mile, because this amount will inevitably depend on the factors listed in (3)
6 supra.⁸

- 7 h. Section 6: The parties have modified the language to explain how to notify
8 the Settlement Administrator of any change of address or request a
9 replacement check. The section has also been modified to explain the
10 procedure to dispute the delivery miles. The section has also been modified
11 to state that payment will be distributed approximately 30 days after the
12 settlement becomes final.
- 13 i. Section 7: The parties have modified this section to explain how to opt-out
14 via email. The parties have also added an explanation that individuals who
15 opt out will still be releasing their claims under PAGA.
- 16 j. Section 8: The parties have modified this section to explain that individuals
17 who opt out can still object to the PAGA component of the settlement. The
18 parties have clarified that an individual submitting an objection does not need
19 to include their dates of service with Postmates. The parties have clarified
20 that an individual can submit an objection and also submit a claim form.
- 21 k. Section 9: The parties have modified this section to note that the Court will
22 consider Class Counsel's request for attorneys' fees and Plaintiffs' service
23 awards at the final approval hearing, in addition to considering whether the
24 settlement is fair, reasonable, and adequate. The parties have clarified that
25
26

27 ⁸ While the Court also ordered that the Notice be modified to disclose that employer-side
28 payroll taxes will be deducted from the settlement amount, such taxes will not be deducted,
because the payments will be made via Form 1099.

1 individuals can check the settlement website to learn whether the final
2 approval hearing has been rescheduled and have deleted the sentence
3 providing that the Court will hear from individuals who made a timely
4 request to speak at the final approval hearing.

- 5 1. Section 10: The parties have added a reference to the settlement website to
6 this section. The parties will ensure that the settlement website contains all
7 documents ordered by the Court. The parties have also added a paragraph
8 directing the reader to the Court’s website and explaining how to use the
9 website.

10 **V. Allocation of Funds**

11 **A. Allocation Based on Mileage**

12 For the reasons explained on pages 10-11 of Plaintiffs’ Motion, Plaintiffs believe that
13 calculating each individual’s allocation based on mileage is the most appropriate way to allocate
14 the settlement because gig workers have generally not been successful in advancing class claims
15 alleging minimum wage and overtime violations. Courts have consistently endorsed allocation
16 based on mileage approach in similar cases involving “gig economy” delivery workers. See, e.g.,
17 Cotter v. Lyft, Inc. (N.D. Cal. 2016) 176 F. Supp. 3d 930, 939 (approving settlement where
18 “plaintiffs’ counsel assigned a minimal value ... to the other claims for damages contained in
19 the lawsuit” apart from expense reimbursement); O’Connor v. Uber Techs., Inc. (N.D. Cal. Mar.
20 29, 2019) 2019 WL 1437101, at *11; Singer v. Postmates Inc. (N.D. Cal. April 25, 2018) 4:15-
21 cv-01284-JSW, Dkt. 98; Marciano v. DoorDash Inc. (Cal. Sup. Ct. July 12, 2018) CGC-15-
22 548102 (Kahn, J.) (same).

23
24 Postmates couriers are not compensated for their time traveling to a pickup location, and
25 Plaintiffs expect Postmates would argue that time couriers spend traveling to a pickup location
26 is not compensable. Moreover, there would have been challenges in achieving class
27 certification for these claims because many couriers do not have overtime or minimum wage
28

1 claims. For example, FLSA claims brought on behalf of Uber drivers have not been successful.
2 See Razak v. Uber Techs., Inc., 2018 WL 1744467, *1 (E.D. Pa. Apr. 11, 2018), appeal pending
3 Third Cir. No. 18-1944. See also Yucesoy v. Uber Techs., Inc., 2016 WL 493189, *6 (N.D. Cal.
4 Feb. 9, 2016). Thus, Plaintiffs consider the mileage expense damages the best measure of the
5 value of couriers’ claims and believe it is the appropriate way to allocate the settlement.
6 Moreover, as explained above, Plaintiffs are not able to calculate potential damages (or
7 allocation) for claims such as meal-and-rest break and sick leave violations because couriers can
8 take breaks whenever they wish. Allocating the settlement based on overtime would similarly
9 not be feasible as the data provided by Postmates indicates that only a relatively small portion of
10 couriers even worked overtime.

