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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KYRA GROVES, CATHERINE HAMMONS, TIMOTHY PIERCE, JAVIER CORTEZ, DONNA BURKS, on behalf of themselves and others similarly situated and in their capacities as Private Attorney General Representatives,

Plaintiffs,
v.

MAPLEBEAR, INC. d/b/a INSTACART,

Defendant

Case No. BC695401

NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE SERVICE ENHANCEMENTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 14, 2020
Time: 8:30 am
Department: 56
Reservation ID: 029198500698

Assigned for all purposes to:
Hon. Holly Fujie

Complaint filed: February 28, 2018

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT at 8:30 a.m. on January 14, 2019, or as soon thereafter as the matter can be heard, in Department 56 of the above entitled Court before the Honorable Holly Fujie, Plaintiffs Kyra Groves, Catherine Hammons, Timothy Pierce, Javier Cortez, and Donna Burks (collectively "Named Plaintiffs") and Related Action Plaintiffs Sarah Lozano, Timothy Hearl, Mimi Hayes, and Paul Taylor (collectively "Related Action Plaintiffs") will move for an order awarding attorneys' fees, litigation expenses and the Plaintiffs' service awards.

This Motion is brought in accordance with the Court's Preliminary Approval Order, and said Motion will be based on this notice, the accompanying points and authorities, the Declaration of Shannon Liss-Riordan, the Declaration of Robert S. Arns, the Declaration of Allen Graves, and the declarations of the respective Named Plaintiffs and Related Action Plaintiffs, the Class Action Settlement Agreement, as amended by Amendments No. 1 & 2 (collectively the "Agreement"), and the complete files and records in this action.

Because all parties have agreed to the proposed class settlement, this motion is not opposed by Defendant Maplebear, Inc. There has been one objection to the Settlement in this case as the prior Opposition by the Related Action plaintiffs has been withdrawn.

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I. INTRODUCTION

Pursuant to the terms of the Parties' Settlement Agreement, Plaintiffs Kyra Groves, Catherine Hammons, Timothy Pierce, Javier Cortez, and Donna Burks (and related action Plaintiffs Sarah Lozano, Timothy Hearl, Mimi Hayes, and Paul Taylor) seek 33% of the settlement fund for attorneys' fees, and class representative service enhancements ranging from $1,000 to $20,000 each, as described further below. Notably, following multiple notices issued to the class in this case, only one class member has objected to the requested fee and incentive awards.[1] In any case, the fact that only one class member out of a class of 66,197 people raised any concern about these requests weighs strongly in favor of the Court's approval.[2]

Moreover, the California Supreme has approved a fee award of one-third of an even larger settlement ($19 million), noting that "an award of one-third the common fund was in the range set by other class action lawsuits" and noting that contingency-based attorneys' fees in class action cases (with or without lodestar cross-check) are acceptable in California and are supported by public policy considerations. *See Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal. 5th 480, 488. Plaintiffs submit that their request for attorneys' fees here is further justified by the substantial

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[1] Objector Blackham has objected to the fact that this motion was not filed until after the deadline to object to the settlement had passed; however, the amount of the requested fee award and incentive payments was clearly disclosed to class members in the Notice. Objector Blackham has also objected to the amount of the requested fee award. Plaintiffs' counsel will address this aspect of the Objection in Plaintiffs' forthcoming response to the Objection, which is due on January 3, 2020. However, as set forth in great detail below, Plaintiffs believe the requested fee award is appropriate in light of the excellent results obtained for the class and the substantial work counsel has done in prior litigation against Instacart (which she was able to build on in obtaining an early settlement in this case). Moreover, Objector Blackham was a named plaintiff representing the settlement class in this case until he was apparently recruited by the Tidrick Law Firm to object to the settlement instead. In his capacity as a named plaintiff, he signed the settlement agreement, indicating his assent to the terms of the settlement (including the fee award.) However, Mr. Blackham has since been (improperly) solicited by the Tidrick firm and persuaded to reverse course now and object to the settlement. *See* Liss-Riordan Final Approval Decl. at ⁋ 34.

[2] *See, e.g.*, *Thieriot v. Celtic Ins. Co.* (N.D. Cal., Apr. 21, 2011) 2011 WL 1522385, *6 ("that no members of the 390–person class objected to the proposed 33% fee award—which was also communicated in the notice—supports an increase in the benchmark rate."); *Kifafi v. Hilton Hotels Ret. Plan*, (D.D.C. 2013) 999 F. Supp. 2d 88, 101 (finding that the "small number of objections [five objections out of almost 23,000 class members] weighs in favor of the requested fee").

monetary (as well as non-monetary) benefits conferred by the settlement, particularly given the uncertainty and risk as to whether this case could have proceeded as a class action at all due to Instacart's arbitration provision, which has already been enforced by several courts[3] as well as Plaintiffs' counsel's efficiency in obtaining this relatively prompt settlement, which, as described in greater detail below, was made possible by their tremendous effort aggressively litigating against Instacart for years in Massachusetts under an identical "ABC" test for employment status as well as their success in a host of very similar cases. *See O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2015) 82 F. Supp. 3d 1133 (denying motion for summary judgment in high-profile case challenging "sharing economy" company's classification of its workers as independent contractors); *Cotter v. Lyft, Inc.* (N.D. Cal. 2015) 60 F. Supp. 3d 1067 (same); *Lawson v. Grubhub, Inc.* (N.D. Cal., July 10, 2017, No. 15-CV-05128-JSC) 2017 WL 2951608, at *1 (same); *O'Connor v. Uber Technologies, Inc.* (N.D. Cal., Sept. 1, 2015, No. C-13-3826 EMC) 2015 WL 5138097, *rev'd on other grounds* (9th Cir. 2018) 904 F.3d 1087; *see also Mazola v. The May Department Stores Co.* (D. Mass. Jan. 27, 1999) 1999 WL 1261312, *2 (noting that the "percentage of the common fund" approach "may be appropriate for the counsel that innovated the cause of action, and took all the risks," in contrast to "counsel that takes advantage of the efforts of others who have . . . done the 'spadework'") (citing *Conley v. Sears, Roebuck & Co.* (D. Mass. 1998) 222 B.R. 181, 188).

Indeed, Plaintiffs' counsel submits that the very favorable terms reached relatively quickly in this case was made possible by counsel's tremendous efforts in other similar cases over the last several years that have been closely watched throughout the "gig economy". Indeed, counsel believes it was due to their substantial experience and reputation in this area, and particular expertise (spanning more than a decade) in cases challenging independent contractor

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[3] *See, e.g., Cobarruviaz et al. v. Maplebear Inc. dba Instacart* (N.D. Cal. 2015) 143 F. Supp. 3d 930, 947 (finding Instacart's arbitration agreement to be valid and enforceable under California law, and granting Instacart's motion to compel arbitration on an individual basis); *Bynum v. Maplebear Inc. d/b/a/ Instacart* (E.D.N.Y. 2016) 160 F.Supp.3d 527, 541 (same under New York law); *Moton v. Maplebear Inc. d/b/a Instacart* (S.D.N.Y. Feb. 9, 2016, No. 15 Civ. 8879) 2016 WL 616343, at *9 (same).

misclassification in a variety of industries, that led the defendant to agree to such a result at this point in the litigation. Moreover, Plaintiffs' counsel are known for their willingness to take cases to trial, including a number of class action wage cases that they have successfully tried to judges and juries – a rarity in this area of law.[4] Due to counsel's extensive efforts and experience, class members will be receiving substantial relief in this case without significant delay or further risks that remain in other pending cases.

