Electronically FILED by Superior Court of California, County of Los Angeles on 12/17/2019 07:10 PM Sherri R. Carter, Executive Officer/Clerk of Court, by K. Hung,Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SHANNON LISS-RIORDAN (State Bar No. 310719)
sliss@llrlaw.com
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
Telephone: (617) 994-5800
Facsimile: (617) 994-5801

Attorney for Plaintiffs KYRA GROVES,
CATHERINE HAMMONS, TIMOTHY PIERCE,
JAVIER CORTEZ, and DONNA BURKS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT 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

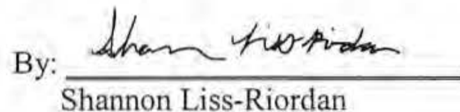
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 14, 2020 at 8:30 a.m., or on such other date or time as this matter may be called, in Department 56 of Los Angeles Superior Court, located at 111 N Hill Street, Los Angeles, CA 90005, Plaintiffs Kyra Groves, Catherine Hammons, Timothy Pierce, Javier Cortez, and Donna Burks[1] on behalf of themselves and all other similarly situated class members, will and hereby do, move for an order finally approving the Class Action Settlement described herein and ordering that notice be issued to the Settlement Class. The motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support thereof submitted herewith, the Declaration of Shannon Liss-Riordan and exhibits thereto, the Declaration of Les Chappell and exhibits thereto, and such other filings and arguments that may be submitted for the Court's consideration, as well as all documents and records on file in this matter to date.

Plaintiffs' Motion is made pursuant to Cal. Code Civ. P. § 382 and Civil Code § 1781(f), on the grounds that the proposed settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class.

Dated: December 17, 2019

LICHTEN & LISS-RIORDAN, P.C.

By: 

Shannon Liss-Riordan

Attorney for Plaintiffs Kyra Groves, Catherine Hammons, Timothy Pierce, Javier Cortez, and Donna Burks on behalf of themselves and others similarly situated

[1] Seth Blackham was a plaintiff in this case (who signed the Settlement Agreement) but the Tidrick Law Firm now purports to represent him, so his name has been omitted from these papers.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND AND RESULTS OF THE NOTICE PROCESS. 4

A. Litigation History 4

B. Review of Settlement Terms 6

C. Preliminary Approval of the Settlement 7

D. Results of the Notice Process to Date 8

III. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT 11

A. The Presumption of Fairness at the Final Approval Stage 12

B. The Kullar Factors at the Final Approval Stage 13

1. The Strength of Plaintiffs' Case 14

2. The Risks of Further Litigation 15

3. The Risks of Maintaining Class Action Status through Trial 17

4. The Amount Offered in Settlement 17

5. The Extent of Discovery Completed and the Stage of Proceedings 18

6. The Experience and View of Counsel 19

7. The State of California Has Not Objected to the Settlement in General or the PAGA Allocation Specifically. 20

8. The Positive Reaction of Class Members Supports Final Approval 22

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Ahmed v. Beverly Health & Rehab. Servs., Inc.,
(E.D. Cal. Feb. 7, 2018) 2018 WL 746393 21

Almond v. Singing River Health Sys.
(2018) 138 S. Ct. 1000 25

Barcia v. Contain-A-Way, Inc.
(S.D. Cal., Mar. 6, 2009) 2009 WL 587844 25

Bautista v. Harvest Management SubLLC
(C.D. Cal., July 14, 2014) 2014 WL 12579822 25

Bynum v. Maplebear Inc. d/b/a/ Instacart
(E.D.N.Y. 2016) 160 F.Supp.3d 527 15

California v. eBay, Inc.
(N.D. Cal. Sept. 3, 2015) 2015 WL 5168666 19

Camp v. Maplebear Inc. dba Instacart
(Los Angeles Sup. Ct.) BC 652216 .... 1, 4, 17

Ching v. Siemens Indus., Inc.
(N.D. Cal. June 27, 2014) 2014 WL 2926210 23

Chu v. Wells Fargo Investments, LLC
(N.D. Cal. Feb. 16, 2011) 2011 WL 672645 21

Cobarruviaz et al. v. Maplebear Inc. dba Instacart
(N.D. Cal. 2015) 143 F. Supp. 3d 930 15

