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' SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Department 304
Hon. Anne-Christine Massullo

Hearing Date: April 29, 2020
Hearing Time: 10:30 a.m.

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

I. Introduction

This Court has already denied the motions to intervene in this case filed by (i) Wendy Santana, (ii) Arsen Altounian, and (iii) Heather LeMaster, Juan Jimenez, Lewis Stokes, and Malarie Taylor ("the LeMaster Objectors") (and collectively, "the Non-Parties"). In their motions, these Non-Parties sought to prematurely intervene themselves in this action in order to nitpick the settlement that the Rimler plaintiffs have achieved here. The Court correctly denied their Motions, finding that they had each failed to show that their interests would not be protected by the settlement. See Order Re Motions to Intervene, Nov. 26, 2019, at 2-3. Nonetheless, apparently undeterred by the Court's decision that they have no right to participate at this time, after Plaintiffs submitted their supplemental briefing in response to the Court's inquiries regarding the settlement, each of these Non-Parties filed a supplemental response.

Plaintiffs recognize that the Court has already been burdened with a significant amount of briefing in this case and that the Court's resources are even more limited in light of the current pandemic; Plaintiffs do not seek to add to the Court's burden with voluminous additional briefing here. Many of the Non-Parties' arguments are largely repetitive of arguments previously made and addressed in Plaintiffs' earlier briefing, and Plaintiffs incorporate by reference their earlier briefing in response. Yet because certain arguments raised in the Non-Parties' filings cannot go unanswered, Plaintiffs respond briefly here.

As discussed below, the arguments raised by these Non-Parties have no merit, and these Non-Parties should not be permitted to continue to derail and delay this settlement approval process. Plaintiffs negotiated this agreement at a mediation held on July 19, 2019, they filed their Motion for Preliminary Approval in October 2019, and they have been unable to get to a preliminary approval hearing for several months, in large part due to the dilatory tactics of these Non-Parties. Class members, who have already been waiting for months, urgently need their settlement payments now more than ever, in light of the pandemic and its unprecedented impact on the economy and low-wage workers in particular. The Court should proceed to grant Plaintiffs' Motion for Preliminary Approval of Class Action Settlement so that the parties can

proceed with sending notice to class members. Any class members who would prefer not to participate in this settlement, and would be willing to wait longer in the hope of obtaining a better outcome (for instance, through individual arbitration), are free to do so. But moving this process forward will allow thousands of workers who desperately need financial support *now* to receive their payments soon (this year).

II. Critiques of Expected Per-Courier Recovery Are Unfounded

The Court's November 26, 2019, order requested estimates of the number of class members expected to receive (i) between $50 and $100 and (ii) more than $100 under the terms of the proposed settlement, assuming a 100% claims rate. Accordingly, in their supplemental briefing, Plaintiffs provided the requested estimates to the Court. Each of the Non-Parties now complains that the expected per-class member recovery is too low.[1] Simply because objectors would like to see higher settlement numbers is not a ground for a court not to approve a settlement in a case that has been vigorously litigated and competently negotiated at arms-length by experienced and knowledgeable counsel. Moreover, as Plaintiffs explained in providing these calculations in their supplemental briefing, Plaintiffs do not believe these numbers are a fair approximation of expected per-class member recovery. This is because class action settlements never have a 100% claims rate; in the experience of Plaintiffs' counsel, class action settlements like this one typically have a claims rate of approximately 50-60%.[2] In

---

[1] Santana mistakenly states that the estimates show that "a measly 0.03%" of couriers would receive more than $100. In fact, the estimates Plaintiffs provided show that this number is 3%, not 0.03%.

Additionally, more than half of the class has driven less than 100 miles *in total* for Postmates. See Decl. of Shannon Liss-Riordan in Support of Plaintiffs' Opposition to Arsen Altounian's Motion to Intervene, Nov. 8, 2019. It thus makes eminent sense that these class members' recovery will be less than $100.

