SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

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

Plaintiff,

v.

POSTMATES, INC.

Defendant.

Case No. CGC-18-567868

TENTATIVE RULING RE CONTINUED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

TENTATIVE RULING

The Court intends to continue the hearing on the motion for preliminary approval to provide the parties with an opportunity to address specific concerns the Court has with both the settlement as a whole and with what facts are missing from the motion. There remain significant deficiencies that prevent this Court from finding the proposed settlement within the range of reasonableness and these must be addressed before the Court considers granting Preliminary Approval. These include: the lack of information regarding the total verdict value of all claims being released, the settling of the PAGA claim for only 0.09% of the potential value (based, at this point, only on one of the PAGA claims), the distribution formula, and the fact this is a claims-made structured settlement.

BACKGROUND

This matter first came before this Court for hearing on November 22, 2019. Plaintiffs submitted on the tentative and the motion was continued for supplemental filings. The Court issued an order on November 26, 2019 directing the parties to address specified issues in a supplemental filing containing an enumerated list. (See November 26, 2019 Order, 1 ("Order".)

Plaintiffs submitted their supplemental filing on January 21, 2019.[1] Six proposed class members[2] and objectors filed oppositions in response to the supplemental brief. Postmates then filed a reply in response to the opposition briefs. The Court has considered all papers filed in connection with this hearing in making its tentative ruling.

I. Class Certification for Settlement Purposes

A. Plaintiffs' Declarations

Plaintiffs were asked to provide declarations setting forth the basic material facts about their employment to demonstrate their adequacy to represent a settlement class. (Order, 2.) Their declarations

---

[1] Prior to submission of their Supplemental Brief, the parties filed a stipulation to file a Second Amended Complaint (the "Proposed Second Amended Complaint"). The Court intends to grant the parties request. In the meantime, and until the Order is issued by the Court, the Court will refer to the not yet filed complaint as the Proposed Second Amended Complaint for purposes of this tentative.

[2] Wendy Santana; Heather LeMaster, Juan Jimenez, Lewis Stokes, and Malarie Taylor; and Arsen Altounian.

had to provide whether they have worked in each of the municipalities that impose civil penalties that are being released, and if not, why it is proper to release class members' local-ordinance claims that they do not themselves possess. (Id.)

In support of their argument that it is proper to release class members' local-ordinance claims for no value that the Plaintiffs' do not themselves possess, Plaintiffs argue that class action releases commonly include claims that stem from the same facts as the claims alleged in the complaint, which in this case would include all local ordinances even for municipalities in which named Plaintiffs have not worked. (Supp. Brief, 3-4.) (Citing *Cotter v. Lyft, Inc*. (N.D. Cal. 2016) 193 F. Supp.3d 1030, 1038.) In *Cotter*, plaintiffs failed to assess the value of certain released claims when it negotiated the agreement on behalf of the proposed class. (*Cotter*, 193 F. Supp.3d at 1038.) The District Court explained that plaintiffs' failure to consider these claims during negotiations did not "automatically invalidate the settlement they reached," if the unconsidered claims (1) are not particularly strong, or valuable, such that they're not likely to have materially influenced the overall settlement; (2) if the released claims arise from the same facts as those alleged in the lawsuit; and (3) the settlement as a whole is reasonable in light of the strength and value of all the claims being released. (*Id*.)

Here, the Court cannot engage in the analysis *Cotter* proposes—and Plaintiffs put forward as authority—because the limited information provided by Plaintiffs does not provide the Court with the ability to assess whether the released local-ordinance claims are strong and valuable as the court in *Cotter* did. Furthermore, there is reason for this Court to believe that these claims have, at least, some value. For example, El Cerrito's Municipal Code § 6.95.110.A.1 provides for civil penalties in the amount of at least fifty dollars to each employee for each day or portion thereof, for minimum wage violations. Emeryville, Richmond, and Santa Clara have similar cumulative daily civil penalties for minimum wage violations. (See Emeryville Municipal Code 537.07(c)(1)(i) ($50 cumulative daily civil penalty); Richmond Code of Ordinances § 7.108.090(g)(1) ($50 cumulative daily civil penalty); Santa Clara Minimum Wage Ordinance § 3.20.090(b) ($50 cumulative daily civil penalty.) Accordingly, Plaintiffs must provide the Court with an estimated total verdict value of the local-ordinance claims in order to

determine whether or not these claims are strong and valuable. This analysis should be part of Plaintiffs' assessment for the minimum wage claim. (See below, §II(A)(1).)