Cortez v. Maplebear Inc. dba Instacart
CGC-18-566596 .... 4, 5

Cotter v. Lyft, Inc.
(N.D. Cal. 2016) 193 F. Supp. 3d 1030 .... 12, 20

Cotter v. Lyft, Inc.
(N.D. Cal. 2015) 60 F.Supp.3d 1067 .... 19, 20

del Toro Lopez v. Uber Techs., Inc.,
(N.D. Cal. Nov. 14, 2018) 2018 WL 5982506 21

Dynamex Operations W. v. Superior Court
(2018) 4 Cal. 5th 903, reh'g denied (June 20, 2018) 16, 17, 20

Epic Systems Corp. v. Lewis
(2018) 138 S.Ct. 1612 15

Fleming v. Covidien Inc.
(C.D. Cal. Aug. 12, 2011) 2011 WL 7563047 16

Franco v. Ruiz Food Products, Inc.
(E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 21

Garcia v. Border Transportation Grp., LLC
(Cal. Ct. App. 2018) 28 Cal. App. 5th 558 16

Harris v. Radioshack Corp.
(N.D. Cal. Aug. 9, 2010) 2010 WL 3155645 16

Holman v. Experian Information Solutions, Inc.
(N.D. Cal., Dec. 12, 2014, No. 11-CV-0180 CW (DMR)) 2014 WL 7186207 22

In re Omnivision Techs., Inc.
(N.D. Cal. 2008) 559 F. Supp. 2d 1036 23

In re Serzone Prod. Liab. Litig.
(S.D.W. Va. 2005) 231 F.R.D. 221 24

Iskanian v. CLS Transp. Los Angeles, LLC
(2014) 59 Cal. 4th 348, cert. denied, 135 S. Ct. 1155 (2015) 16

Johnson v. VCG-IS, LLC
(San Diego Super. Ct. July 18, 2018) Case No. 30-2015-00802813 16

Johnson v. VCG-IS, LLC
(San Diego Super. Ct. Sept. 5, 2018) Case No. 30-2015-00802813 13

Jones v. Singing River Health Servs. Found.
(5th Cir. 2017) 865 F.3d 285 25

Karl v. Zimmer Biomet Holdings Inc.
(N.D. Cal. Nov. 6, 2018) 2018 WL 5809428 16

Kullar v. Foot Locker Retail, Inc.
(2008) 168 Cal. App. 4th 116 .... 5, 14, 25

Kullar v. Foot Locker Retail, Inc.
(2011) 191 Cal. App. 4th 1201 1

Lawson v. GrubHub, Inc.
(N.D. Cal. 2018) 302 F.Supp.3d 1071 .... 13, 20

Lawson v. Grubhub, Inc.
(N.D. Cal., July 10, 2017, No. 15-CV-05128-JSC) 2017 WL 2951608......................... 19, 20

Makabi v. Gedalia
(Cal. Ct. App. Mar. 2, 2016) 2016 WL 815937.. 16

Marciano v. DoorDash Inc.
(July 12, 2018) CGC-15-548101 20

Marshall v. Nat'l Football League
(8th Cir. 2015) 787 F.3d 502 24

Martin v. Legacy Supply Chain Servs. II, Inc.,
(S.D. Cal. Feb. 12, 2018) 2018 WL 828131 21

Mass. Delivery Ass’n v. Healey
(1st Cir. 2016) 821 F.3d 187.. 17

Miller v. Ghirardelli Chocolate Co.
(N.D. Cal. Oct. 2, 2014) 2014 WL 4978433 25

Moton v. Maplebear Inc. d/b/a Instacart
(S.D.N.Y. Feb. 9, 2016, No. 15 Civ. 8879) 2016 WL 616343 16

Nat'l Rural Telecomms. Coop. v.DIRECTV, Inc.
(C.D. Cal. 2004) 221 F.R.D. 523... 22

O'Connor v. Uber Technologies, Inc.
(N.D. Cal. 2015) 311 F.R.D. 547, rev'd on other grounds (9th Cir. 2018) 904 F.3d 1087 ... 19

O'Connor v. Uber Technologies, Inc.
(N.D. Cal., Sept. 1, 2015, No. C-13-3826 EMC) 2015 WL 5138097 19