[2] As for Santana's objection to the claim procedure and Altounian's objection to the use of emailed notice of claim forms, class action settlements commonly utilize emailed claim forms in settlements like this one, and such procedures have been regularly approved by state and federal courts, and they have proven effective. See, e.g., Cotter v. Lyft, (N.D. Cal.) 3:13-cv-04065-VC (using a virtually identical claims process and garnering a claim rate of 64%); Singer v. Postmates, (N.D. Cal.) 4:15-cv-01284-JSW (using a virtually identical claims process (*cont'd*)

making their calculations, Plaintiffs also were not able to account for the fact that many class members (those who are pursuing or expressed a written interest in pursuing arbitration) will have their points (and therefore their expected recovery) doubled. Of course, if they would rather choose to take their chances with pursuing their arbitration, instead of participating in this

---

and garnering a claim rate of 48%); and Marciano v. DoorDash, (Cal. Sup. Ct.) CGC-15-548102 (using a virtually identical claims process and garnering a claim rate of 46%).

There are very good reasons for using a claims process – a process which has been approved by numerous courts around the country, including in California. The undersigned counsel prefer using a claim form (with repeated follow-up reminders) in order to confirm that class members' addresses are up-to-date so that they can be ensured of actually receiving their settlement check. Sending checks to class members at outdated addresses causes numerous difficulties (particularly with such a transient class population) and does not necessarily lead to more class members receiving settlement funds. Instead, it leads to numerous checks being sent out and never cashed, necessitating the expense of cancelling checks, as well as the risk of checks being cashed by current residents at class members' former addresses (which leads to problems when class members later inquire about their checks, only to find they were cashed by someone else). It also leads to the problem of tax forms being sent to class members who never actually received or cashed their payment. Indeed, in one of the only cases in which Plaintiffs' counsel allowed checks to be sent to all class members, without the use of a claim form, counsel had class members for years into the future getting in touch to say that they had received a tax delinquency notice for a payment they had never received. Counsel therefore much prefers using this method of a simple claim process to ensure that checks are being sent to correct addresses. See Decl. of Shannon Liss-Riordan, filed concurrently, ¶ 4.

Courts routinely approve settlements with this type of claim procedure. See O'Connor v. Uber Technologies, Inc. (N.D. Cal., Mar. 29, 2019) 2019 WL 1437101, at *13 (granting preliminary approval of proposed class action settlement, noting "[t]he notice procedure is designed to encourage a high claim rate, and it would take drivers minimal time to fill out and submit the straightforward claim form."), summarily affirmed, 2019 WL 7602362 (9th Cir. Dec. 20, 2019); Cotter v. Lyft, Inc., 193 F.Supp.3d 1030, summarily affirmed, Ninth Cir. Case No. 17-15648, Dkt. No. 25 (9th Cir. Sept. 15, 2017); Marciano v. DoorDash, (Cal. Sup. Ct.) CGC-15-548102, July 12, 2017 Final Approval Order (Judge Harold Kahn approved this claims procedure in San Francisco Superior Court); Keller v. Nat'l Collegiate Athletic Ass'n (NCAA), (N.D. Cal. Aug. 19, 2015) 2015 WL 5005901, *5 (overruling objection to claims process because it minimized waste, fraud, and administrative costs, and because it was simple, straightforward, and designed to make submitting a claim as easy as possible); Miller v. Ghirardelli Chocolate Co., (N.D. Cal. Oct. 2, 2014) 2014 WL 4978433, *4 (reasoning that claims process was appropriate in part because it "directs available funds to those who most care about the alleged deception and thus are willing to file a claim.").

settlement, they are free to do so.[3]

In sum, while Plaintiffs provided the estimates of the number of class members who would receive at least $50 or at least $100 in order to respond to the Court's request, these calculations were closer to an academic exercise than a realistic estimate of how many class members will receive between $50 and $100 and how many will receive more than $100. The Court should disregard the Non-Parties' efforts to capitalize on the abstract nature of these estimates.

III. Plaintiffs Properly Assigned No Value to Claims Under Local Ordinances

LeMaster and Altounian contend that Plaintiffs have improperly ignored the value of claims that certain couriers may have under local ordinances in various California municipalities.[4] While LeMaster and Altounian assert that these claims are incredibly valuable, as Plaintiffs have explained time and again in their earlier briefing, there are significant challenges in pursuing class-wide claims of minimum wage violations. These challenges are in large part due to the difficulty in assessing compensable time; couriers can log on and off the Postmates App when they wish, and they can also keep the App open while simultaneously waiting for a delivery and engaging in personal activities. Given these challenges, claims for minimum wage for gig economy workers have not fared well in courts. See, e.g. Tan v. GrubHub, Inc., 171 F. Supp. 3d 998, 1010 (N.D. Cal. 2016) (dismissing overtime and minimum

---

[3] As explained previously, the parties have also agreed to send additional notices to those couriers who have signed up for arbitration, in order to ensure that couriers are able to make an informed decision as to whether to participate in the settlement or continue to pursue their claims in arbitration. See Plaintiffs' Opposition to LeMaster Objectors' Motion to Intervene, Nov. 6, 2019.