11 **B. Class Members Who Worked Pre- and Post-Dynamex**

12 The Court also inquired as to whether class members who worked for Postmates after
13 Dynamex have stronger claims than those who worked prior to Dynamex. Although Postmates
14 does not agree, Plaintiffs’ position is that (as numerous courts have recognized) the Dynamex
15 “ABC” test is retroactive. See Gonzales v. San Gabriel Transit, Inc. (2019) 40 Cal. 5th 1131,
16 1156; Garcia v. Border Transportation Group, LLC (2018) 28 Cal. App. 5th 558, 572 n. 12;
17 Valadez c. CSX Intermodal Terminals, Inc. (N.D. Cal. Mar. 15, 2019) 2019 WL 1975460, at *5;
18 Johnson v. VCG-IS, LLC (Super Ct. Cal. July 18, 2018) Case No. 30-2015-00802813-CU-CR-
19 CXC, Ruling on Motion in Limine, at *1–2. Additionally, though Plaintiffs do not agree,
20 Postmates has and would continue to argue that Dynamex does not apply to claims for expense
21 reimbursement under Section 2802 of the Labor Code, and Postmates is actively challenging
22 A.B. 5’s application to gig economy companies. Thus, there is no difference in the strength of
23 the claims of couriers who worked pre- and post-Dynamex and there should be no difference in
24 the recovery of couriers who worked pre- and post-Dynamex.

25 **C. Doubled Points for Certain Class Members**

26 The Court also indicated that it believed the parties’ proposal to double the points of
27 class members who opted out of arbitration, initiated arbitration, or demonstrated an interest in
28

1 writing to initiate arbitration prior to October 17, 2019, was vague. The parties hereby clarify
2 that they would consider a class member to fit this criteria if the class member either (1)
3 provided Postmates with a valid request to opt out of its arbitration provision; (2) filed a
4 demand for arbitration with the American Arbitration Association against Postmates
5 challenging their classification (whether represented by counsel or acting *pro se*); or (3) retained
6 an attorney to represent them in filing a demand for arbitration against Postmates challenging
7 their classification, even if the demand has not been filed.

8 The settlement awards these class members double points in recognition of the fact that
9 these class members do not face the same risks as the rest of the class in bringing their claims.
10 Courts have routinely recognized that the risk of enforcement of an arbitration agreement and
11 concomitant loss of the ability to bring class claims⁹, and here, the allocation formula simply
12 accounts for the fact that these couriers who opted out of the arbitration clause or who intended
13 to pursue individual arbitrations did not face that particular risk. “[A]n allocation formula need
14 only have a reasonable, rational basis, particularly if recommended by experienced and
15 competent counsel.” In re Zynga Inc. Sec. Litig. (N.D. Cal. Oct. 27, 2015) 2015 WL 6471171,
16 *12. Thus, “[i]t is reasonable to allocate [] settlement funds to class members based on the
17 extent of their injuries or the strength of their claims on the merits.” Destefano v. Zynga, Inc.
18 (N.D. Cal. Feb. 11, 2016) 2016 WL 537946, *14. Here, the doubling of points for class
19 members who opted out of arbitration and who intended to pursue their claims individually in
20 arbitration does just that by taking into account the relative strength of these courier’s claims.
21 See In re Sprint Corp. ERISA Litig. (D. Kan. 2006) 443 F. Supp. 2d 1249, 1262 (“A reasonable
22

23
24 ⁹ See, e.g., Ontiveros v. Zamora (E.D. Cal. 2014) 303 F.R.D. 356, 369-370 (granting final
25 settlement approval and finding that defendant’s appeal of order denying motion to compel
26 arbitration “introduced risk to the litigation because an opinion from the Ninth Circuit in
27 defendant’s favor could have impaired plaintiffs’ ability to proceed as a class”); Deatrick v.
28 Securitas Security Servs. USA, Inc. (N.D. Cal. Apr. 7, 2016) 2016 WL 1394275, at *5 (granting
preliminary settlement approval and finding that one of the “risks to pursuing further litigation
rather than settling” was that defendant “could successfully enforce [its] class action waiver and
arbitration clauses”).

1 [allocation] plan may consider the relative strength and values of different categories of
2 claims”); In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA)
3 Litig. (C.D. Cal. 2014) 295 F.R.D. 438, 458 (“[T]he district court’s determination concerning
4 the fairness and adequacy of a proposed settlement is nothing more than an amalgam of delicate
5 balancing, gross approximations and rough justice”); Custom LED, LLC v. eBay, Inc. (N.D.
6 Cal., June 24, 2014, No. 12-CV-00350-JST) 2014 WL 2916871, at *7 (finding allocation plan
7 that provided for different recoveries was not arbitrary because it was based on the relative
8 strength of the class members’ claims).