O'Connor v. Uber Technologies, Inc.
(N.D. Cal. 2015) 82 F. Supp. 3d 1133 19

O'Connor v. Uber Technologies, Inc.
(N.D. Cal. 2015) 82 F.Supp.3d 1133 20

O'Connor v. Uber Technologies, Inc.
(N.D. Cal., Sept. 1, 2015), 2015 WL 5138097, rev'd on other grounds, (9th Cir. 2018) 904 F.3d 1087 13

Oppenlander v. Standard Oil Co.
(D. Colo. 1974) 64 F.R.D. 597 19

Rodriguez v. D.M. Camp & Sons
(E.D. Cal. 2013) 2013 WL 2146927... 25

Rodriguez v. W. Publ'g Corp.
(9th Cir. 2009) 563 F.3d 948 25

Roes, 1-2 v. SFBSC Management, LLC
(9th Cir., Dec. 11, 2019, No. 17-17079) 2019 WL 6721190... 13

Schuchardt v. Law Office of Rory W. Clark
(N.D. Cal. 2016) 314 F.R.D. 673.. 22

Schwann v. FedEx Ground Package Sys., Inc.
(1st Cir. 2016) 813 F.3d 429... 17

Singer v. Postmates, Inc.
(N.D. Cal., Sept. 1, 2017, No. 4:15-CV-01284-JSW) 2017 WL 4842334 20

Speaks v. U.S. Tobacco Coop., Inc.
(E.D.N.C. 2018) 324 F.R.D. 112, 148 23

Sumerlin v. Maplebear Inc. dba Instacart
(Los Angeles Sup. Ct.) BC603030 .... 1, 17

Vasquez v. USM Inc.
(N.D. Cal. Feb. 16, 2016) 2016 WL 612906 22

Vazquez v. Jan-Pro Franchising Int'l Inc.
(Nov. 20, 2019) S258191.. 17

Vazquez v. Jan-Pro Franchising International, Inc.
(9th Cir. 2019) 930 F.3d 1107 13

Vazquez v. Jan-Pro Franchising International, Inc.
(9th Cir. 2019) 939 F.3d 1050 13

Viceral v. Mistras Group, Inc.
(N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869 21

Wershba v. Apple Computer, Inc.
(2001) 91 Cal. App. 4th 224 .... 12, 14

Statutes

Cal. Civil Code § 1781.. 1

Cal. Code Civ. P. § 382.. 1

Cal. Lab. Code § 2699 .... 16, 21

Rules

Rule 3.769 of the California Rules of Court (CRC) 12

Other Authorities

Kapp, Diana
"Uber's Worst Nightmare", San Francisco Magazine (May 18, 2016)................................ 13

Manual Complex Lit. (4th ed.) § 21.62 24

I. INTRODUCTION

As set forth in Plaintiffs' Motion for Preliminary Approval, Plaintiffs have reached a settlement with Defendant Maplebear Inc. dba Instacart ("Instacart"), which will resolve all wage and hour claims against Instacart arising from its alleged misclassification of full-service shoppers and delivery drivers ("class members") in California as independent contractors over a nineteen-month period of time, from September 1, 2017, through May 9, 2019. Under the terms of this agreement, Instacart has agreed to pay a total of $10,965,000 (non-reversionary) and implement certain non-monetary changes to benefit class members.

The settlement reached by the parties is fair, reasonable, and adequate, and is larger than settlements recently approved by this Court of earlier misclassification cases brought against Instacart in California, including a California settlement covering misclassification claims against Instacart over a timeframe of 4.5 years (from December 2, 2011, to July 25, 2016) in Sumerlin v. Maplebear Inc. dba Instacart, BC603030, and a nationwide settlement for a nearly 6 year timeframe (excluding the Sumerlin settlement class) in Camp v. Maplebear Inc. dba Instacart, BC 652216. See Liss-Riordan Final Approval Decl. at ¶ 9. After substantial scrutiny and briefing, both the Sumerlin and Camp class action settlements were granted final approval by the Honorable John Shepard Wiley of this Court in January 2018. Id.

