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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN FRANCISCO**

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]

POSTMATES CLASSIFICATION CASES

Included Actions:

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

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

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

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

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

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

CASE NO. CJC-20-005068

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

Hon. Suzanne R. Bolanos

Dept. 303

Hearing: July 21, 2021, 2:00 p.m.

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## INTRODUCTION

In this case, Plaintiffs have reached a landmark class settlement with Postmates totaling $32 million, representing one of the largest settlements to date in a case challenging misclassification of "gig economy" workers. The proposed settlement is the result of hard-fought negotiation and thoughtful decision-making by highly experienced counsel who have successfully litigated, negotiated, and administered a number of other settlements of similar misclassification claims on behalf of gig economy workers.

As described in multiple rounds of briefing and further below, this settlement represents an excellent result for the class and should be preliminarily approved by the Court so that notice can be issued. Below, the parties have addressed the Court's inquiries and instructions in its July 2, 2021 order.[1]

## ARGUMENT

### I. Plaintiffs' Statement Regarding Why Class Certification of the Settlement Class Is Appropriate

The Court asked Plaintiffs to supplement their briefing with an explanation for why the proposed settlement class satisfies the class certification requirements. Plaintiffs assert that the class in this action should be certified for settlement purposes because it meets all requirements for class certification under applicable law. "Code of Civil Procedure section 382 allows class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." Bufil v. Dollar Financial Group (2008) 162 Cal.App.4th 1193, 1204. Section 382 has been construed to require an ascertainable class and a well-defined community of interest. Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809. To demonstrate the latter "community of interest" requirement, plaintiff must show: "(1) predominant questions of law or fact; (2) class representatives with

[1] The plaintiff in Santana v. Postmates, one of the coordinated cases, has now agreed to join in the settlement, which Plaintiffs in Winns v. Postmates and Vincent v. Postmates had previously agreed to join. The parties have included the Santana case in the revised Settlement Agreement being submitted concurrently. See Exhibit 1 to Declaration of Shannon Liss-Riordan (Liss-Riordan Decl.).

claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. A plaintiff must also demonstrate that a class action is superior to other forms of litigation. Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1234. Here, all of these factors are met.[2]

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

To determine whether a proposed settlement class is ascertainable for purposes of Cal. Code Civ. Proc. §382, courts consider "1) the class definition; 2) the size of the class; and 3) the means available for identifying class members." Reyes v. Board of Supervisors (1987) 196 Cal.App.3d 1263, 1271. Here, the proposed class is ascertainable because it is comprised of all drivers who used the Postmates platform as independent contractor drivers in California between June 3, 2017 and January 1, 2021. Postmates keeps records of the identities of these individuals, their contact information, and the estimated mileage they drove while performing deliveries. Thus, it will be able to provide this information for purposes of issuing notice and calculating the settlement distribution. The total class size is approximately 700,000 drivers. The numerosity requirement is easily satisfied. See Villalpando v. Exel Direct, Inc. (N.D. Ca. 2014) 303 F.R.D. 588, 605-06.[3]

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

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

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

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[2] Postmates' position is that it is agreeing to the certification of a settlement class for settlement purposes only, and that it would vigorously contest any efforts to certify a class outside the settlement context.

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

> independently established trade, occupation, or business of the same nature as the work performed.

(Cal. 2018) 4 Cal. 5th 903, 956-57. The California legislature codified this test in 2019 in Assembly Bill 5 (A.B. 5); Cal. Labor Code § 2775 et seq. Plaintiffs allege that Postmates drivers perform the same service—making deliveries to Postmates' customers—and that delivery is Postmates' usual course of business. Thus, Plaintiffs expect they would be likely to establish that Postmates drivers are employees under Prong B, and a class can be certified on this basis alone. Costello v. BeavEx, Inc. (7th Cir. 2016) 810 F.3d 1045, 1060. Plaintiffs also contend that the nature of proof needed to establish the usual course of Postmates' business or the work that class members perform will not vary. Indeed, a court in California recently certified a class of gig economy workers claiming misclassification under the California ABC test. See James v. Uber Techs. Inc., (N.D. Cal. 2021) 338 F.R.D. 123, 145 (certifying class of Uber drivers who had opted out of arbitration agreement).[4]