Plaintiffs' fee request is also consistent with fee requests approved by California courts, including the California Supreme Court, *see Laffitte*, *supra* (approving one-third contingency fee request). *See also In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 457–58, 463 (upholding fee award of 33.3% of $1.725 million settlement); *Lusby v. GameStop Inc.* (N.D. Cal. Mar. 31, 2015) 2015 WL 1501095, *9 (in wage and hour action, awarding fees in the amount of one-third of common fund); *Singer v. Becton Dickinson and Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, *8 (same); *Burden v. SelectQuote Insurance Services* (N.D. Cal. Aug. 2, 2013) 2013 WL 3988771, *4 (same); *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. 2013) 297 F.R.D. 431, 450 (same); *Barnes et al., v. The Equinox Group*, (N.D. Cal. Aug 2, 2013) 2013 WL 3988804, *4; (same); *Hightower v. JPMorgan Chase Bank, N.A.* (C.D. Cal. 2015) 2015 WL 9664959, *11 (approving 30% fee request in part because "the risk of no recovery for Plaintiffs, as well as for Class Counsel, if they continued to litigate, were very real"); *Garner v. State Farm Mut. Auto. Ins. Co.* (N.D. Cal. Apr. 22, 2010) 2010 WL 1687829, *2 (approving 30% fee request and emphasizing "Class Counsel prosecuted this case on a purely contingent basis, agreeing to advance all necessary expenses, knowing that they would only receive a fee if there were a recovery"); *In re Nuvelo, Inc. Sec. Litig.* (N.D. Cal. July 6, 2011) 2011 WL 2650592, *2 (approving 30% fee request and noting "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk

[4] Indeed, counsel brought the first (and only, to date) misclassification case to trial against another "gig economy" company, GrubHub Inc. *See Lawson v. Grubhub, Inc.* (N.D. Cal. 2018) 302 F.Supp.3d 1071, *appeal pending*, Ninth Cir. Appeal No. 18-15386.

that they might be paid nothing at all"); *Kanawi v. Bechtel Corp.* (N.D. Cal. Mar. 1, 2011) 2011 WL 782244, *2 (approving 30% fee request and reasoning "[s]uch a practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney").

Plaintiffs emphasize the importance of contingency fee awards in encouraging plaintiffs' attorneys to file and litigate – efficiently – cases of importance, particularly those on behalf of lower-wage workers, and particularly those cases that are risky and uncertain. Because not every such case results in a fee award, fees that are awarded on a contingency basis from common fund settlements are essential for the continued prosecution of cases like this one and the ability of firms to maintain a practice representing low wage workers on contingency who are not able to afford paying attorneys' fees. *See Fleury v. Richemont N. Am., Inc.* (N.D. Cal. Apr. 14, 2009) 2009 WL 1010514, *3 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.... [i]f this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing") (internal citation omitted). As set forth at length in the accompanying Declaration of Shannon Liss-Riordan, it is through the award of contingency fees from cases that have succeeded, or resolved at an early stage successfully, that have made possible Plaintiffs' counsel's practice in which the firm has aggressively and tenaciously litigated cases for years on behalf of low wage workers.

Plaintiffs also request, as class representative service enhancements as follows: $20,000 each for Named Plaintiffs Kyra Groves and Catherine Hammons as well as for Related Action Plaintiffs Sarah Lozano, Timothy Hearl, Mimi Hayes, and Paul Taylor, $5,000 each for Plaintiffs Cortez and Pierce, and $1,000 for Plaintiff Burks for their service in this litigation. In addition to their important contributions to the case, their requests are also justified because merely associating their names with a high-profile lawsuit such as this one created a tremendous risk of

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being black-balled in the "gig economy" industry and beyond. The requested enhancements are also in line with incentive awards approved by this Court. *See*, *e.g.*, *Glass v. UBS Fin. Servs.,* (N.D. Cal. 2007) No. C-06-4068 MMC, 2007 WL 221862. at * 17 ("requested payment of $25,000 to each of the named plaintiffs is appropriate" in wage and hour settlement); *Garner v. State Farm Mut. Auto. Ins. Co.,* (N.D. Cal. 2010) No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8 ("Numerous courts in the Ninth Circuit and elsewhere have approved Service awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class") (collecting cases); *Hasty v. Elec. Arts, Inc.,* (San Mateo Cnty. Super. Ct. Sept. 22, 2006) No. CIV 444821 (approving an award of $30,000 to the class representative in a wage and hour class action); *Meewes v. ICI Dulux Paints,* (L.A. Cnty. Super. Ct. Sept. 19, 2003) No. BC265880 (approving service awards of $50,000, $25,000 and $10,000 to the named Plaintiffs).

II. LEGAL STANDARD

California has long recognized, as an exception to the general American rule that parties bear the costs of their own attorneys, the propriety of awarding attorneys' fees to a party who has recovered or preserved a monetary fund for the benefit of himself or herself and others. *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal. 5th 480, 488–89. In the context of class action litigation, attorneys' fees may properly be awarded pursuant to the common fund doctrine when a class settlement agreement establishes a relief fund from which the attorneys' fees are to be drawn. *Id.*

Under the terms of this class action settlement agreement, Plaintiffs move for an award of attorneys' fees in the amount of 33% of the settlement fund, or $3,655,000. *See* Agreement at ¶¶ I(8), I(19).

III. DISCUSSION

A. The California Supreme Court Has Endorsed the Use of Percentage Approach to Award Attorneys' Fees in Class Action Wage and Hour Cases

In *Laffitte*, *supra*, the California Supreme Court joined the "overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, the court may determine the amount of a reasonable fee by

choosing an appropriate percentage of the fund created." *Id.* at 503. In so doing, the Court described the "recognized advantages of the percentage method," including "ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation." *Id.*

The vast majority of Ninth Circuit and other federal courts are in accord. *See Aichele v. City of Los Angeles* (C.D. Cal. Sept. 9, 2015) 2015 WL 5286028, *5 ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, *i.e.*, class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.").[5]

One of the principle advantages of the percentage approach for awarding attorneys' fees in class action litigation is that it is result-oriented, thereby promoting the more efficient use of attorney time and resources, rather than encouraging attorneys to prolong litigation in order to inflate their recoverable hours. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.* (1st Cir. 1995) 56 F.3d 295 ("[U]sing the [percentage of fund] method . . . enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to spend as many hours as possible (and bill for them) but also face a strong disincentive to early settlement"). Similarly, the percentage method better approximates the workings of the marketplace by ensuring that attorneys receive compensation for the true value of their services

[5] *See also Knight v. Red Door Salons*, Inc. (N.D. Cal. Feb. 2, 2009) 2009 WL 248367, *5 ("use of the percentage method in common fund cases appears to be dominant") citing *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1047; *In re Activision Sec. Litig.* (N.D. Cal. 1989) 723 F. Supp. 1373, 1374–77 (collecting authority and describing benefits of the percentage method over the lodestar method); *Morales v. Conopco, Inc.* (E.D. Cal., 2016) 2016 WL 6094504, *7 ("Because of the ease of calculation and the pervasive use of the percentage of recovery method in common fund cases, the court thus adopts this method."); *Swedish Hospital Corp. v. Shalala* (D.C. Cir. 1993) 1 F.3d 1261, 1271 ("a percentage of the fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condominium Association v. Dunkle* (11th Cir. 1991) 946 F.2d 768, 774 ("we believe that the percentage of the fund approach is the better reasoned in a common fund case").

and skills. *Id.* at 307 ("Another point is worth making: because the [percentage of fund] technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace . . . the market pays for the result achieved") (quoting *In re Continental Ill. Sec. Litig*. (7th Cir. 1992) 962 F.2d 566, 572).