Here, the Court similarly granted preliminary approval of the settlement after substantial and supplemental briefing, multiple hearings, and a searching review of the proposed settlement in view of close scrutiny by two other Plaintiffs' attorneys who have pending lawsuits against Instacart, and found the proposed settlement in this case to be fair, reasonable, and adequate. See Prelim. Approval Order. (Aug. 28, 2019). As part of that process, the Court required Plaintiffs to submit additional information about the value of the settled claims and fairness of the settlement under Kullar v. Foot Locker Retail, Inc., (2011) 191 Cal. App. 4th 1201, which Plaintiffs' counsel submitted in a supplemental declaration. Now, notice has been sent to the settlement class, and to date, more than 5,452 class members have submitted claims to participate in the settlement, and only 1 has objected to the settlement. See Chappell Decl. at ¶

31, submitted herewith. The Parties will continue to accept claims through the date of the final approval hearing on January 14, 2020, and they will provide an updated accounting of the claim rate prior to the hearing.

As for objections to and requests for exclusion from the settlement, the deadline for filing them has now passed. As explained below, the sole objection to the proposed settlement, and approximately 99% of the requests for exclusion received by Epiq (the claims administrator) reflect the views of a single objecting Plaintiffs' law firm: the Tidrick Law Firm LLP. Thus far, only a single objection has been received by Epiq. It was submitted by the Tidrick Law Firm ostensibly on behalf of Plaintiff Seth Blackham, who was a plaintiff who signed the Settlement Agreement in this lawsuit but then apparently reversed course after being contacted by The Tidrick Law Firm after agreeing to the settlement. The Tidrick Law Firm's use of Mr. Blackham for this purpose is improper, as Mr. Blackham "represent[ed] and warrant[ed] that [he had] no objection to the Settlement, and will not encourage, counsel, or represent others to object to the settlement of the Litigation" when he signed the Settlement Agreement. See Ex. A to Liss-Riordan Final Approval Decl. (Agreement) at ⁋ III(9)(e)(viii).[2]

In addition to the Blackham Objection, the Tidrick Law Firm also submitted 3,635 requests for exclusion from the settlement to Epiq on or about November 15, 2019, and an additional 77 late requests for exclusion on December 6, 2019. See Chappell Decl. at ⁋⁋ 26-27. As part of Epiq's review of those requests for exclusion, Epiq determined that 252 were duplicate requests, and that 517 exclusion requests submitted by the Tidrick Law Firm were for individuals ***who were not members of the settlement class***. Id. Of the remaining requests, Epiq determined that 2,011 of them had only been signed by an attorney at the Tidrick Law Firm, contained a written caveat that they opt out request was "null and void" if the person decided to submit a claim, and therefore were facially invalid under the Settlement Agreement. Id.; Ex. A

[2] Plaintiffs will respond to the substance of the Tidrick Law Firm's objections on January 3, 2020, which is the deadline for responding to objections set forth in the Settlement Agreement. See Ex. A to Liss-Riordan Final Approval Decl. (Agreement) at ⁋ III(9)(e)(iv).

(Agreement) at ⁋ III(9)(d)(iii). After many hours were spent removing duplicate, invalid, and late requests for exclusion from the Tidrick Law Firm's submissions, only 907 requests (or 24.4% of the requests submitted by the Tidrick Law Firm) remained. Chappell Decl. at ⁋ 29. Setting aside requests for exclusion submitted by the Tidrick Law Firm, Epiq only received 11 requests for exclusion that were submitted directly by settlement class members. Id.

As explained more fully below, the Court should give very little weight to, and should seriously question the validity and genuineness of, the exclusion requests solicited and submitted by the Tidrick Law Firm. Given that the Tidrick Law Firm solicited and submitted 517 exclusion requests from people who are not even in the Groves settlement class, these indiscriminately submitted exclusion requests do not reflect any broad dissatisfaction with the settlement on the part of the settlement class. To the contrary, the fact that thousands of the exclusion requests submitted by the Tidrick Law Firm contained an explicit caveat that they were "null and void" if the individual submitted a claim for payment strongly suggests that the exclusion requests were not actually authorized by the class members themselves and raises serious questions of whether each individual understood the meaning and import of the exclusion requests that was submitted on their behalf through the Tidrick Law Firm.

In sum, despite what initially may appear to be a large number of opt out requests from class members, these opt outs are clearly part of a concerted campaign by a single law firm trying to undermine the settlement for its own benefit, were submitted to the claims administrator in a single bulk mailing along with 517 invalid opt-out requests for individuals who are not even part of the settlement class, and do not reflect real dissatisfaction with the settlement on the part of the settlement class. Given that only 11 class members submitted exclusion requests on their own, and only a single objection has been filed, Plaintiffs believe that the overall response to the settlement has been extremely positive.