[4] Altounian suggests that Plaintiffs purposefully obfuscated whether they drove in certain municipalities. While Plaintiffs had no such intent, for the avoidance of doubt, they now submit additional declarations clarifying the cities in which they drove for Postmates. See Decls. of Jacob Rimler, Giovanni Jones, Joshua Albert, Dora Lee, and Kellyn Timmerman (filed concurrently).

Counsel for Altounian also states that he has "calculated [Altounian's] individual damage entitlements at over $100,000 inclusive of local municipal penalties", but he offers no explanation for how he arrived at this calculation.

wage claims under California state law 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); Yucesoy v. Uber Techs., Inc., 2016 WL 493189, *6 (N.D. Cal. Feb. 9, 2016) (same, under Massachusetts law).

Plaintiffs have no reason to believe – and the Non-Parties have offered none – that class action claims under local minimum wage ordinances would be any more successful, and the Non-Parties have not cited any gig economy settlement in California or elsewhere in which settlement value was ascribed to such claims. The astronomical values assigned to these claims by the Non-Parties are simply theoretical.

In sum, for these reasons and as explained in their prior briefing, Plaintiffs have properly declined to assign value to the local ordinance claims and have instead valued the claims in this settlement based on their claim of mileage reimbursement under Section 2802 of the California Labor Code – a valuation that has been consistently endorsed by courts in other gig economy misclassification settlements, including the federal court in Singer v. Postmates, (N.D. Cal.) 4:15-cv-01284-JSW.

IV. The Confusion as to Whether Certain Clients Are Represented by Keller Lenkner or Lichten & Liss-Riordan Highlights the Need for the Opt-Out Mechanism in the Proposed Settlement

A. Requiring Individuals to Opt Out of the Settlement Ensures That a Class Member Will Not Be Unwittingly Opted Out by a Lawyer Whom the Class Member Does Not Understand to Represent Them

The LeMaster Objectors argue that the opt-out process provided for by the settlement, which requires class members who wish to exclude themselves to do so personally, is improperly designed to interfere with class members' choice of counsel. As Plaintiffs and Postmates have explained in their prior briefing, the parties believe this requirement is necessary in order to ensure that a lawyer who claims to represent the class member cannot make the decision without the class member's knowledge, but rather that the class member makes the decision for themselves. The need for this guardrail against improper opt-outs is highlighted by the ongoing confusion, which has been laid bare before this Court previously and in Keller Lenker's latest filing, as to whether certain clients are represented by Keller Lenkner

or Lichten & Liss-Riordan (LLR). Indeed, as noted previously, Keller Lenkner at one time purported to represent the named plaintiff in this action, Jacob Rimler, who had no intention of signing up to be represented by Keller Lenkner. See Decl. of Jacob Rimler in Support of Plaintiffs' Opposition to LeMaster Objectors' Motion to Intervene, Nov. 6, 2019. In order to minimize the confusion, the parties agreed to require class members to opt out of the settlement on their own, which will ensure that a class member will not be opted out without their knowledge by a lawyer who claims to represent them, when in fact the class member believes themselves to be represented by another lawyer.

B. LLR Is Eminently Qualified to Represent the Class

In support of their argument as to why individual opt-outs from the settlement are not appropriate, the LeMaster Objectors submitted declarations from three couriers who were previously represented by both Keller Lenkner and LLR.[5] In these declarations, the couriers make a number of misstatements about their conversations with Kady Matsuzaki, a paralegal at LLR. Contrary to the statements made in the couriers' declarations, Ms. Matsuzaki *never* suggested or implied that couriers should "sign over with" LLR or that they were in any way required to sign a declaration in order to participate in the settlement. See Declaration of Kady Matsuzaki ¶ 7. (filed concurrently). Rather, she simply informed these couriers that both Keller Lenkner and LLR currently believed that they represented the couriers, and she inquired as to who the courier understood themselves to be represented by. Id. at ¶¶ 3-4. Similarly, the suggestion that Ms. Matsuzaki acted improperly in not explaining the specific terms of the settlement to these couriers is entirely specious. As explained in her declaration, Ms. Matsuzaki called the couriers to inquire about who they understood represented them, not to discuss the settlement itself. The proposed settlement has not yet been approved, and couriers do not yet need to make a decision as to whether they want to participate. If the Court grants preliminary

[5] In their declarations, these couriers disclaim LLR's representation of them, and so LLR no longer contends that it represents them.

approval, LLR will take all the proper steps to ensure that clients are adequately informed about the terms of the settlement and their rights and options under the settlement.[6] The purpose of Ms. Matsuzaki's calls was not to encourage couriers to participate in the settlement; it was merely to ascertain their understanding of their legal representation. Id. at ¶ 8.