9 **D. Expected Recovery**

10 The Court asked Plaintiffs to calculate, assuming a 100% claim rate, the number of class
11 members expected to receive an individual payment of at least \$50 and the number expected to
12 receive at least \$100. The most recent data available to Postmates indicates that there are
13 411,671 potential settlement class members who completed at least one delivery in California
14 between June 3, 2017 and October 17, 2019. Of those potential settlement class members, and
15 subject to the assumption requested by the Court, 16,675 would receive at least \$50 (but less
16 than \$100), and 13,436 would receive at least \$100.¹⁰ To place these figures in context, the data
17 also indicates that over 82% of couriers drove less than 500 estimated miles, and over 90% of
18 couriers drove less than 1,000 estimated miles. Of the couriers who drove at least 500 estimated
19 miles, approximately 42% would receive at least \$50 and approximately 19% would receive at
20 least \$100. And of the couriers who drove at least 1,000 estimated miles, approximately 77%
21 would receive at least \$50 and approximately 34% would receive at least \$100.

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25 ¹⁰ The settlement agreement provides that every settlement class member who timely
26 submits a valid claim form will receive a minimum of \$10 (Paragraph 5.4), and that individuals
27 who opted out of arbitration, initiated arbitration, or demonstrated in writing an interest in
28 initiating an arbitration demand against Postmates before October 17, 2019, will have their
estimated miles doubled (Paragraph 5.7). To avoid confusion and complicated calculations that
the settlement administrator is in the best position to address after claims are made, the figures
provided above do not account for these provisions.

1 **VI. Release of Claims**

2 The Court asked for a justification of the broad release of class members' claims. As
3 noted in the cases cited above in Section II.A., it is commonplace in class action litigation for
4 claims to be released beyond those asserted in the complaint, so long as they are tied to the
5 same basic factual predicate. Every claim contemplated by the settlement arises from a single
6 theory of injury: that Postmates has allegedly violated wage and hour law by misclassifying
7 couriers as independent contractors. Similar releases have been routinely approved, in
8 recognition of the fact that settlement of these claims is not feasible without providing
9 defendants relief from the potential for repeated claims alleging slight variations on the claims
10 asserted under the same statutory scheme (e.g., the California Labor Code or New York Labor
11 Law) but arising from the *same facts and legal theory* (alleged independent contractor
12 misclassification). See, e.g. Cotter, (N.D. Cal. 2016) 193 F. Supp. 3d at 1038; see also Howard
13 v. America Online Inc., (9th Cir. 2000) 208 F.3d 741, 747 (enforcing release that “bar[red]
14 claims that ‘*ar[o]se out of or [we]re related to the matters referred to’ in the complaint*”)
15 (emphasis added); Greko v. Diesel U.S.A., Inc., (N.D. Cal. Apr. 26, 2013) 2013 WL 1789602,
16 *6 (approving release of claims “arising from, or related to, the same facts alleged in or that
17 *reasonably could have been included*” in the complaint) (emphasis added); Bond v. Ferguson
18 Enterprises, Inc., (E.D. Cal. June 30, 2011) 2011 WL 2648879, *3 (approving release of “All
19 claims, demands, rights, liabilities, and causes of action, whether brought directly,
20 representatively, or in any capacity, that were or *could have been* asserted in the Lawsuit based
21 upon the facts alleged therein”) (emphasis added).

23 The Court also asked Plaintiffs to justify the use of the service award as consideration
24 for the general release. As explained above in Section I, courts commonly find that such service
25 awards are appropriate consideration for a general release.

26 The parties have modified the Settlement Agreement and Notice to clarify that only
27 those class members who submit a valid claim are releasing their FLSA claims.
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1 Finally, the Court asked Plaintiffs to justify the inclusion in the release of claims
2 asserted in the Lee and Albert complaints, as well as the claims in the original Rimler complaint.
3 The inclusion of these claims is appropriate because the Lee and Albert complaints, like the
4 Rimler complaint, are premised on Postmates' classification of its couriers as independent
5 contractors. Courts have found that so long as settlement class members are apprised of the
6 claims that they are releasing, there is nothing wrong with releasing claims pending in another
7 parallel action. See Trombley v. Nat'l City Bank (D.D.C. 2011) 826 F. Supp. 2d 179, 202 case
8 dismissed, 2012 WL 556319 (D.C. Cir. Feb. 13, 2012) (nothing improper about releasing the
9 claims of an overlapping class where "the expansive reach of the releases could not have been
10 clearer" and observing that there is "no requirement that the Class be specifically apprised of all
11 pending actions covered by the releases, as long as the releases themselves were reasonably
12 clear"); see also Wal-Mart Stores, Inc. v. Visa USA, Inc. (2d Cir. 2005) 396 F.3d 96, 106
13 ("Broad class action settlements are common, since defendants and their cohorts would
14 otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the
15 country.") (citations and internal quotation marks omitted).