For these reasons, and for the reasons that will be set forth in Plaintiffs' response to objections on January 3, 2020, Plaintiffs hereby move for final approval of the Settlement Agreement. In a separately filed motion, Plaintiffs also request approval of the settlement's

provision for attorneys' fees and costs and class representative service enhancements.

II. FACTUAL BACKGROUND AND RESULTS OF THE NOTICE PROCESS.

A. Litigation History

Plaintiffs briefly recount, for the Court's convenience, the history of this action as previously described in their Motion for Preliminary Approval. Plaintiffs' counsel began this case by filing PAGA letters with Instacart and the Labor & Workforce Development Agency (LWDA) on behalf of Plaintiffs Kyra Groves, Catherine Hammons, and Timothy Pierce in December 2017, seeking to pursue claims for the timeframe post-dating the release period in the nationwide settlement of misclassification-related claims in another case, Camp v. Maplebear Inc. dba Instacart, Case No. BC652216. See Liss-Riordan Final Approval Decl. at ¶ 3. The release period in the Camp settlement ended on August 31, 2017; therefore, the claims in this case cover the period of time starting from September 1, 2017, onward. Id. Plaintiffs alleged that Instacart is a same-day grocery delivery service that selects and purchases requested groceries from major retailers and then delivers them to the homes and businesses of its customers and that drivers and full-service shoppers for Instacart (called "Shoppers") in California have been misclassified as independent contractors rather than employees. As a result, Plaintiffs contend that Instacart has violated California state law by failing to reimburse these individuals for their necessary business expenses and failing to pay minimum wage and overtime (among other violations). Id. at ¶ 2. Plaintiffs' counsel also filed a new class case making the same allegations and covering the period of time after the Camp release, Cortez v. Maplebear Inc. dba Instacart, CGC-18-566596 (for which the claims have now been added into this case, for settlement purposes). Id. at ¶ 4. On January 25, 2019, Plaintiffs' counsel filed amended PAGA letters on behalf of Plaintiffs regarding additional Labor Code allegations alleged in the amended Complaint. Id. at ¶ 3.

In the summer of 2018, counsel agreed to mediation with Instacart to attempt to seek a global resolution of the matters they were litigating related to Instacart. The parties engaged an

experienced wage-and-hour mediator, Michael Dickstein. They mediated in July 2018, without reaching resolution. They then mediated again, in two further full-day sessions, in August 2018 and September 2018. Eventually, after exchanging extensive data and concluding exhaustive and in-depth discussions, they agreed to a global settlement of all pending litigation related to the misclassification claims of Instacart Shoppers in California for the period post-dating the Camp settlement release (September 1, 2017, through May 9, 2019). Id. at ¶ 5.

Plaintiffs filed their Motion for Preliminary Approval in March 2019.[3] Following the announcement of the settlement, two other Instacart Shoppers, Sarah Lozano, Timothy Hearl, and Mimi Hayes (represented by the Arns Law Firm) and Paul Taylor (represented by the Graves Firm), filed briefs opposing preliminary approval of the settlement. The Court held a hearing on May 9, 2019, and ordered further briefing and a further hearing on August 2, 2019. Id. at ¶¶ 6-7. Thereafter, the Parties and the Lozano and Taylor Plaintiffs engaged in further negotiations and agreed to amend the proposed settlement to address their principal concerns. Specifically, the Settlement Agreement was revised to set aside $175,000 of the existing settlement fund to serve as a separate fund for the sub-class of eighty-two (82) drivers who opted out of Instacart's arbitration clause. These individuals will be paid from this separate fund in recognition of the fact that they are differently situated from other Settlement Class Members in certain procedural respects. Id. at ¶ 8; see also Amendment No. 1 to Settlement Agreement (part of Ex. A to Liss-Riordan Decl, filed herewith)

The hearing on preliminary approval was rescheduled at the Parties' request to August 28, 2019, and in a carefully written and thorough Order, the Court granted preliminary approval. In doing so, the Court found that the settlement was entitled to a presumption of fairness, that seven of the eight Kullar factors had been satisfied (or were not relevant), and that provisional certification of the class was warranted. See Prelim. Approval Order.