Cases which result in *no* recovery also demonstrate why the percentage approach is essential to plaintiff-side firms that engage in contingency practice on behalf of low-wage workers: for every successful case, there are always others that will be vigorously pursued for years only to result in no recovery for the class or counsel. *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ¶¶ 13-14. Indeed, Plaintiffs' counsel has spent years litigating other cases on behalf of workers without compensation, at considerable expense. *Id.* In the practice of their contingency work, Plaintiffs' counsel's firm has also advanced hundreds of thousands of dollars in out-of-pocket expenses, much of which have not been repaid, to pursue litigation on behalf of workers in various types of employment cases, including wage, tips, misclassification, and discrimination cases. *Id.* at ¶ 13.

To name just a few examples:

- Plaintiffs' counsel has litigated over the last several years many other cases against "gig economy" companies for misclassifying workers as independent contractors for which the firm has received, and are likely to receive, no or very little compensation. For example, in two such cases *Taranto, et al. v. Washio, Inc.*, (SF. Sup.) No. CGC-15-546584 and *Iglesias v. Homejoy, Inc.* (N.D. Cal.) No. 15-cv-01286-EMC, the companies shut down during the litigation, leaving the workers with no or little payment for their claims and Plaintiffs' counsel with no or little reimbursement for fees and expenses.

- Plaintiffs' counsel spent several years litigating on behalf of Boston and Chicago cab drivers, alleging that they have been misclassified as independent contractors under state law. In the litigation on behalf of the Boston cab drivers, the trial court ruled that the plaintiffs were likely to succeed on the merits of their claims and entered an injunction against the transfer of assets by the owner of Boston Cab Dispatch, an order that was worth more than $200 million, and which was affirmed on appeal. *See Sebago v. Tutunjian* (2014) 85 Mass. App. Ct. 1119. That result was, however, unexpectedly reversed on appeal to the Supreme Judicial Court, *Sebago v. Boston Cab Dispatch, Inc.* (2015) 471 Mass. 321, and that entire litigation, including many hundreds of hours of attorney time, went uncompensated. Similarly, the litigation on behalf of Chicago cab

drivers was unsuccessful, and the firm was not compensated for that work either. *See Enger v. Chicago Carriage Cab Co.* (N.D. Ill. 2014) 77 F. Supp. 3d 712, *aff'd*, (7th Cir. 2016) 812 F.3d 565.

- Likewise, Plaintiffs' counsel's firm has advanced many hundreds of thousands of dollars in expert expenses and incurred thousands of hours of unpaid attorney time for cases challenging discrimination in promotional exams for police officers in Massachusetts. Although the firm was successful at trial in an earlier case challenging entry level exams for firefighters and police officers, *see Bradley v. City of Lynn* (D. Mass. 2006) 443 F. Supp. 2d 145, a follow-up case that has been pending for 9 years, *Lopez v. City of Lawrence, Massachusetts* (D. Mass. June 11, 2010) 2010 WL 2429708, *1, was lost, and the judgment against the plaintiffs was affirmed on appeal, *see* (1st Cir. May 18, 2016) 2016 WL 2897639.

Id. at ¶ 13.

These cases demonstrate why a percentage-of-the-fund approach is essential to plaintiff-side firms that engage in contingency practice on behalf of low-wage workers; for every successful case, there are always others that will be vigorously pursued for years only to result in no recovery for the class or counsel. In sum, a plaintiffs-side contingency practice on behalf of low wage workers who could not afford to pay out-of-pocket for counsel, such as Plaintiffs' counsel's firm, is made possible by the nature of contingency fee work. Thus, in considering the fairness and reasonableness of the proposed attorneys' fees in this case, the Court should consider the nature of Plaintiffs' counsel's practice, which is only made possible by this contingency fee structure.

1. Counsel's Request for 33% of the Fund for Attorneys' Fees is Presumptively Reasonable

Courts in California have consistently approved a request for one-third of the common fund. *See, e.g., In re Cal. Indirect Purchaser X-Ray Film Antitrust Litig.* (1998) (Sup. Cr. Alameda Cty.) 1998 WL 1031494, *9 (awarding 30 percent of common fund as attorneys' fee and collecting California cases where fee awards constituted 30 to 45 percent of common fund).) "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 65, n. 11 (citation omitted); *see also Cotchett, Pitre & McCarthy* v. *Universal Paragon Corp.* (2010) 187 Cal. App. 4th 1405, 1421 (contingency fees typically

range *from* 33 to 40 percent of class benefit); *see also Laffitte, supra,* 1 Cal.5th at 485 (approving a one-third of common fund settlement.); *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal., 2007) 2007 WL 3492841, *4 (in wage and hour action, stating "fee awards in class actions average around one-third of the recovery" and awarding fees in that amount) (citing 4 Newberg and Conte, Newberg on Class Actions § 14.6 (4th ed. 2007)); *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 457–58, 463 (upholding fee award of 33.3% of $1.725 million settlement); *see also Lusby*, 2015 WL 1501095 at *9 (in wage and hour action, awarding fees in the amount of one-third of common fund); *Singer,* 2010 WL 2196104 at *8 (same); *Burden,* 2013 WL 3988771 at *4 (same); *Barbosa,* 297 F.R.D. at 450 (same); *Barnes*, 2013 WL 3988804 at *4 (same).

2. Other Factors Support Plaintiffs' Request for Fees

There is no definitive set of factors California courts require to be considered in determining the reasonableness of an attorneys' fees award; however, federal courts assessing fee requests under California standards have utilized factors including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *See Hendricks v. Starkist Co*. (N.D. Cal., Sept. 29, 2016) 2016 WL 5462423, *11 *citing Vizcaino*, 290 F.3d at 1048-50. Other courts have additionally considered (6) reactions from the class; and, if it so chooses, (7) a lodestar cross-check. *See Barnes v. The Equinox Group, Inc.* (N.D. Cal. 2013) 2013 WL 3988804, *4.

a. The Monetary and Non-Monetary Results Achieved by this Settlement Support Plaintiffs' Request

"When determining the value of a settlement, courts consider the monetary and non-monetary benefits that the settlement confers." *Taylor v. Meadowbrook Meat Company, Inc.* (N.D. Cal., 2016) 2016 WL 4916955, *5

Here, the settlement provides $10,965,000 to the settlement class of approximately 66,000

Instacart Shoppers.[6] After deductions for a payment to the Labor and Workforce Development Agency ("LWDA") ($112,500), the Settlement Administrator ($180,000), Class Counsel ($3,655,000), Litigation Costs ($50,000), a Subclass Fund for drivers who opted out of arbitration ($175,000), and incentive payments to the named Plaintiffs ($131,000), the balance of the settlement will be distributed to class members who have submitted claim forms in proportion to the total number of hours spent providing shopping and/or delivery services during the class period (with delivery hours receiving double-weight because of the increase in mileage-related expenses associated with making deliveries). *See* Agreement at ⁋ III(13)(c). Importantly, *no funds will revert to Instacart* – any unclaimed funds will be redistributed to class members who have submitted a claim and whose second share would be greater than $50, and any leftover funds following this residual distribution will go to *cy pres*, the Workers' Rights Clinic of Legal Aid at Work. *Id.* at ⁋ III(14)(i).