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

"Typicality is present when the named class representatives' interest in the action is significantly similar to that of the other class members." City of San Diego v. Haas (2012) 207 Cal.App.4th 472, 501. Here, each named Plaintiff performed services in California while classified as an independent contractor during the proposed settlement class period. See Declarations of Jacob Rimler, Giovanni Jones, Dora Lee, Kellyn Timmerman, and Joshua Albert (filed January 15, 2020); Declarations of Melanie Ann Winns, Ralph John Hickey, Jr.,

[4] Because the "ABC" test requires the employer to establish all three prongs, Plaintiffs' position is that it is unnecessary to discuss Prongs A or C, Dynamex, 4 Cal. 5th at 963, but Plaintiffs assert that the necessary evidence would be common under Prongs A and C as well. For example, Prong A asks whether the employer has the right to control the workers' performance, which Plaintiffs assert would go to Postmates' *contractual* right to control drivers, which would be common to all class members. And Prong C considers whether the workers "wear the hat" of the company, or of their own independently established business, which will also raise a common question for all class members. See, e.g., Portillo v. Nat'l Freight, Inc., (D.N.J. July 1, 2020) 2020 WL 3582514, *10 (certifying class under all three prongs of New Jersey ABC test); Mujo v. Jani-King Int'l, Inc., (D. Conn. Jan. 9, 2019) 2019 WL 145524, *8 (same, under Connecticut ABC test); DeGiovanni v. Jani-King Intern., Inc., (D. Mass. 2009) 262 F.R.D. 71, 84-86 (same, under Massachusetts ABC test).

Steven Alvarado, Kristie Logan, Shericka Vincent, and Wendy Santana (Exhibit 2 to Liss-Riordan Decl.). They all drove their personal vehicles to make deliveries to Postmates' customers. See id. Plaintiffs' claims therefore are typical of the proposed class.

**4. Plaintiffs Are Adequate Class Representatives**

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

Plaintiffs' counsel have extensive expertise and experience in "gig economy" cases and are widely considered the preeminent firm challenging the classification of workers as independent contractors in the so-called gig economy. Plaintiffs' counsel have achieved numerous successes against these companies. See, e.g., O'Connor v. Uber Techs., Inc. (N.D. Cal. 2015) 82 F. Supp. 3d 1133 (defeating defendant's motion for summary judgment); Cotter v. Lyft, Inc. (N.D. Cal. 2015) 60 F.Supp.3d 1067 (same); Lawson v. GrubHub, Inc. (N.D. Cal. July 10, 2017) 2017 WL 2951608, *1 (same). Plaintiffs' counsel was certified as class counsel in one of the first such cases, see O'Connor v. Uber Techs., Inc. (N.D.Cal. Sept. 1, 2015) 2015 WL 5138097, rev'd on other grounds, (9th Cir. 2018) 904 F.3d 1087; see also James v. Uber Techs., Inc., (N.D.Cal. Jan. 26, 2021) 2021 WL 254303 (certifying class of Uber drivers challenging misclassification). Plaintiffs' counsel was also the first (and, to date, only) plaintiffs' lawyer to litigate the status of a "gig economy" delivery driver all the way to trial, and that decision is currently on appeal. Lawson v. Grubhub, Inc. (N.D. Cal. 2018) 302 F. Supp. 3d 1071, appeal pending Ninth Cir. Appeal No. 18-15386.[5]

[5] Plaintiffs' counsel have also recently obtained a significant ruling from the California Supreme Court, holding Dynamex to be retroactive, see Vazquez v. Jan-Pro Franchising Int'l, Inc. (Cal. Jan. 14, 2021, No. S258191) 2021 WL 127201; a ruling denying a motion to dismiss

### 5. A Class Action is Superior to Other Means of Resolving Plaintiffs' Claims

"A class action also must be the superior means of resolving the litigation, for both the parties and the court." Aguiar v. Cintas Corp. No. 2 (Cal. Ct. App. 2006) 144 Cal.App.4th 121, 132. In determining whether a class action would be superior, courts consider factors such as judicial efficiency and the need to avoid many "separate, duplicative proceedings", see Sav-On Drug Stores, Inc. v. Superior Court, (2004) 34 Cal.4th 319, 340, and whether workers are unlikely to come forward to pursue their own individual claims in the absence of a class action, either because of the relatively small individual recoveries or the "desperate financial condition" of putative class members. See Reyes, 196 Cal.App.3d at 1279–1280. Here, there are approximately 700,000 class members, and granting class certification is superior to litigating the individual cases that would remain without certification.