[3] Prior to filing the preliminary approval motion, Plaintiffs also filed an Amended Complaint naming additional Plaintiffs in February 2019, including Plaintiff Seth Blackham.

B. Review of Settlement Terms

Plaintiffs also briefly recap the significant terms of the Settlement as described in their Motion for Preliminary Approval. The Settlement provides for two components of relief to class members: monetary relief in the amount of $10,965,000, as well as non-monetary relief aimed at improving the day-to-day quality of the work of Instacart Shoppers including:

- Instacart agreed to add a mileage-based component to the estimated payment amount for each batch of groceries that is provided to Shoppers in California providing Delivering Services. On the mileage-based component, Instacart has agreed to: (1) inform Shoppers of the total mileage-based amount of compensation they will receive for each batch (if they accept); and (2) inform Shoppers how the mileage based component is calculated - e.g., provide an estimated number of miles expected to be driven from the store to delivery location (regardless of actual route taken) and the rate used for such miles (e.g., X cents per mile).
- Instacart agreed to add as a component of its compensation algorithm the estimated number of units picked by a shopper in each batch.
- Instacart has agreed to include as a component of its compensation algorithm the estimated weight of known heavy weight items picked by a shopper in each batch, where weight information is available to Instacart before the batch estimate is provided to a shopper.
- Instacart has agreed to provide excess commercial automobile liability insurance for claims made by a third party against a shopper related to their independent contractor services to Instacart, which is secondary to the shoppers' primary insurance.
- Instacart has agreed to inform customers when a driver is also the person who shopped for the order. Plaintiffs believe that this change may promote further tipping of drivers to account for their having shopped for and delivered groceries.
- For multi-store requests made in a single order, Instacart has agreed to provide customers with the ability to provide different tip amounts to the different drivers who deliver a multi-store order.

See Ex. A (Agreement) at ¶ (III)(3). In exchange, class members who have not opted out will, if the settlement is finally approved, release all claims based on or reasonably related to the independent contractor misclassification-based claims in the Action. Id. at ¶ III(18).

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). Ex. A (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).

C. Preliminary Approval of the Settlement

The Court preliminarily approved the settlement on August 28, 2019, after multiple hearings, several rounds of briefing (including from Plaintiffs' counsel in other litigation against Instacart), and applying substantial scrutiny to the provisions of the Settlement Agreement, the Class Notice, and the claim form. See Prelim. Approval Order. The Court's preliminary approval of the settlement included approval of a supplement to the Settlement Agreement that addressed the concerns of the Lozano and Taylor Plaintiffs, and as a result, the Lozano and Taylor Plaintiffs now support and are participating in the settlement.

Pursuant to Cal. Code Civ. P. 382, the Court certified, for settlement purposes, a class of all individuals who performed grocery shopping or delivery services for Defendant in California since September 1, 2017, through May 9, 2019. The Court appointed Plaintiffs as class representatives and appointed Lichten & Liss-Riordan, P.C. as Class Counsel. The Court also appointed Epiq as Settlement Administrator.

The Court also approved the Class Notice and the method of distributing the Class Notice as set forth in the Settlement Agreement. The Agreement, as approved by the Court, established various deadlines, directing the Settlement Administrator to disseminate the Class Notice within 45 days of preliminary approval, and setting an opt-out and written objection deadline of 30 days following the distribution of Class Notice. See Ex. A (Agreement) at ¶ III(9)(c)(ii), III(9)(d)(i). Further, Plaintiffs informed the LWDA of the settlement on April 23,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2019, providing a copy of the long-form agreement and Motion for Preliminary Approval, but the LWDA has declined to submit any comment or objection to the settlement. See Liss-Riordan Final Approval Decl. at ¶ 6.[4] The Agreement also established the deadline of December 17, 2019, for Plaintiffs to submit their Final Approval Motion, and the deadline of January 3, 2020, for the parties to respond to any objections to the settlement.