B. Consideration for Release of Individual Claims

Plaintiffs were also directed to disclose whether they received consideration of any kind, directly or indirectly, for the release of their individual claims. (Order, 2.) According to Plaintiffs' supplemental brief, Plaintiffs are not receiving separate consideration for the release of their individual claims, though the service awards being requested are partially in consideration for a broader general release. (Supp. Brief, 4.) As discussed in section VI(A) below, the service award should not be contingent upon Plaintiffs signing a broader release. (See *Roes, 1-2 v. SFBSC Management, LLC* (9th Cir. 2019) 944 F.3d 1035.)

II. The Settlement Calculation

A. Maximum Value of the Claims

Plaintiffs were ordered to provide the Court the maximum value of all class claims and PAGA claims and the bases for their valuation. (Order, 2.) In addition, due to the explicit release of additional claims in the Settlement Agreement not pleaded in the First Amended Complaint or Proposed Second Amended Complaint, Plaintiffs were advised to provide a full valuation of *all* released claims and provide the Court with an explanation of how they calculated the value of these claims. (Id.)

1. Class Claims

Plaintiffs failed to provide the Court with the maximum value of all class claims.[3] The Court has taken into consideration that there are substantial risks of no recovery for certain non-PAGA claims[4], and

[3] Plaintiffs claim they already provided the Court with counsel's valuation of the expense reimbursement, minimum wage, and overtime claims, along with their best estimates of the released claims related to itemized wage statements, meal and rest breaks, one-in-seven days' rest, unlawful terms, sick leave, reporting time, accurate records, and unfair/unlawful business practices. (Supp. Brief, 5.) Not so. Plaintiffs provided an estimated value for the expense reimbursement claim and unpaid overtime wages only. The remaining claims were either assessed no value at all or valued at zero. (Liss-Riordan Decl., ¶¶22-42.) The Court is well aware that the parties entered into a settlement agreement to avoid the risks of trial. However, counsel provided no value for the majority of its claims. The Court understands that defendant may have defenses it will raise at trial, however, that does not mean that all but two of the fourteen claims pleaded have zero value for settlement purposes.

[4] These include causes of action for: Unpaid wages, Failure to Post Days, Untrue/Misleading Advertising,

therefore reasonable for Plaintiffs' counsel to assign no value to these claims when considering the overall full-verdict value. However, other claims appear to have, at least, some value and Plaintiffs must assess the value for the following claims and provide the basis for the calculations:

The Overtime claim: Plaintiffs must provide the basis for the $1.5 million valuation.

The Minimum wage claim: Presumably, if Plaintiffs can calculate overtime damages, Plaintiffs can also calculate the minimum wage damages because both are based on an individual's hourly compensation. Furthermore, counsel only discusses why Plaintiffs would be unsuccessful obtaining an award under Cal. Labor Code § 1194.2's liquated damages provision, but does not discuss the recovery of the unpaid balance of the minimum wage violation on its own.

The Itemized Wage Statement claim: Plaintiffs' argument relating to injury is irreconcilable with the plain language of the statute. If, as is undisputed, the wage statements violated Labor Code § 226(a)(2)-(4),(6)-(7), then the class suffered injury as a matter of law – Plaintiffs do not need to put on evidence of harm and the statutory penalties are mandatory. (Lab. Code § 226(a)(2)-(4),(6)-(7), (e)(2)(B)(iv) ["(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following…. (iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number"].) As to Postmates' good faith defense, California appellate courts considering a similar issue have rejected a good faith defense to Labor Code 226. (See *Kao v. Holiday* (2017) 12 Cal.App.5th 947, 961–962 [employer's good faith belief that employee is exempt amounts to mistake of law that is not excused under Lab. Code, § 226]; *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1085.) Assuming Plaintiffs prevail on their underlying misclassification claim, Plaintiffs should explain why a good faith defense in this case would justify valuing and/or discounting the claim to zero.