## II. Notice

### 1. LWDA

Plaintiffs are submitting the Revised Agreement to the LWDA simultaneously with this filing. See Liss-Riordan Decl. ¶ 3.

### 2. Process

#### i. Opt-outs

As explained at the hearing, the parties agreed upon the attorney opt-out procedures in order to protect each class member's ability to individually choose whether to participate in the

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on the ground that Proposition 22 abates claims under A.B. 5, see Hassell v. Uber Techs. Inc., (June 21, 2021) 2021 WL 2531076; as well as other significant Ninth Circuit and California appellate decisions on the issue of independent contractor misclassification, see Haitayan v. 7-Eleven, Inc. (9th Cir. 2019) 762 F. App'x 393 (reinstating claims of misclassification for franchisees); Vazquez v. Jan-Pro Franchising Int'l, Inc. (9th Cir.) 923 F.3d 575, opinion reinstated in part on reh'g, (9th Cir. 2019) 939 F.3d 1050, (9th Cir. 2021) 986 F.3d 1106; Vazquez v. Jan-Pro Franchising Int'l, Inc., (2021) 10 Cal. 5th 944; and significant decisions on arbitration-related issues, see, e.g., Rivas v. Coverall N. Am., Inc. (9th Cir. Jan. 7, 2021) 2021 WL 58144, at *1 (affirming that PAGA claim could not be compelled to arbitration and that the Supreme Court's decision in Epic Systems did not abrogate the California Supreme Court's decision in Iskanian); Rittmann v. Amazon.com, Inc. (9th Cir. 2020) 971 F.3d 904 (holding AmazonFlex drivers exempt from the FAA under 9 U.S.C. § 1); Waithaka v. Amazon.com, Inc. (1st Cir. 2020) 966 F.3d 10 (same).

settlement. In the last several years, because so many plaintiffs' law firms have solicited gig economy workers to bring individual arbitration cases, many of these workers are confused about what lawyers claim to be representing them and who is sending these solicitations. It has been the undersigned counsel's experience that many workers, often unknowingly, have signed up to be represented by multiple firms. Thus, in order to mitigate against this confusion and the risk that law firms will opt out clients *en masse* from the settlement without conferring with clients about whether they would actually prefer to participate in the settlement (and who may not even know they are represented by that firm), the parties agreed – in consultation with Judge Massullo – to require attorneys to aver that they have in fact discussed the settlement with and advised their clients regarding the settlement (and the estimated amount they would receive under the settlement) and that the client class member was the one deciding to opt out of the settlement. See Hanlon v. Chrysler Corp. (9th Cir. 1998) 150 F.3d 1011, 1024 ("The right to participate, or to opt-out, is an individual one and should not be made by the class representative or the class counsel.").

Importantly, class members themselves may opt out with a simple email or written letter. See Revised Agreement ¶ 7.1. The stricter requirements that apply to counsel seeking to opt out on behalf of a client *do not apply* to class members opting out on their own. The parties have revised the requirements applicable to counsel filing opt-outs on behalf of their clients pursuant to the Court's instructions. See Revised Agreement ¶ 7.1.2.

**ii. Objections**

The agreement makes clear that class members may submit objections by email. See Revised Agreement ¶ 8.2 (noting that written objections must "be submitted to the Settlement Administrator by mail or in the body of an email").

**iii. Exclusion of an Individual**

The Court asked:

> *To the extent an excluded individual may notify the Settlement Administrator that he or she is a Settlement Class Member more than thirty days after the distribution of the*

*Settlement Class Notice, what does "the Parties shall endeavor to include the individual in the Settlement Class" mean?*

This means that, as long as it is feasible, the parties will include the driver in the class. In other words, if the class member does not come forward until after all the funds have been distributed, then it would not be possible to include the class member. But if the class member comes forward before then, and if there are funds remaining in the dispute resolution fund or from uncashed checks, and the settlement awards for all Settlement Class Members who submitted timely claims have been allocated or paid, then the class member would be included. The parties have revised the Settlement Agreement to clarify this. See Revised Agreement ¶ 6.11.