Additionally, the non-monetary component of the settlement includes changes to Instacart's policies and practices, specifically the following: (1) using a mileage-based component to the estimated payment amount for each order that is provided to Shoppers in California providing Delivering Services; (2) include as a component of its compensation algorithm, the estimated number of units picked in each order, and the estimated weight of known heavyweight items in each order, where weight information is available; (3) provide excess commercial automobile liability insurance for claims made by third parties against Shoppers while providing Covered Services, which will be secondary to the Shoppers' primary insurance; (4) inform customers when a Shopper performing Delivering Services is also the person who provided In-Store Shopping Services for the order; and (5) provide customers with the ability to provide different tip amounts to the different Shoppers who deliver a multi-store order for a customer's

[6] Of the 66,268 total settlement class members, roughly 11,000 Shoppers have very low shopping hours and no delivery hours, with 5,000 shoppers having *less than one hour total* spent on the Instacart Application. Thus, many Shoppers in the settlement class have negligible damages. Those Shoppers who spent a substantial amount of time on the Applications stand to receive thousands of dollars each. *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ⁋ 2, n. 1.

multi-store requests made in a single order. *See* Agreement at ¶ (III)(3). These non-monetary benefits of the settlement, though not precisely quantifiable, add transparency and make compensation fairer to take into account more difficult deliveries that are heavier, bulkier and farther away. This day-to-day value, in addition to the substantial monetary payments to be made to participating class members, provides a substantial benefit. *See Willner v. Manpower Inc.* (N.D. Cal. June 22, 2015) 2015 WL 3863625, *7 (a change in policy, even if it cannot be specifically valued, must factor into courts' analysis of the degree of success achieved by a settlement).

Significantly, Plaintiffs and their counsel have achieved this substantial monetary and non-monetary relief for Class Members quickly and efficiently, which, as discussed herein, would not have been possible without their significant experience litigating independent contractor misclassification cases, including their widely recognized work in cases against gig economy companies and their case against Instacart in Massachusetts. *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ⁋ 15, n. 4. As discussed herein and in counsel's declaration, counsel's extensive experience litigating wage and hour cases, particular specialization in misclassification cases, and demonstrated results in similar litigation contributed directly to an early and favorable result in this case. *See Sproul v. Astrue* (S.D. Cal. Jan. 30, 2013) 2013 WL 394056, *2 ("Courts are loathe to penalize experienced counsel for efficient representation…").

b. The Risk of Litigating this Case Were Substantial

There are many risks inherent in litigating a class action – class certification, arbitration provisions, a decision on the merits, and potential appeals are all issues that can result in no recovery whatsoever to class members or class counsel. *See Parkinson v. Hyundai Motor Am.* (C.D. Cal. 2010) 796 F. Supp. 2d 1160, 1166 ("The most important factor is the risk of nonpayment, which was significant in this contingency class action"). For this reason, courts

routinely find that this factor supports a higher fee request.[7]

In this case, Plaintiffs, class members, and their counsel faced all of these risks, every one of which could have resulted in no recovery whatsoever. Perhaps most notable was the risk that Plaintiffs' claims would be compelled to individual arbitration and they would therefore be unable to even attempt to represent a class, particularly in light of recent caselaw from the U.S. Supreme Court. *See Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612. Indeed, many courts have already found Instacart's arbitration agreement, including its class action waiver, to be enforceable. *See* cases cited *supra*, n. 3. While Plaintiffs would have been able to pursue their representative PAGA claims under *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, 386, *cert. denied*, (2015) 135 S. Ct. 1155, Instacart would have challenged that those claims were manageable on a representative basis. Additionally, Instacart could have filed a motion to compel arbitration of the PAGA claims on the theory that *Iskanian* was implicitly overruled by the Supreme Court's decisions in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (as many defendants have done of late), entitling it to an automatic right of appeal that would have delayed the case indefinitely.

Furthermore, although the *Dynamex* decision was recently codified into statutory law through the legislature's enactment of Assembly Bill 5, it has been well publicized that various

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[7] *See Hightower v. JPMorgan Chase Bank, N.A.* (C.D. Cal. 2015) 2015 WL 9664959, *11 (approving 30% fee request in part because "the risk of no recovery for Plaintiffs, as well as for Class Counsel, if they continued to litigate, were very real"); *Garner v. State Farm Mut. Auto. Ins. Co.* (N.D. Cal. Apr. 22, 2010) 2010 WL 1687829, *2 (approving 30% fee request and emphasizing "Class Counsel prosecuted this case on a purely contingent basis, agreeing to advance all necessary expenses, knowing that they would only receive a fee if there were a recovery"); *In re Nuvelo, Inc. Sec. Litig.* (N.D. Cal. July 6, 2011) 2011 WL 2650592, *2 (approving 30% fee request and noting "It is an established practice to reward attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all"); *Kanawi v. Bechtel Corp.* (N.D. Cal. Mar. 1, 2011) 2011 WL 782244, *2 (approving 30% fee request and reasoning "[s]uch a practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney"); *Bellinghausen*, 306 F.R.D. at 261 (noting that "when counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award"); *Hensley v. Eckerhart* (1983) 461 U.S. 424, 448 (noting that "[a]ttorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate").

1 "gig economy" companies still intend to challenge this legal development by launching a ballot
2 initiative next year to carve these companies out of the law. *See* John Myers, "Uber, Lyft,
3 DoorDash launch a $90-million fight against California labor law", *Los Angeles Times* (Oct. 29,
4 2019) (attached as Ex. D to Liss-Riordan Final Approval Decl.). Moreover, even if *Dynamex* did
5 apply and the PAGA claim proceeded expeditiously (without an appeal), there would have been
6 the significant risk that any potential penalties would have been reduced by the Court to a fraction
7 of what might have been recovered as damages, given a potential finding that Instacart classified
8 class members as independent contractors in good faith or that the higher penalty amounts were
9 confiscatory. Courts have abundant discretion to reduce PAGA penalties. *See* Cal. Lab. Code §
10 2699(e)(2).[8] Even without the risks outlined above, absent this settlement, class members would
11 run the risk of losing on the merits at trial or on appeal.

12 **c. Counsel Have Extensive Background in this Field of Law**

13 Prosecuting class actions requires an "extraordinary commitment of time, resources, and
14 energy from Class Counsel," and, many times, settlements "simply [are not] possible but for the
15 commitment and skill of Class Counsel." *Garner*, 2010 WL 1687829, at *2. This is particularly
16 so where a "case was wholly without precedent, raised numerous novel and complex issues of
17 both law and fact, and required a considerable effort from Class Counsel simply to be in a
18 position to file suit, let alone to litigate this case successfully." *Id.*

19 Here, Counsel's work on the cutting edge of wage-hour class actions, with a specialty in
20 cases involving independent contractor misclassification and arbitration clauses. *See* Liss-Riordan
21 Decl. in support of Mot. for Attnys' Fees at ¶¶ 3-9. As described in her Declaration, Attorney
22 Liss-Riordan has been featured by many major publications for her accomplishments representing
23 low wage workers in a variety of industries.[9] Each year since 2008, she has been selected for

24 [8] *See also Harris v. Radioshack Corp.* (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645, *3-4;
25 *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *3-4; *Makabi v. Gedalia* (Cal. Ct. App. Mar. 2, 2016) 2016 WL 815937, at *2 & n.3 (unpublished).

26 [9] These publications include San Francisco Magazine (Exhibit A to Liss-Riordan
27 Declaration), the Los Angeles Times (Exhibit B), the Wall Street Journal (Exhibit C), American Lawyer (Exhibit D), the ABA Journal (Exhibit E), the Recorder (Exhibit F), Mother Jones
28 (Exhibit G), the Boston Globe (Exhibits H and I), and Commonwealth Magazine (Exhibit J).

inclusion in *Best Lawyers in America* (Chambers), and her firm has been consistently been ranked in recent years in the top tier for its practice area. The 2013 edition referred to her as "*the reigning plaintiffs' champion*", and the 2015 edition said she is "*probably the best known wage class action lawyer on the plaintiff side in this area, if not the entire country*." *Id.* at ¶ 7.[10] She is a frequent invited speaker at local and national seminars on various topics regarding employment law, class actions, and wage and hour litigation, with a particular focus on issues concerning arbitration and class actions. *Id*. at ¶ 5. Ms. Liss-Riordan's firm is well known as one of the preeminent employee-side firms engaged nationwide in this area of practice. *Id*. Counsel's skill and extensive experience in this area of law, coupled with a willingness to take on risky cases like this one, justifies Plaintiffs' fee request.