The Rest Break claim: Under the Industrial Welfare Commission wage orders, employers are required to "authorize and permit all employees to take rest periods" at the rate of at least every four hours worked. (Cal. Code Regs., tit. 8, § 11090, subd. 12.) "Authorized rest periods shall be counted as hours worked for which there shall be no deduction from wages." (Ibid.) Counsel should explain why the fact that couriers could sign off the app whenever they wanted relieves Postmates from their obligation to guarantee at least 10 minutes of paid rest time when a driver worked over 4 hours.

Sick leave claim: Plaintiffs failed to assign any value to the sick leave claim on the basis that the hourly rate is incalculable. As stated above, if Plaintiffs could calculate the overtime damages, then Plaintiffs should be able to calculate the hourly rate.

Reporting time claim: Plaintiffs argue that because drivers are not required to report to work, it is likely this claim would return no recovery. However, in the Proposed Second Amended Complaint, Plaintiffs allege that "Plaintiffs and members of the putative class, have periodically been required to report for

---

FLSA Minimum wage and Overtime.

work but have either not been put to work or have been furnished with less than half of his or her usual or scheduled days' work." (Proposed Second Amended Complaint ¶ 61.) Plaintiffs should explain this discrepancy.

UCL: Plaintiffs state that to the extent the UCL claim would result in restitution, such recovery is already accounted for in the calculations above and in Plaintiffs' Motion which assigned value to the underlying wage claims and expense reimbursement claim. To the extent counsel provides the Court with the value assigned to the underlying wage claims as required in this Order, it is not necessary for counsel to provide a valuation for this claim.

In addition, Plaintiffs must address the following regarding their $88 million valuation for the Expense Reimbursement claim[5]: Plaintiffs settled with Postmates in July 2019. Counsel asserts Plaintiffs "subsequently extrapolated" the data to determine the likely total damages through October 17, 2019 (the end of the claim period). However, there is no information as to how counsel estimated the potential additional miles logged by drivers between July and October. Indeed, any such extrapolation should be supported by the declaration of an expert to assure that the predicate factors counsel used were in fact sound and statistically correct. This lack of information combined with the fact that the estimated number of class members increased from 380,000 to 411,671— a 31,671 difference—from the time Plaintiffs first filed their motion in September 2019 to when they filed their supplemental brief in January 2020 must be addressed because the Court must determine whether there is any significant change to the $88 million valuation. Plaintiffs must explain the reason for the increase of class members and when this additional information was made available. Counsel must also explain her approach at extrapolating the data to determine the miles logged between July and October. The explanation should inform the Court whether the miles logged between July and October were taken into consideration, as well as why it would be proper to release the claims of roughly 31,000 additional class members whose miles were not taken into consideration in the valuation.[6] (See *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 176 F.Supp.3d 930, 940 [denying preliminary approval based, in part, on counsel's improper estimate of the maximum

---

[5] Counsel assigned a maximum value of $88 million to the drivers' reimbursement claim. (Motion, 11.) Counsel arrived at this value by multiplying the total estimated miles by the average of the IRS fixed rate during the applicable time frame (which ranged from 54 to 58 cents per mile). (Id.) Counsel's explanation regarding the calculation of the value of the claim is sufficient.

[6] Presumably, these additional class members also have overtime claims that were not considered in the assessed $1.5 million valuation.

reimbursement claim as a result of miles logged after settlement but prior to hearing on the motion for preliminary approval].)

2. PAGA Claims

Plaintiffs' $274 million PAGA valuation only took into consideration Plaintiffs' claim for expense reimbursement. Plaintiffs were ordered to provide the maximum recovery under PAGA taking into consideration the wage claims. Plaintiffs must do so.

3. All Released Claims

Plaintiffs assert they have not located any case law requiring valuation of every released claim. (Supp. Brief, 4-5.) Plaintiffs cite *Lane v. Facebook* (9th Cir.) 696 F.3d 811 for the proposition that the court acts properly in evaluating the strength of Plaintiffs' case in its entirety rather than on a claim-by-claim basis. (Id. at 5.) In *Lane v. Facebook*, however, the Ninth Circuit noted that the lower court had, in fact, meaningfully accounted for the potential value of the plaintiffs' claims by ordering briefs and hearing arguments relating to the potential recovery of the specific claim at issue. (*Lane*, 696 F.3d at 823-824; see also *Cotter*, 193 F. Supp.3d at 1038.)