**iv. Settlement Share Disputes**

The parties have clarified in the Revised Agreement that a class member disputing their Estimated Miles on the notice may do so by submitting trip histories from the Postmates Application or tax documentation showing their mileage. See Revised Agreement ¶ 8.2.

**3. Substance**

The parties have made the requested revisions to the Notice outlined in the Court's order. See Revised Notice, attached as Exhibit A to Revised Agreement.

The Court noted that the Notice provides for attorneys' fees and costs based on 28% of the settlement while the Settlement Agreement provides for attorneys' fees and costs up to 33% of the settlement. The parties have revised the Notice to reflect attorneys' fees and costs up to 33%. However, Plaintiffs intend to request attorneys' fees and costs representing 28% of the settlement when they file their motion for attorneys' fees and costs.

## III. Allocation and Distribution of Funds and the Dispute Resolution Fund

**1. Double Points**

The Settlement Agreement provides that:

> Settlement Class Members will be awarded points proportional to the estimated number of miles driven while using the Postmates application as a courier, with one point for every estimated mile driven. Settlement Class Members who either opt out of arbitration, initiate arbitration, or demonstrate in writing an interest in initiating an arbitration demand against Postmates prior to January 1, 2021 will

> have their points doubled for purposes of this distribution formula (to account for, from plaintiffs' perspective, these drivers' greater likelihood of having their claims pursued, in light of Postmates' arbitration clauses).

See Revised Agreement ¶ 5.7. In its recent Order, the Court cited Plaintiffs' January 2020 briefing, in which Plaintiffs explained that they would consider a driver to satisfy this criteria if the driver "(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 (whether represented by counsel or acting pro se); 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." See Plaintiffs' Supplemental Brief, January 21, 2020, at 22-23. The Court indicated that class members should not be required to submit a retainer agreement with an attorney as proof that the class member should be entitled to double points, if the class member retained an attorney but did not actually file a demand for arbitration against Postmates. To clarify, the parties did not intend to require settlement class members to submit a retainer agreement as proof that the settlement class member retained an attorney but did not file a demand. Rather, the parties' intent is for the Settlement Administrator to award double points when the criteria in the Settlement Agreement are met, which includes when a Settlement Class Member's attorney informs Postmates in writing (by January 1, 2021) of the attorney's intent to file an arbitration demand against Postmates on behalf of the settlement class member. As for those drivers who did not receive double points and believe they are entitled to double points under the Settlement Agreement, these individuals should provide documentation via email or letter sufficient to show that they validly opted out of arbitration, initiated arbitration against Postmates, or communicated to Postmates (themselves or through counsel) an intent to initiate arbitration before January 1, 2021.

At the hearing, the Court has asked for the estimated number of drivers who will receive double points. According to Postmates' records, the parties estimate that approximately 50,000

couriers[6] would be eligible for a "double" share as a result of having opted out of the arbitration clause or having filed an arbitration demand or expressed intent to do so to Postmates in writing on or before January 1, 2021. This represents approximately 7.14% of class members.

**2. Dispute Resolution Fund**

The Court asked:

> *With respect to the redistribution of funds, the Settlement Agreement provides that residual funds from uncashed checks (and any remaining funds in the Dispute Resolution Fund) will only be distributed to class members for whom a second payment would be at least $50. (See Proposed Settlement ¶ 5.8.) This calculation is not dependent, then, on the number of class members who received an initial check of $50. Rather, it is dependent on the amount of residual funds of uncashed checks and funds remaining in the Dispute Resolution Fund, and whether that amount can provide, for at least some class members, a redistribution of at least $50. It seems to the Court that it is possible that very few Class Members will meet the $50 minimum because the amount of residual funds is far too low. This means that only some, and likely very few, of the Class Members will be entitled to the full Net Settlement Amount, which includes the funds earmarked for the Dispute Resolution Fund, after attorneys' fees, service awards, and costs are deducted. The parties should explain why the plan for redistribution is fair to the class as a whole.*

Plaintiffs continue to believe that that the Dispute Resolution Fund is an important component of this settlement. Counsel have routinely included dispute resolution funds in similar settlements, and they have been helpful for administering these settlements. If the funds are not used up for resolving disputes, their proceeds are distributed to class members in the final distribution. And they ensure that there are sufficient funds available for resolving bona fide disputes that may arise regarding distribution of the settlement.