Similarly, counsel for the Related Action Plaintiffs lent their experience to help secure this settlement, as amended. For instance, Attorney Arns, who represents the Related Action Plaintiffs in the *Lozano* case has been in practice for over forty years and has tried over sixty cases to a jury verdict. *See* Arns Decl. at ¶ 4. He has worked on over thirty other class action matters, including numerous wage-and-hour cases and a prior case nationwide case against Instacart, *Camp v. Maplebear Inc. dba Instacart*, BC 652216. *Id.* Similarly, Attorney Graves, who represents Related Action Plaintiff Paul Taylor, is an accomplished wage-and-hour attorney who has represented plaintiffs in numerous representative actions under California law and has served as a lecturer and instructor on employment law. *See* Graves Decl. at ¶¶ 6-7.

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[10] Each year since 2008, she has been listed by the *Boston Globe Magazine* as one of "Boston's Best Lawyers." *Id.* at ¶ 8. She has been named a "Super Lawyer" by *Boston Magazine* each year since 2005. She was named one of ten "Lawyers of the Year" by *Massachusetts Lawyers Weekly* in 2002 (in her fourth year of practice). *Id.* In 2009, she was included on "The Power List", *Massachusetts Lawyers Weekly*'s "roster of the state's most influential attorneys" (which described her as a "[*t*]*enacious class-action plaintiffs' lawyer [who] strikes fear in big-firm employment attorneys throughout Boston with her multi-million- dollar victories on behalf of strippers, waiters, skycaps and other non-exempt employees*."). *Id*. San Francisco Magazine wrote a profile on counsel stating "Liss-Riordan has achieved a kind of celebrity unseen in the legal world since Ralph Nader sued General Motors." *See* Ex. A to Riordan Decl. in support of Mot. for Attnys' Fees.

d. Counsel Incurred a Substantial Financial Burden in Litigating this Case on a Contingency Fee Basis

The contingent nature of litigating a class action and the financial burden assumed typically justifies a higher percentage of the fund as well since counsel litigates with no payment and no guarantee that the time or money expended will result in any recovery.[11] As with virtually all work handled by Plaintiffs' counsel's firm, counsel accepted this case on a fully contingent arrangement, with no payment up front, and have borne the expenses, costs, and risks associated with litigating this case. Plaintiffs' attorneys who accept cases on contingency often spend years litigating cases (typically while incurring significant out-of-pocket expenses for experts, transcripts, document production, and so forth), without receiving any ongoing payment for their work. Sometimes fees and expenses are recovered; other times, nothing is recovered. As discussed *supra*, Plaintiffs' counsel has litigated many cases for years, at times winning in the trial court, only to lose on appeal and receive nothing for thousands of hours of work. As noted in *Vizcaino* and other cases, substantial fee awards encourage counsel to take on risky cases on behalf of clients who cannot pay hourly rates and would therefore not otherwise have realistic access to courts. That access is particularly important for the effective enforcement of public protection statutes, such as the wage laws at issue here. Thus, "private suits provide a significant supplement to the limited resources available to [government enforcement agencies] for enforcing [public protection] laws and deterring violations." *Reiter v. Sonotone Corp.* (1979) 442 U.S. 330, 344. By incentivizing plaintiffs' attorneys to take on risky, high-stakes, and important litigation,

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[11] *Bower v. Cycle Gear Inc.* (N.D. Cal. 2016) 2016 WL 4439875, *7 (awarding 30% of common fund for fees and noting that counsel had litigated the action for almost two years with no payment and no guarantee of recovery); *see also Hendricks*, 2016 WL 5462423, at *12 (finding that enhancement from 25% benchmark was warranted because class counsel carried a substantial financial burden both in advancing out-of-pocket costs and in representing plaintiff and the class members on a contingency basis); *see also Hightower v. JPMorgan Chase Bank, N.A.* (C.D. Cal. 2015) 2015 WL 9664959, *10 ("any law firm undertaking representation of a large number of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy, and resources with the very real possibility of an unsuccessful outcome and no fee recovery of any kind.") (internal quotations omitted) *citing Vizcaino*, 290 F.3d at 1051 ("attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose").

and devote themselves to it aggressively and fully, fee awards serve an important purpose and extend the access of top legal talent to constituencies such as low-wage workers who would otherwise never be able to confront large corporations such as Instacart, who are themselves represented by top-rated and top-billing attorneys. The fees awarded in this case will be used to support future cases on behalf of workers in California, as well as providing compensation for counsel for past and future cases where the risks result in no reward.

f. The Reaction of the Class (or Lack Thereof) Supports Plaintiffs' Fee Request

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528–29.

Here, 66,197 Class Members were sent notice of the settlement on multiple occasions, and only a single class member has objected to Plaintiffs' fee request (or to the settlement at all). Accordingly, this factor weighs heavily in favor of Plaintiff's request. *See In re Cendant Corp., Derivative Action Litig.* (D.N.J. 2002) 232 F. Supp. 2d 327, 338 ("the extremely small number of complaints that have arisen regarding the proposed attorneys' fees in the Settlement Agreement [six objections out of more than 200,000 class members]…weighs in favor of approval of the requested attorneys' fees."); *Kifafi*, 999 F. Supp. 2d at 101 (the "small number of objections [five objections out of almost 23,000 class members] weighs in favor of the requested fee").

g. A Lodestar Cross-Check, if Applied, Supports Plaintiffs' Fee Request

California courts have the discretion to employ (or decline to employ) a "lodestar cross-check" on a request for a percentage of the fund fee award. *Laffitte*, 1 Cal. 5th at 505. However, as noted before, the California Supreme Court in *Laffitte* has now made clear that this cross-check is not required. *Id.* Plaintiffs submit that a cross-check is not necessary in this case, as it is recognized that the lodestar cross-check can reward unnecessary overbilling, inflation of timekeeping records, and inefficient litigation. *See Albion Pac. Prop. Res., LLC v. Seligman*

(N.D. Cal. 2004) 329 F. Supp. 2d 1163, 1170-71 (noting that "[a] fee applicant should neither be rewarded for hiring expensive legal counsel nor penalized for hiring more efficient legal counsel. Thus, if a fee applicant can demonstrate that its attorneys billed fewer hours than reasonably competent counsel would have billed, the fee applicant should be reimbursed at an above-average hourly rate").

This is one of many cases that have been filed against gig economy companies by Plaintiffs' counsel, and the cases involve similar (though not identical facts), and several of the cases have been litigated heavily. *See O'Connor*, *supra* (821 docket entries); *Cotter*, *supra* (341 docket entries). Similarly, in the earlier-filed arbitration action on behalf of Massachusetts Shoppers, *Busick v. Maplebear Inc. dba Instacart*, JAMS Case No. 1100081511, Plaintiffs' counsel engaged in extensive motion practice and discovery over the course of four years that including an objection to the *Camp* settlement and hundreds of hours of work.[12]

i. In Any Event, The Lodestar Cross-Check, if Applied, Confirms that Plaintiffs' Request is Reasonable

Should the Court elect to apply it, the lodestar cross-check is simply a comparison of Counsel's lodestar (the number of hours counsel reasonably expended on the litigation by a

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[12] In *Busick*, Plaintiffs' counsel filed a clause construction brief and reply, a class certification motion, Reply and Supplemental Reply, an Opposition to Instacart's Motion to strike Class Allegations, an Opposition to Instacart's petition to vacate the clause construction award and surreply in further opposition, an Opposition to Instacart's Petition for an Extraordinary Writ to the California Court of Appeals, an Answering Brief at the California Court of Appeals, and two oppositions to Instacart's motions to stay the arbitration: one in San Francisco Superior Court and one before the arbitrator. *See* Liss-Riordan Decl. in support of Mot. Attnys' Fees at ⁋ 15, n. 4.