On the other hand, after reviewing the Settlement Class Members' Released Claims (see Proposed Settlement ¶ 2.41), other courts have glossed over broad releases when they are based on or reasonably related to the employment classification claim without requiring an assessed value for those claims. (See e.g., *O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1119 ["Although the *O'Connor* and *Yucesoy* cases were limited to claims based on expense reimbursement and the payment of tips, the Settlement Agreement contains an expansive release provision: it will require settlement class members—all drivers in California and Massachusetts—to release all claims based on or reasonably related to the employment misclassification claim, i.e., overtime, minimum wage, meal and rest breaks, and workers' compensation."].) Nonetheless, counsel should be prepared to address or provide supplemental briefing on this point. While there may be no reported cases requiring such a valuation, the fact that the class members are receiving around $20 each after fees and expenses in exchange for these broad releases, causes the Court concern.

B. The Settlement Discount

Plaintiffs have set forth several reasons to discount the settlement. However, the Court cannot evaluate the reasonableness of the discount without knowing what the discount is, a value that in turn depends on the maximum value of the claims.

Plaintiffs were also asked to: (1) Justify the 0.09% PAGA allocation; (2) Discuss the maximum civil penalty that could be imposed if Plaintiffs were to succeed on their PAGA claims; and (3) Provide an evaluation of the factors the Court would be called on to consider in determining the ultimate civil penalty amount. (Order, 2-3.) Plaintiffs failed to do so.

As stated above, Plaintiffs failed to provide the maximum civil penalties that could be imposed, opting instead only to calculate the maximum recovery penalty on the expense reimbursement PAGA claim. Plaintiffs must provide the maximum civil penalty that could be imposed if Plaintiffs were to succeed on their *all* PAGA claims. As to Plaintiffs' justification for the near 100% PAGA discount, Plaintiffs argue that there is a significant likelihood that the Court could drastically reduce the PAGA penalties in light of defendant's argument that legal uncertainty relating gig economy workers render penalties unwarranted. (Supp. Brief, 9.) Plaintiffs also suggest the Court take a "sliding scale" approach in evaluating the adequacy of the settlement of the PAGA claim, by taking into account the value of the settlement as a whole. (Id. at 7.) (Citing *Viceral v. Mistras Grp. Inc.* (N.D. Cal. Oct. 11, 2016) 2016 WL 5907869.) However, this Court cannot ascertain the reasonableness of the value of the settlement as a whole because it has neither the full verdict value of all PAGA claims nor the class claims, unlike the court had in *Viceral*. (*Id*. at *8-9.)

Lastly, the portion of the settlement total set aside to resolve the PAGA claims, $250,000, appears to have been calculated in an arbitrary fashion. While the Court accepts counsel's argument that PAGA penalties may be reduced subject to the court's discretion where warranted, Plaintiffs should explain the basis for coming to a $250,000 allocation, and whether this allocation is proper in light of the parties failing to assess the maximum value of PAGA penalties.

C. Investigation and Discovery

Plaintiffs' counsel was asked to disclose, in a declaration, the "substantial data" that was received in advance of mediation and the discovery that was obtained in the *Albert* case before the case was stayed.

(Order, 3.) In her declaration, counsel states that in advance of mediation, Postmates produced an excel spreadsheet that disclosed the number of potential couriers who worked during the class period, their miles driven, their hours worked, the couriers' earnings, and the number of PAGA pay periods covered by the case. (Supp. Liss-Riordan Decl., ¶ 3.) This information is sufficient for the Court, though the Court reserves its right to require counsel to provide the data collected in discovery for its own review and potentially by review of an expert if necessary.

III. Dispute Resolution Fund

The Court is satisfied with counsel's explanation regarding the separate allocation of funds for class members versus the allocation set aside for administration costs that will not be disbursed to the class. (Supp. Brief, 9-10.) However, the Supplemental Brief raises other concerns Plaintiffs must now address.