D. Results of the Notice Process to Date

Pursuant to the Court's Order and Settlement Agreement, Epiq emailed the Class Notice to all 66,268 email addresses reflecting 66,197 unique class members, and promptly attempted to re-send emails that were rejected by class members' email providers. See Chappell Decl. at ¶¶ 4-5, 8-9, 12. Of the 66,268 emailed Class Notices, just 541 were undeliverable by email. Id. at ¶ 9. Epiq was able to obtain mailing addresses and mailed the Class Notice to these class members and only 29 class members' mailed notices were returned as undeliverable, yielding an extraordinary overall "reach rate" of 99.8%. Id. at ¶ 15.

On November 19, 2019, Epiq emailed an initial reminder notice to all class members who had not yet submitted claims. Chappell Decl. at ¶ 10. At plaintiff and defense counsels' joint request, Epiq emailed additional reminder notices to all class members who had not yet submitted claims on a weekly basis on December 10, 2019 and will continue to do so on a weekly basis until the final approval hearing, so that class members have now received up to *three* notices of the settlement. Id. To date, 5,452 class members have submitted claims, representing approximately 19% of the settlement fund (were there to be a 100% claim rate). Id. at ¶ 31.[5] All unclaimed class funds will be distributed to class members who have submitted

---

[4] Plaintiffs provided additional notice to the LWDA of their Amendments to the Settlement as well. Again, the LWDA has declined to submit any comment or objection to the settlement. Id. at ¶ 8, n. 1.

[5] Plaintiffs expect that the claims will continue to increase in the coming weeks, and they will report to the Court the updated claim rate both prior to and at the January 14 hearing.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

claims. See Ex. A (Agreement) at ¶¶ III(14)(i).[6]

As provided by the Settlement Agreement, class members have been permitted to submit claims online or by mail. Chappell Decl. at ¶ 29. Additionally, Epiq has maintained a website including court filings and important dates and has in place a mechanism for responding to calls and emails from class members regarding the settlements. Id. at ¶¶ 16-20. As noted earlier in this motion, only ***one*** class member has objected to the settlement. That class member, Plaintiff Seth Blackham, signed the Settlement Agreement in this case. In that Agreement, Mr. Blackham "represent[ed] and warrant[ed] that [he had] no objection to the Settlement, and will not encourage, counsel, or represent others to object to the settlement of the Litigation" when he signed the Settlement Agreement. See Ex. A (Agreement) at ¶ III(9)(e)(viii). The Tidrick Law Firm now purports to represent Mr. Blackham, and that firm is objecting to the settlement and filed an objection ostensibly on Mr. Blackham's behalf. Class Counsel will respond to the merits of the Tidrick Law Firm's objections on January 3, 2020, which is the date set forth in the Settlement Agreement, but notes that Mr. Blackham already agreed in writing that he had "no objection to the Settlement."

Regarding requests for exclusion, 99% of the requests received by the claims administrator were submitted by the same Tidrick Law Firm that is objecting to the settlement. Chappell Decl. at ¶ 29. Specifically, on or around November 15, 2019, the Tidrick Law Firm sent the claims administrator, Epiq, two boxes containing 3,635 requests for exclusion, which were similar in form and content. Id. at ¶ 26. It submitted an additional box of 77 requests on December 6, 2019, as well as two other separately mailed requests. Id. at ¶¶ 27-28. After devoting hours and $13,927.50 in administrative costs reviewing those requests, Epiq

[6] Because the percentage of settlement funds claimed exceeds the percentage of class members who have submitted claims, this shows that the class members with larger settlement shares have claimed at a higher rate than those with lower shares, which is typical in this type of settlement. By distributing unclaimed funds to class members who have claimed, the benefit of the settlement is concentrated on those class members who have a higher stake in the case and have been interested enough to submit a simple online claim form.

determined that:

- 252 of the 3,714 exclusion requests submitted by the Tidrick Law Firm were ***duplicate*** requests for the same person.
- 517 of the 3,714 exclusion requests submitted by the Tidrick Law Firm were for individuals ***who are not settlement class members***.
- 2,011 of the 3,714 exclusion requests submitted by the Tidrick Law Firm were only signed by an attorney at the Tidrick Law Firm and included an express caveat that stated: "This opt-out request is subject to the limitation that if the person specified below submits a claim to the settlement administrator, then this opt-out request is null and void."

See Chappell Decl. at ¶¶ 27-29.