Likewise, while the *Busick* litigation was ongoing, a nationwide settlement of misclassification-related claims against Instacart was announced in *Camp v. Maplebear Inc. dba Instacart*, Case No. BC652216, which purported to settle the claims of the Massachusetts Instacart workers in *Busick*. On behalf of Ms. Busick, counsel objected to the Camp settlement (only with respect to its treatment of the Massachusetts workers she was representing). *Id.* In connection with that effort, counsel filed a Motion to Intervene and Reply Brief in Support, a Motion to Opt Out the Certified Class and Reply Brief in Support, three Objection briefs, a Motion to Vacate the Judgment in Camp, and two Oppositions to Motions to Dismiss two separate appeals from the Camp settlement in the California Court of Appeals. *Id.* Counsel also argued at a hearing on Instacart's Motion to Vacate the Clause Construction award, an *ex parte* emergency motion to stay the arbitration before the San Francisco Superior Court, and an appeal at the California Court of Appeals (which she won). Counsel also appeared on numerous occasions in connection with preliminary and final approval of the *Camp* settlement and to argue her Motion to Intervene and objections. *Id.*

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reasonable hourly billing rate) to the percentage of the fund requested.

Here, counsel calculates their lodestar at approximately $966,693 yielding a multiplier of approximately 3.16 that would be applied to reach the percentage of the fund requested. *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ¶¶ 24-25. A summary of the firm's hours and costs is included the corresponding declaration of Shannon Liss-Riordan at ¶¶ 15-25.

The current multiplier is supported by case law from California and other jurisdictions. *Natural Gas Anti-Trust Cases I, II, III & IV* (Cal. Sup. Ct. 2006) 2006 WL 5377849, *4 ("This Court and numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees."); *In re California Indirect Purchases* (Cal. Sup. Ct. 1998) 1998 WL 1031494, *10 (citing *Wilson v. Bank of America Nat'l Trust & Sav. Ass'n.,* (Cal. Sup. Ct. 1982) No. 643872 (multiplier of 10 times the hourly rate awarded) (cited in 3 Newberg & Conte, Newberg on Class Actions, § 1403, at 14-5 n.21), and *Glendora Community Redevelopment Agency v. Demeter* (Cal. App. 2 Dist., 1984) 155 Cal. App. 3d 465, 479 (approving fee award 12 times estimated lodestar multiplier)); *see also Beckman v. KeyBank, N.A.* (S.D.N.Y. 2013) 293 F.R.D. 467 (in overtime exemption misclassification case settled pre-litigation, with only informal damages-related discovery and no substantive motion practice, approving percentage-based fee award that represented multiplier of 6.3 in a $4.9 million settlement); *New England Carpenters Health Benefits Fund v. First Databank, Inc.* (D. Mass. Aug. 3, 2009) 2009 WL 2408560, *2 (multiplier of 8.3); *Weiss v. Mercedez–Benz* (D.N.J. 1995) 899 F. Supp. 1297 (multiplier of 9.3); *Conley v. Sears, Roebuck & Co.*, (D. Mass. 1998) 222 B.R. 181, 182 (multiplier of 8.9); *In re Rite Aid Corp. Securities Litig.*, 362 F. Supp. 2d (E.D. Pa. 2005) 587, 589-90 (multiplier of 6.96); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.* (E.D. Pa. May 19, 2005) 2005 WL 1213926, *18 (15.6 multiplier).

ii. Counsel's Hours Worked are Reasonable

In order to calculate counsel's lodestar for purposes of the cross-check, Plaintiffs have submitted a declaration attesting to the estimated number of hours Ms. Liss-Riordan, Ms. Pagano, and the firm's staff have spent on this litigation and anticipate spending on the litigation in the

coming months. *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ¶¶ 15-22.[13] Similarly, counsel for the Related Action Plaintiffs have submitted their own declarations outlining their hours spent on the litigation and respective multipliers for their time. *See* Arns Decl. at ¶ 3; Graves Decl. at ¶ 54, Ex. 5 to Graves Decl.

For example, as detailed in counsel's declaration, counsel spent substantial time investigating a potential case against Instacart, drafting the PAGA letter and complaint, reviewing documents and preparing for mediation, interviewing the Named Plaintiffs and other class members at length on multiple occasions, analyzing comprehensive data produced by Instacart in connection with mediation, mediating the case over the course of three separate sessions, engaging in further negotiations following mediation, and guiding the case through the settlement approval process (including responding to a Motion to Intervene and Opposition filed by the Related Action Plaintiffs, filing supplemental briefing in response to the Court's request, negotiating Amendments to the Settlement, and significant time spent working with the Settlement Administrator regarding settlement administration issues). *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ¶ 15. Additionally, lead counsel estimates at least an additional 50 hours of work responding to the Blackham objection, preparing for, traveling to and attending the final approval hearing, and continuing to work with the Settlement Administrator to facilitate administration of the settlement. *Id.*

Thus, counsel's time spent on this case can be generally divided into several categories of activity, all of which is recoverable under well-established case law:

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[13] In assessing counsel's lodestar (for cross-check purposes or otherwise), a court is permitted to "us[e] counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task." *Laffitte*, 1 Cal. 5th at 505 (also stating "detailed time sheets" are not required as part of a lodestar calculation – whether as a cross-check or otherwise); *In re Rossco Holdings, Inc.* (C.D. Cal. May 30, 2014) 2014 WL 2611385, *8 ("In California, an attorney need not submit contemporaneous time records in order to recover attorney fees"); *Rodgers v. Claim Jumper Rest., LLC* (N.D. Cal. Apr. 24, 2015) 2015 WL 1886708, *10 ("Plaintiff's counsel is not required to record in great detail how each minute of his time was expended" and can instead "meet his burden of justifying his fees by simply listing his hours and "identifying the general subject matter of his time expenditures"); *Rodriguez v. Cty. of Los Angeles* (C.D. Cal. 2014) 96 F. Supp. 3d 1012, 1023-24 ("Courts generally accept the reasonableness of hours supported by declarations of counsel.").

- Pre-litigation investigation: *see*, *e.g.*, *Sierra Club v. U.S. E.P.A.* (N.D. Cal. 2007) 625 F. Supp. 2d 863, 870; *see also Lema v. Comfort Inn Merced* (E.D. Cal. Apr. 17, 2014) 2014 WL 1577042 (approving of pre-litigation work "reasonably necessary to secure information, evaluate Plaintiff's case, and prepare the complaint for filing").

- Legal research and drafting: *see Santiago v. Equable Ascent Fin.* (N.D. Cal. July 12, 2013) 2013 WL 3498079, *6.

- Communication between co-counsel: *E.g., Defenbaugh v. JBC & Associates, Inc.* (N.D. Cal. Aug. 10, 2004) 2004 WL 1874978.

- Communication with opposing counsel: *E.g., Hernandez v. Erin Capital Mgmt., LLC* (C.D. Cal. Oct. 3, 2011) 2011 WL 4595802, *3.

- Settlement conferences: *E.g., Lota by Lota v. Home Depot U.S.A., Inc.* (N.D. Cal. Dec. 31, 2013) 2013 WL 6870006, *10.

- Court appearances: *E.g.*, *Alvarado v. FedEx Corp.* (N.D. Cal. 2011) 2011 WL 4708133, *28.

- Settlement administration: *E.g.*, *Wren v. RGIS Inventory Specialists* (N.D. Cal. 2011) 2011 WL 1230826, *30.