Pursuant to Plaintiffs' Supplemental Brief and the revised Proposed Settlement, individuals who believe they have been inadvertently excluded as class members must notify the settlement administrator within 30 days after the initial notice is given. (Supp. Brief, 17; Proposed Settlement, ¶ 6.11.) These individuals are subject to the same 60-day deadline to opt-out, object, or submit a claim, and are not being provided any additional time. (Supp. Brief, 17.) Thus, it is not clear the purpose of paying these individuals from a separate fund when they are under the same obligations as any other member of the class, and will be provided their Individual Settlement Share under the same distribution time-frame.

There is a second issue regarding the Dispute Resolution Fund, and that is that the Proposed Settlement states that payments to excluded individuals "shall be disbursed from the [fund], as long as sufficient money is left in the Dispute Resolution Fund." (Proposed Settlement, ¶ 6.11.) In its Order, the Court asked Plaintiffs what would happen if there were insufficient funds for an excluded individual to get paid. (Order, 3, 5.) In the Supplemental Brief, counsel states that "as long as such an individual made themselves known prior to final disbursement, funds remaining from uncashed checks could also be used as a source of payment." (Supp. Brief, 17.) This proposal—that inadvertently excluded individuals have until final disbursement of funds to "make themselves known"—is contrary to the 30-day deadline after initial distribution of notice to notify the Settlement Administrator of their identity. (Proposed Settlement,

¶ 6.11.) As for the fund being used to resolve any bona fide disputes regarding the calculation of payment owed, presumably class members will contact the settlement administrator once they receive their Notice and dispute their miles prior to the disbursement of funds. The Court is unclear, therefore, why the Dispute Resolution Fund is necessary.

IV. Notice

A. LWDA

In her declaration, counsel admits she failed to comply with the Labor Code and did not provide a copy of the initial proposed settlement agreement to the LWDA. (Supp. Liss-Riordan Decl. ¶ 4.) Counsel has since filed the Proposed Settlement (as modified and filed concurrently with this supplemental briefing) with the LWDA on January 15, 2020. (Id. at ¶ 5.) Therefore, this condition is met.

B. Process

- Email Notice: The parties argue that email notice is the best practical notice. The Court's concern with email notice is that emails may be flagged as spam or deleted. Given that class members will receive their payment only if they submit a claim form, and will release their claims if they do nothing, counsel should be prepared to address whether both email and mail notice will provide better notice to class members.
- Opt-outs: Counsel should provide, at the hearing or through supplemental briefing, authority allowing a Court to preliminarily approve a settlement that prevents an attorney from opting out of said settlement on behalf of their clients/class members.
- Objections: Objections should be mailed/emailed to the Settlement Administrator only, not filed with the Court. (See Proposed Settlement ¶¶ 8.1, 8.2.)
- Claim Form: In the Supplemental Brief, counsel states: "Notwithstanding the formal "bar date" the parties will allow claims to be submitted as long as it is feasible prior to distribution. (Supp. Brief, 17.) This agreement to allow for late claims is at odds with the 60-day deadline imposed on class members to submit timely claim forms. (See Proposed Settlement ¶¶ 5.3, 5.4.)

C. Substance

- The parties should confirm the percentage of drivers *in California* that use the English version of the App, as opposed to nationwide, such that English-only notice is appropriate.
- The parties must provide the estimated payment each class member is expected to receive. It should be of no consequence that the estimated payment will inevitably depend on the number of claims submitted, and amount of attorney's fees and service awards awarded. In every settlement, the ultimate net settlement amount always depends on these factors. Counsel may assume a 100% claim rate, and the fees and awards granted as requested, in order to provide class members with the best possible estimation of payment.
- Counsel also states that while the Court ordered the Notice be modified to disclose that employer-side payroll taxes would be deducted from the settlement amount, no such taxes will be deducted because the payments are made via 1099. (Supp. Brief, 20, fn. 8; see Order, 7.) But see Proposed Settlement ¶ 2.44 [The Total Settlement Amount includes … taxes and tax expenses … Settlement Class Members' tax obligations arising out of the Settlement…."].) Plaintiffs should amend the Notice to remove employer-side payroll taxes. Plaintiffs must explain what "taxes, tax expenses, and Settlement Class Members' tax obligations," the Settlement Agreement is referring to.
- Page 9, § VIII: All references to objections being mailed or filed with the Court must be excluded.
- The Notice is not clear as it pertains to the instructions for emailing objections. (Compare Notice, Page 9, §7 with Page 9, § 8.)
- The end of the Notice should contain the Website URL and the documents contained on the settlement website should be listed, i.e., the operative complaint, the notice, the settlement agreement, preliminary approval order, all papers filed in connection with preliminary approval motions (including all orders and tentative rulings).
- Any revisions to settlement terms should be reflected in the notice.