Moreover, in compliance with Judge Massullo's prior order and this Court's July 2, 2021 Order, the parties have now modified the notice form to provide an estimate of each class member's settlement amount assuming both a 50% and 100% claim rate. The calculations of these settlement amounts will necessarily need to be done *before* the class notice is distributed and before 1) any individuals who were inadvertently excluded from the settlement class make themselves known to the administrator and 2) any class members submit disputes of their miles

[6] This figure represents Postmates' best current estimate based on a review of opt-out records and arbitration demands filed against Postmates.

or their status as a class member who should receive double points. A Dispute Resolution Fund is therefore necessary to handle bona fide disputes that may arise during the settlement administration process, and by setting these funds aside from the initial distribution, the parties may provide class members with more accurate estimates of what their settlement share will be. While the parties may also use uncashed checks as a fund to cover disputes that may arise, counsel have found that setting aside some modest amount such as that proposed here is important to address inevitable disputes that arise in the class settlement administration. Without the fund, resolving such disputes may cut into the funds that have been earmarked for other class members.

As the Court noted, prior to the second distribution, if any funds are remaining in the Dispute Resolution Fund, the funds will be distributed to class members who are entitled to receive at least $50. See Revised Agreement ¶ 5.7. This second residual distribution has been approved by courts on numerous occasions in similar settlements.[7] The $50 threshold was chosen in order to strike a balance between the parties' goal of maximizing the amount of funds that will be distributed to class members (as opposed to *cy pres*) with the added administration costs that come with sending out a second round of checks; the more individuals who receive a second check, the higher the administration costs. Furthermore, there is the concern that if checks are very small (for instance, just a few dollars or less), many class members will not bother to cash them, which defeats the purpose of the second distribution altogether and results in more money being sent to *cy pres* rather than to class members.

Moreover, the Dispute Resolution Fund represents a very small portion (approximately 1.4%) of the approximately $18 million that will be distributed to the class; thus, it should have a relatively insignificant impact on the amount to be distributed in the initial distribution. This

[7] See, e.g., Cotter v. Lyft, Inc. (N.D. Cal.) Case No. 13-cv-4065, Dkt. 169-1 at 75 (approving settlement with identical provision for distributing residual funds to only those class members whose share would be at least $50); Singer v. Postmates, Inc. (N.D. Cal.) Case No. 15-cv-1284, Dkt. 73-1 at 5.14 (same); O'Connor v. Uber Techs. Inc. (N.D. Cal.) Case No. 13-3826-EMC, Dkt. 916-1 at 142 (approving same process "but only those for whom the residual payment would be at least $100.").

fund is simply a way to resolve anticipated disputes regarding settlement amounts without impacting the amounts of other class members.

Pursuant to the Court's Order, the parties have revised the Settlement Agreement to note that, prior to final approval, the Settlement Administrator will submit a declaration accounting for the funds to be distributed from the Dispute Resolution Fund. See Revised Agreement ¶ 2.9.

**IV. Miscellaneous Issues**

- The parties are concurrently filing a stipulation and order for the filing of the Second Amended Complaint.
- The parties have modified the Settlement Agreement to require the Settlement Administrator to provide a list of objections to the Court, see Revised Agreement ¶ 8.7, in addition to the prior requirement that the Settlement Administrator provide a list of opt-outs. See Revised Agreement ¶ 7.3.

**CONCLUSION**

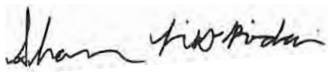
The parties have endeavored to address all of the Court's inquiries. The parties look forward to the preliminary approval hearing, at which time they would ask this Court to grant preliminary approval, allow notice to be issued to the settlement class, and set a date for final approval later this year.

Dated: July 15, 2021

Respectfully submitted,

JACOB RIMLER and GIOVANNI JONES, in their capacities as Private Attorney General Representatives,

By their attorneys,



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