Because this case has been efficiently litigated and was settled at an early stage, there is no need for the Court to comb through records to eliminate duplicative billing, nor could there be a reasonable argument that this case was overstaffed.

iii. Counsel's Hourly Rates are Reasonable

Plaintiffs assert the following hourly rates for counsel and staff: Shannon Liss-Riordan (attorney) - $850; Adelaide Pagano (attorney) - $425; Paralegal and Staff - $200.

Attorney Liss-Riordan's rate, which is the rate she has been awarded in recent cases, is in line with, if not lower, than the rates that have been approved in this district for other top lawyers. *See, e.g., Gutierrez v. Wells Fargo Bank, N.A.* (N.D. Cal. May 21, 2015) 2015 WL 2438274, *5 (in consumer class action, finding reasonable rates of between $475-$975 for partners); *Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan* (N.D. Cal. Dec. 22, 2018, No. 3:16-CV-01413-JD) 2018 WL 6726963, *1 (approving the requested hourly rate of $900 for partner in ERISA case); *Civil Rights Educ. & Enf't Ctr. v. Ashford Hosp. Tr., Inc.* (N.D. Cal. Mar. 22, 2016) 2016 WL 1177950, *5 (approving an hourly rate of $900 for highly experienced partner); *Nat'l Fed'n of the*

Blind of Cal. v. Uber Techs., Inc. (N.D. Cal. Dec. 6, 2016), No. 14–cv–4086–NC. Order Granting Final Approval and Attorneys' Fees (Dkt. No. 139) (approving hourly rates of $900 and $895 for senior partners).[14] Indeed, Ms. Liss-Riordan's rate is on par with established wage and hour practitioners, *see Villalpando v. Exel Direct Inc.*, (N.D. Cal.) 3:12-cv-04137-JCS, Dkt. No. 344-1 at ¶ 74 (asserting $795 hourly rate for wage and hour firm partner). *See* Liss-Riordan Decl. in support of Mot. for Attnys' Fees at ⁋ 16.

Ms. Liss-Riordan's work warrants this rate because of her exceptional qualifications and status as a national expert on wage and hour litigation. She is especially well known for successfully representing low wage workers in scores of cases that include precedent-setting trials and appeals. In this case, Ms. Liss-Riordan, along with the other attorneys working with her and under her direction, were able to draw from the wealth of experience that she and her firm have developed over the last two decades in this area of wage law, and her particular expertise in independent contractor misclassification cases. Ms. Liss-Riordan's national prominence in this field, breadth of experience, success in litigating employment misclassification cases in new and emerging industries, and comparison to defense counsel's rates, justifies an hourly rate of $850, if not more. This rate has also been approved in recent settlement approval orders. *See O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2019 WL 4394401, at *11 (N.D. Cal. Sept. 13, 2019) (approving $850 hourly rate for Attorney Liss-Riordan); *Cotter v. Lyft Inc.*, (N.D. Cal. Mar. 16, 2017) 2017 WL 1033527 Order Granting Final Approval of Settlement Agreement (Dkt. No. 310) (approving $800 hourly rate for Attorney Liss-Riordan); *Singer v. Postmates* (N.D. Cal. April 25, 2018) 4:15-cv-01284-JSW (approving $800 hourly rate for Attorney Liss-Riordan); *In Re Caviar, Inc.*, JAMS Ref. No. 1100082951 (same); *Tang, et al. v. Shyp, Inc.*, JAMS Ref. No.

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[14] *See also Ridgeway v. Wal-Mart Stores Inc.*, (N.D. Cal. 2017) 269 F. Supp. 3d 975, 984 (approving rates above $800 per hour for five senior partners); *Betancourt v. Advantage Human Resourcing, Inc.* (N.D. Cal. Jan. 28, 2016) 2016 WL 344532, *8 (in employment law class action, noting "reasonable rates for partners range from $560 to $800"); *In re Magsafe Apple Power Adapter Litig.* (N.D. Cal. Jan. 30, 2015) 2015 WL 428105, *12 (in consumer class action, finding that "[i]n the Bay Area, reasonable hourly rates for partners range from $560 to $800").

01-15-0004-0358 (same); *Reid v. Postmates, Inc.,* JAMS Ref. No. 1100081502 (same).[15]

Likewise, the rates asserted by the Related Action counsel are reasonable, as set forth in the accompanying declarations of Robert S. Arns and Allen Graves. *See* Graves Decl. at ¶¶ 46-48, Ex. 4 to the Graves Decl. For instance, Judge Wiley approved an hourly billing rate of $950 for Attorney Arns in the *Camp* case, which settled similar misclassification claims on behalf of a nationwide class of Instacart Shoppers. *See Camp v. Maplebear Inc. dba Instacart*, (Los. Angeles Sup. Ct. Jan 16, 2018) BC652216.

iv. Applying a Multiplier to Counsel's Lodestar Is Reasonable

If the Court elects to use counsel's lodestar as the method for awarding fees, notwithstanding courts' clear preference for the percentage method, Plaintiffs urge the Court to approve the resulting multiplier of 3.16.[16] California courts have a "relatively permissive attitude on the use of multipliers," *Lealao v. Beneficial California, Inc.,* (2000) 82 Cal. App. 4th 19, 24, and, as noted above, courts in California and elsewhere have awarded multiplier substantially

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[15] The rate asserted for Ms. Pagano, a 2014 Harvard Law School graduate who has five years of licensed experience who was recently promoted to partner at the firm, is also reasonable. *See, e.g., Villalpando*, 3:12-cv-04137-JCS, Dkt. No. 344-1 at ¶ 74 (asserting $500 hourly rate for plaintiffs-side wage and hour attorney admitted in 2014); *Luna v. Universal City Studios, LLC*, (C.D. Cal. Sept. 13, 2016) 2016 WL 10646310, at *9 (adopting hourly rate of $410 for associates with three to seven years' experience in wage-and-hour class action); *Dmuchowsky v. Sky Chefs, Inc.*, (N.D. Cal. May 1, 2019) 2019 WL 1934480, at *12 (approving hourly rate of $400 for graduate of law school class of 2014); *Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc.*, (N.D. Cal. Dec. 6, 2016) No. 14–cv–4086–NC Order Granting Final Approval and Attorneys' Fees (Dkt. No. 139) (approving hourly rate of $355 for law school class of 2014).

The rates asserted by counsel's firm's paralegal staff are also reasonable. *Betancourt*, 2016 WL 344532, *8 (reasonable rates and paralegals and litigation support staff range from $150 to $240); *Dixon*, 2014 WL 6951260, at *10 ("The court finds that a reasonable hourly rate for paralegals … is $200 per hour"); *Zoom Elec., Inc. v. International Broth. of Elec. Workers, Local 595* (N.D. Cal., May 24, 2013,) 2013 WL 2297037, *4 (quoting market rates of "between $180 and $225 per hour for law clerks and paralegals" in 2013); *see also Villalpando*, 3:12-cv-04137-JCS, Dkt. No. 344-1 at ¶ 74 (asserting up to $250 hourly rate for plaintiff-side wage and hour paralegals).