V. Allocation and Distribution of Funds

A. Double Points

The Settlement proposes to double the points of class members "who opt out of arbitration, initiate

arbitration, or demonstrate in writing an interest in initiating an arbitration demand against Postmates." (Proposed Settlement, ¶ 5.7.) In their Supplemental Brief, Plaintiffs explain that they would consider a class member to fit this criteria if the class member either (1) provided Postmates with a valid request to opt out of its arbitration provision; (2) filed a demand for arbitration with the American Arbitration Association against Postmates challenging their classification; or (3) retained an attorney to represent them in filing a demand for arbitration against Postmates challenging their classification, even if the demand has not been filed. (Supp. Brief, 22-23.) Plaintiffs argue this plan for allocation is justified on the basis that these class members do not face the same risks as the rest of the class in bringing their claims. (Id. at 23.) For example, those who opted out of the arbitration clause or who intended to pursue individual arbitration do not face the risk of enforcement of an arbitration agreement and the loss of the ability to bring class claims. (Ibid.)

This explanation makes little sense. Plaintiffs simultaneously claim those who opted out of the arbitration clause have claims as strong as those who intend to pursue individual arbitration. Presumably, class members fall into either category: those who opt-ed out of the arbitration agreement and those who did not. Treating class members differently on account of them retaining an attorney to pursue their claims to minimize risk to Postmates is not a proper basis for allocation. The Court is also concerned with the documentation class members would be required to provide the Settlement Administrator to show that the class member retained an attorney.

B. Redistribution

Plaintiffs were asked to explain in more detail the residual distribution of uncashed checks. (Order, 9.) The Court requested more detail regarding the number of class members expected to receive at least $50, assuming a 100% claim rate (eligibility to receive a redistribution of the uncashed checks). (Proposed Settlement, ¶ 5.8.) The Court is concerned with the percentage of class members—less than 3%—that would qualify for redistribution of the uncashed checks under this scenario.

Similarly, the Proposed Settlement allows funds from the Dispute Resolution Fund to be redistributed to "Settlement class members who submitted late claims." (Proposed Settlement, ¶ 5.8.)

This provision is at odds with the 60-day deadline imposed on class members to submit their claim forms. Why are settlement class members permitted to submit late claims?

C. Opt-In Class

If the parties seek to provide class members with every opportunity to receive their individual share and are concerned with late claims, the parties should highly consider an opt-out settlement only. Counsel states that a claims process is less "messy" than sending checks without a claim form because checks often do not reach their intended recipients and are often cashed by current residents of class members' former addresses. (Liss-Riordan Decl., ¶ 10.) However, assuming a 100% claim rate, managing the claim forms of over 410,000 class members will inevitably be a difficult task, and have likely driven up the settlement administration costs which are estimated to be $250,0000, further reducing the amount available for the class. Furthermore, considering the parties preference for email notice as the "optimal means of distributing notice" because it "reaches almost 100% of the class" (Supp. Brief, 10), class members will have the opportunity to contact the Settlement Administrator to change their address of record if they have moved, as provided for in the Proposed Settlement Agreement and as detailed in the Notice.

VI. Release of Claims

A. Service Awards

With regard to Plaintiffs' use of the service award as consideration for the general release, counsel explains that courts commonly find that such service awards are appropriate consideration for a general release. (Supp. Brief, 25.)