17 **VII. Miscellaneous Issues**

- 18 • **Class Definition:** The parties have modified the class definition in Paragraph 2.36 such
19 that "Settlement Class" means any and all individuals who entered into an agreement
20 with Postmates to use the Postmates platform as an independent contractor to offer
21 delivery services to customers, and used the Postmates platform as an independent
22 contractor courier to accept or complete at least one delivery in California during the
23 Settlement Period.
- 24 • **Second Amended Complaint:** The parties are concurrently filing a stipulation to file
25 the Second Amended Complaint in this matter.
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- 1 • **Other Litigation Against Postmates:** The parties have modified the Settlement
2 Agreement so that it no longer preliminarily or permanently enjoins Settlement Class
3 Members from initiating litigation against Postmates.
- 4 • **Amendments or Modifications to Settlement:** The parties have modified Paragraph
5 3.8.15 to provide that the Court must approve any revisions to the settlement agreement
6 after final approval.
- 7 • **Paragraph 4.5:** The parties have modified Paragraph 4.5 to delete the sentence
8 identified by the Court.
- 9 • **Paragraph 6.10:** The parties have modified Paragraph 6.10 to require the Settlement
10 Administrator to provide receipt of valid Claim Forms and Objections to the Court.
- 11 • **Release as to Settlement Administration:** Paragraph 10.6 provides that class members
12 shall not have any claims against the Plaintiffs, Class Counsel, the Settlement
13 Administrator, or Postmates or its counsel relating to distributions made in accordance
14 with the Settlement Agreement. This provision is eminently appropriate, as any
15 distributions made under the Settlement Agreement will be made pursuant to the Court's
16 final approval order. It would not be proper to allow a Settlement Class Member to
17 pursue a claim against any party or counsel that was acting in compliance with the
18 Court's order.
- 19 • **Selection of Settlement Administrator:** Plaintiffs have selected Simpluris as the
20 settlement administrator. As ordered by the Court, a Declaration from Michael
21 Sutherland, Chief Executive Officer of Simpluris, is being filed concurrently with this
22 brief confirming Simpluris' ability to administer the settlement and explaining how it
23 will protect sensitive personal information.
- 24 • **Settlement Website:** The settlement website will be available to class members
25 beginning on the Initial Distribution Date. "Content-neutral" means that none of the
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1 language in the website will contain any suggestion or implication as to the validity of
2 the claims or defenses asserted in this case.

- 3 • **Objection Without Statement of Intent to Appear:** The Court ordered that no
4 separate notice of intent to appear at the final approval hearing should be required. See
5 Order re Motion for Preliminary Approval, Nov. 25, 2019, at p.4. Accordingly, in
6 compliance with the Court's order, the parties have modified Paragraph 8.4 so that no
7 such notice need be filed. Pursuant to Paragraph 8.3, however, the parties continue to
8 believe that objectors should be required to state whether or not they intend to appear at
9 the final approval hearing, so that the parties can ensure they will be in the best position
10 to adequately address the arguments advanced by any objectors at the hearing. As the
11 Court has ordered that a separate notice of appearance need not be filed, the only way
12 for the parties to know who will be appearing at the final approval hearing is to require
13 that, in order to be valid, an objection must contain a statement as to whether the person
14 intends to appear.
15

16 **VIII. Conclusion**


17 For the reasons described herein and in Plaintiffs' Motion for Preliminary Approval, the
18 Court should find that the proposed settlement is fair, reasonable, and adequate, and that it
19 provides meaningful relief to the settlement class. The Court should grant preliminary approval,
20 allow the notice to be issued to the class, and schedule a date for a final approval hearing.
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1 Dated: January 15, 2020

Respectfully submitted,

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3 JACOB RIMLER, GIOVANNI JONES,
4 DORA LEE, KELLYN TIMMERMAN,
5 and JOSHUA ALBERT, on behalf of
6 themselves and others similarly situated
7 and in their capacities as Private Attorney
8 General Representatives,

By their attorneys,

9 By: 
10 Shannon Liss-Riordan, SBN 310719
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