[16] Pursuant to Amendment No. 1 to the Settlement Agreement, respective counsel for the Related Action plaintiffs is entitled to 8.25% of the fee award each, which comes to approximately $301,537 to each of their firms. *See* Amendment No. 1 at ¶ 5. Given the number of hours expended by these firms and the reasonable hourly rates asserted, it is clear that these amounts are reasonable and warranted. For instance, Allen Graves estimates that the multiplier for his time spent on the objection in this case is approximately 1.4. *See* Graves Decl. at ¶ 54.

larger than the one requested here.[17] The current multiplier is supported by case law from California and other jurisdictions. *Natural Gas Anti-Trust Cases I, II, III & IV* (Cal. Sup. Ct. 2006) 2006 WL 5377849, *4 ("This Court and numerous cases have applied multipliers of between 4 and 12 to counsel's lodestar in awarding fees."); *In re California Indirect Purchases* (Cal. Sup. Ct. 1998) 1998 WL 1031494, *10 (citing *Wilson v. Bank of America Nat'l Trust & Sav. Ass'n.,* (Cal. Sup. Ct. 1982) No. 643872 (multiplier of 10 times the hourly rate awarded) (cited in 3 Newberg & Conte, Newberg on Class Actions, § 1403, at 14-5 n.21), and *Glendora Community Redevelopment Agency v. Demeter* (Cal. App. 2 Dist., 1984) 155 Cal. App. 3d 465, 479 (approving fee award 12 times estimated lodestar multiplier)); *see also Vizcaino,* 290 F.3d at 1052–54 (listing nationwide class action settlements where multiplier ranged up to 8.5); *Yuzary v. HSBC Bank USA, N.A.* (S.D.N.Y. Oct. 2, 2013) 2013 WL 5492998 (in overtime exemption misclassification case with informal discovery and no substantive motion practice, approving percentage-based fee award that represented a multiplier of 7.6 in $15.625 million settlement with no non-monetary relief); *Beckman v. KeyBank, N.A.* (S.D.N.Y. 2013) 293 F.R.D. 467 (in overtime exemption misclassification case settled pre-litigation, with only informal damages-related discovery and no substantive motion practice, approving percentage-based fee award that represented multiplier of 6.3 in a $4.9 million settlement); *New England Carpenters Health Benefits Fund v. First Databank, Inc.* (D. Mass. Aug. 3, 2009) 2009 WL 2408560, *2 (multiplier of 8.3); *Weiss v. Mercedez–Benz* (D.N.J. 1995) 899 F. Supp. 1297 (multiplier of 9.3); *Conley v.*

[17] Once the court has fixed the lodestar, a court may apply a multiplier to the lodestar after the consideration of certain enhancement factors including (1) the results obtained; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary to litigate the case; (4) the preclusion of other employment due to acceptance of the case; and (5) whether the fee is fixed or contingent. *Hendricks*, 2016 WL 5462423, at *12 citing *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48. Notably, while federal law generally precludes courts from using as a basis for a multiplier factors that has already been "baked in" to unadorned lodestar calculations (*i.e.*, the novelty and complexity of the case, counsel's skill, and the contingent risk enhancement), California law is not so restrictive. *Flannery v. California Highway Patrol* (Cal. App. 1 Dist., 1998) 61 Cal. App. 4th 629, 645 (rejecting federal restrictions on lodestar multipliers); *see also Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 42 [97 Cal.Rptr.2d 797, 815].

Sears, Roebuck & Co., (D. Mass. 1998) 222 B.R. 181, 182 (multiplier of 8.9); *In re Rite Aid Corp. Securities Litig.*, 362 F. Supp. 2d (E.D. Pa. 2005) 587, 589-90 (multiplier of 6.96); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.* (E.D. Pa. May 19, 2005) 2005 WL 1213926, *18 (15.6 multiplier).

In this case, as discussed herein and in previous filings, Plaintiffs have achieved excellent monetary and non-monetary results for class members in a short amount of time, based on not only work performed in this case but in cutting edge work performed in other heavily litigated cases. The novelty and difficulty of the questions involved in this litigation and the cases that were filed before it, and the skill required to recognize and litigate them, should be apparent. The risk of no recovery despite the time and resources devoted to the case was, as described, ever-present. Accordingly, Plaintiffs submit that it would be reasonable for the Court to apply a multiplier to their lodestar if the Court elects to award fees using the lodestar method.

B. Plaintiffs' Request For Class Representative Service Enhancements Is Reasonable

Under California law, named plaintiffs are generally entitled to a service award for initiating litigation on behalf of absent class members, taking time to prosecute the case, and incurring financial and personal risk. *See Clark v. American Residential Services LLC* (2009) 175 Cal. App. 4th 785. Such awards are "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393–94, *as modified* (July 27, 2010). "[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299 (internal citation omitted).

Here, these factors all weigh in favor of granting the requested service awards. Several of the Named Plaintiffs worked for Instacart during the pendency of this litigation and some continue to work for Instacart, and they were willing to risk retaliation and their financial security to bring this case. *See* Hammons Decl. at ⁋ 2; Cortez Decl. at ⁋ 2; Burks Decl. at ⁋ 2; Taylor Decl. at ⁋ 3. Likewise, Plaintiffs Groves and Cortez have had high-profile cases in the media and public eye that bear their names in the caption. *See* Cortez Decl. at ⁋ 3; Groves Decl. at ⁋ 2. Additionally, several of the class representatives here spent substantial time working with the attorneys on this case, participating in the mediation sessions, and organizing Instacart Shoppers. *See* Groves Decl. at ⁋⁋ 4-5; Hammons Decl. at ⁋ 5. Moreover, each of the Named Plaintiffs and Related Action Plaintiffs are signing a general release of claims against Instacart as part of the settlement, and these service awards form part of the consideration for those releases. See Agreement at ⁋ III(17)(a); Amendment No. 1 at ⁋ 6(a). All of the Named Plaintiffs and Related Action Plaintiffs have attested to the amount of the time they have spent on the litigation. *See* Cortez Decl. at ⁋⁋ 6-7; Groves Decl. at ⁋⁋ 5-6; Hammons Decl. at ⁋⁋ 4-6; Pierce Decl. at ⁋⁋ 4-5; Burks Decl. at ⁋⁋ 4-5; Taylor Decl. at ⁋ 8; Ex. 1 to Arns Decl. (Lozano Decl.) at ⁋ 2; Ex. 2 to Arns Decl. (Hayes Decl.) at ⁋ 2*;* Ex. 3 to Arns Decl. (Hearl Decl.) at ⁋ 2.

Numerous courts in California have approved incentive payments in line with what has been requested here. *Ross v. U.S. Bank Nat. Ass'n* (N.D. Cal., Sept. 29, 2010, No. C07-02951SI) 2010 WL 3833922, at *2 (approving $20,000 enhancement award to Class Representative in California wage-and-hour class action settlement); *Glass,* 2007 WL 221862 at * 17 ("requested payment of $25,000 to each of the named plaintiffs is appropriate" in wage and hour settlement); *Garner,* 2010 WL 1687832, at *17 n.8 ("Numerous courts in the Ninth Circuit and elsewhere have approved Service awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class") (collecting cases); *Hasty v. Elec. Arts, Inc.,* (San Mateo Cnty. Super. Ct. Sept. 22, 2006) Case No. CIV 444821 (approving an award of $30,000 to the class representative in a wage and hour class action); *Meewes v. ICI Dulux Paints,* (L.A. Cnty. Super. Ct. Sept. 19, 2003) Case No. BC265880 (approving service awards of $50,000, $25,000

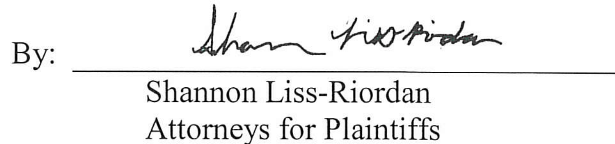
and $10,000 to the named Plaintiffs). Likewise, there is no "drastic disparity" in the size of each payment relative to the settlement shares of class members, some of whom will be receiving thousands of dollars in their settlement payment. For these reasons, the requested service enhancements should be approved.

VII. CONCLUSION

Based upon the foregoing, and the papers filed in support of this Motion, Plaintiffs respectfully request that the Court grant their request for attorneys' fees and class representative service payments.

Dated: December 17, 2019

LICHTEN & LISS-RIORDAN, P.C.

By: 

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