In light of recent Ninth Circuit guidance, the service award should not be contingent upon Plaintiff signing a broader release. (See *Roes, 1-2 v. SFBSC Management, LLC* (9th Cir. 2019) 944 F.3d 1035, 1057-58 [holding a court should not permit common funds to be paid to settle individual claims in exchange for a general release, as payments for general releases (1) "appear to be contrary to [Ninth Circuit] caselaw on incentive payments," and (2) "also raise concerns about a potential conflict of interest between the class representatives and unnamed class members"].) While Plaintiffs may sign a broader

release, there is no good reason it should be given in exchange for the service award. Additionally, the fact that the funds not given to Plaintiffs are returned to the Net Settlement Amount for redistribution to the Class Members, further supports why a broader release should not be given in exchange for a service award. There is no reason the other settlement members should pay for what is in effect "broader" releases Plaintiffs provided to defendant. Thus, the parties must amend the language in the Proposed Settlement and the Notice.

B. FLSA Claims

Plaintiffs were also asked to reconcile ¶ 2.29 of the Proposed Settlement which purports to limit the FLSA release to those who submit valid claims, with ¶ 9.2 and ¶ 2.41 that effectuates a release unless a Class Member opts out. Plaintiffs did not do so. Paragraph 2.41 (The Settlement Class Members' Released Claims) releases the FLSA claims of all class members regardless of whether they file a claim form. This should be revised.

C. The *Rimler, Lee,* and *Albert* Complaints

Plaintiffs argue that the release of claims based the non-operative *Rimler* complaints (the initial Complaint and the First Amended Complaint), as well as the *Lee* and *Albert* complaints pending in federal district court is appropriate because courts have found that so long as settlement class members are apprised of the claims they are releasing, there is nothing wrong with releasing claims pending in another parallel action. (Supp. Brief, 26.) (Citing *Trombley v. National City Bank* (D.D.C. 2011) 826 F.Supp.2d 179, 202.)

Trombley is not exactly on point. There, the court found it proper to release the claims of a parallel action so long as the "notices were reasonably clear as to the release of claims." In this case, Plaintiffs are releasing claims based on "any allegations in the *Lee, Albert*, and/or *Rimler*" complaints. (Proposed Settlement ¶ 2.41.) It is not reasonably clear from the Settlement Agreement or the Notice what those claims are. Second, the Court is unclear why the allegations in these complaints are, in part, the basis for the release when the plaintiffs in those cases were added to the *Rimler* action here, and presumably their claims incorporated in the Proposed Second Amended Complaint. Third, counsel has provided no authority to base a release of claims on the allegations of a a non-operative complaint.

D. Broad Release of Claims

Plaintiffs first argue that it is commonplace in class action litigation for claims to be released beyond those asserted in the complaint, so long as they are tied to the same basic factual predicate. (Supp. Brief, 25.) (Citing *Cotter v. Lyft, Inc*. (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1038.) Plaintiffs claim that settlement is not feasible without providing defendants relief from the potential for repeated claims alleging slight variations. (Supp. Brief, 25.)

The cases cited by Plaintiffs propose that a settlement release may release claims the plaintiff did not originally bring, as long as the released claims arise from the same facts as those alleged in the lawsuit, and the settlement as a whole is reasonable in light of the strength and value of all the claims being released. (*Cotter*, 193 F.Supp.3d at 1038; see also *Reyn's Pasta Bella, LLC v. Visa USA, Inc*. (9th Cir. 2006) 442 F.3d 741, 748.) Here, the proposed released claims appear to be limited to claims that arise from the same facts and legal theory (misclassification).

VII. Miscellaneous Issues

- The parties revised the Class Definition. (See Proposed Settlement ¶ 2.36.) Parties must explain the effect and purpose of this change.
- Plaintiffs' initial motion stated that the class was understood to consist of 380,0000 individuals. (Motion, 13:23.) Plaintiffs now claim there are 411,671 potential settlement class members. (Supp. Brief, 24.) Plaintiffs must explain the change and the effect on the settlement.
- The Court will not order Settlement Class Members preliminarily and permanently enjoined from initiating litigation against Postmates. (Proposed Settlement ¶¶ 3.6.3.)
- The Settlement Administrator must be named in the Proposed Settlement Agreement. (See Proposed Settlement ¶ 2.34.)
- The declaration from Shannon Liss-Riordan does not contain a proper attestation under C.C.P. § 2015.5. All further declarations must be filed in accordance with the California Code of Civil Procedure.
- If any changes are made to the Proposed Settlement Agreement, Plaintiffs' counsel must submit the revised Proposed Settlement Agreement to the LWDA and submit proof of having done so.