Indeed, contrary to the Non-Parties' insinuations against LLR, LLR is universally recognized as one of the preeminent plaintiff-side employment class action firms in the country, which has pioneered what has become this entire wave of litigation against "gig economy" companies. Shannon Liss-Riordan, lead counsel for Plaintiffs, is well recognized as the leading attorney to wage the misclassification battle against the "gig economy", having begun these cases nearly seven years ago, having obtained the first (and only) class certification order to date, having brought the first (and only) case to trial, having obtained the first (and only) summary judgment ruling on behalf of plaintiffs applying Dynamex, having litigated and won Dynamex issues on appeal with a case now pending at the California Supreme Court, and having obtained a host of legal rulings that have advanced the rights of gig economy workers, as well as a number of settlements that have been approved.[7] And now, amidst the global COVID-19 pandemic, Ms. Liss-Riordan has not hesitated to challenge gig economy companies for their

---

[6] Altounian's suggestion that LLR neglected to timely inform Jacob Rimler, the lead plaintiff in this case, of the settlement is also incorrect.

[7] Examples of cases that Ms. Liss-Riordan has litigated in this area, which have shaped the law surrounding independent contractor misclassification in the gig economy include: O'Connor v. Uber Techs., Inc., (N.D. Cal., Sept. 1, 2015), 2015 WL 5138097 rev'd, (9th Cir. 2018) 904 F.3d 1087 (first and only class certification order, reversed on arbitration grounds); Lawson v. GrubHub, Inc., (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir. No. 18-15386 (first and only "gig economy" misclassification case to go to trial); Johnson v. VCG-IS, LLC (San Diego Super. Ct. Sept. 5, 2018) (first 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., 939 F.3d 1045 (9th Cir. 2019) (holding Dynamex to be retroactive, to apply to franchises, and affirming strict reading of Prong B under "ABC" test) (Cal. Supreme Court) Case No. S258191 (appeal pending regarding Dynamex retroactivity); Cunningham v. Lyft, Inc., Case Nos. 19-cv-11974 (D. Mass.), Rittman v. Amazon, Inc. 383 F.Supp.3d 1196 (W.D. Wash. 2019); Waithaka v. Amazon, Inc., 404 F. Supp. 3d. 335 (D. Mass. 2019) (first and only cases to hold that gig economy drivers are exempt from arbitration under Federal Arbitration Act).

continued refusal to classify their workers as employees, thereby denying them the right to sick leave they need now more than ever. See Verhines v. Uber Technologies, Inc., (N.D. Cal.) Case No. 20-cv-1886; Capriole v. Uber Technologies, Inc., (N.D. Cal.) Case No. 20-cv-2211; Cunningham v. Lyft, Inc., Case Nos. (D. Mass.) 19-cv-11974, (1st Cir.) 20-1373; Rogers v. Lyft, Inc., (San Francisco Superior Court) Case No. CGC-20-583685.[8]

Throughout the course of this litigation and settlement approval process, LLR has represented its clients diligently and appropriately. And it has achieved a significant settlement that will provide significant payment to thousands of class members at a time when they are in need of additional income more than ever.

CONCLUSION

For the foregoing reasons, and the reasons explained in Plaintiffs' prior briefing, this Court should grant Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

[8] For more background on Ms. Liss-Riordan's extensive experience in this area, see Liss-Riordan Decl. ¶¶2-3 and the Lichten & Liss-Riordan, P.C. website, https://www.llrlaw.com/shannon-liss-riordan/.

Dated: April 22, 2020

Respectfully submitted,

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

By their attorneys,

By: Shannon Liss-Riordan

Shannon Liss-Riordan, SBN 310719
Anne Kramer, SBN 315131
LICHTEN & LISS-RIORDAN, P.C.