After removing duplicate, invalid, and late requests for exclusion, only 907 of the 3,714 exclusion requests submitted by the Tidrick Law Firm appeared to Epiq to meet the requirements for an exclusion request under the Settlement Agreement. See Chappell Decl. at ¶29; Ex. A (Agreement) at ¶ III (9)(d)(iii). That represents less than 1.4% of the settlement class. Aside from the requests for exclusion submitted by the Tidrick Law Firm, only 11 settlement class members submitted requests to be excluded from the settlement. Chappell Decl. at ¶ 29.

The validity and authenticity of the opt-out requests submitted by the Tidrick Law Firm is highly suspect in view of the above information. Despite the Tidrick Law Firm's assertion in its objections that it was submitting opt-out requests on behalf of 3,714 putative class members, in reality only 907 of those requests arguably met the requirements of Paragraph 9(d)(iii) of the Settlement Agreement. This error results because, per the claims administrator's review, 252 of the Tidrick law firm submissions were duplicate requests, and 517 of the opt-out requests were submitted by the Tidrick Law Firm on behalf of individuals who do not match any settlement class member (meaning they do not appear to be entitled to participate in this settlement and would not have received notice of the settlement). Moreover, of the opt-out requests that

matched the name of a settlement class member, 2,011 were not signed by the class member and were therefore deemed invalid by the claims administrator. Another 27 opt-out requests were submitted almost a month late. See Chappell Decl. at ¶¶ 26-29. This attempt by the Tidrick Law Firm to falsely inflate the number of opt-outs should not be overlooked by the Court. The Tidrick Law Firm, in its objection campaign to undo the settlement, should not have shifted the burden and costs of reviewing and filtering thousands of duplicate and invalid exclusion requests to the claims administrator and the class.

Moreover, the indiscriminate nature of opt-out requests submitted by the Tidrick Law Firm and the fact that more than 517 exclusion requests mailed by the Tidrick Law Firm came from non-class members calls into serious doubt whether the class members whose opt-out requests were submitted by the Tidrick Law Firm actually intended to opt-out of the settlement, and understood the consequences of requesting exclusion. Indeed, the fact that 2,011 of exclusion requests submitted by the Tidrick Law Firm included a statement that "[t]his opt-out request is subject to the limitation that if the person specified below submits a claim to the settlement administrator, then this opt-out request is null and void" strongly suggests that the Tidrick Law Firm did not actually obtain the consent of those persons prior to submitting the exclusion request on their behalf.

For these reasons, the Court should view the opt-out requests submitted by the Tidrick Law Firm with skepticism, require the Tidrick Law Firm to explain to the Court and the parties how it solicited and obtained the opt-out requests it submitted, and explain how that process resulted in the submission of 517 exclusion requests for non-class members.

III. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT

Rule 3.769 of the California Rules of Court (CRC) sets forth the procedures for settlement of class actions in California. A two-step process is required: first, the court preliminarily approves the settlement and the class members are notified as directed by the court. CRC 3.769(c)-(f). Second, the court conducts a final approval hearing to inquire into the

fairness of the proposed settlement. CRC 3.769(g). If the court approves the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the judgment. CRC 3.769(h).

Many courts in California, including this one, have adopted a "front loaded" approach to settlement approval, where settlements are carefully reviewed at the preliminary approval stage, and final approval is generally reserved for review of the results of the notice period, and the reaction of the class to the settlement. See Cotter v. Lyft, Inc. (N.D. Cal. 2016) 193 F. Supp. 3d 1030, 1037 ("courts should review class action settlements just as carefully at the initial stage as they do at the final stage…rather than kicking the can down the road.").

A. The Presumption of Fairness at the Final Approval Stage

"[A] presumption of [a class action settlement's] fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224, 245.

The settlement that has been reached here is the product of significant effort and tenacious negotiations by the parties and their counsel. The settlement was reached after ***multiple*** day-long mediation sessions with Michael Dickstein, an experienced mediator of wage-and-hour class actions. See Liss-Riordan Decl. in support of Reply in support of Prelim. Appr. ("Liss-Riordan Reply Decl.") at ¶ 9. The parties have conducted significant research, investigation, and exchange of information in connection with this case, including a review of substantial damages data. Id. at ¶¶ 9, 12-16. Lichten & Liss-Riordan has a great deal of experience in wage and hour class action litigation and has been widely recognized for its work challenging alleged independent contractor misclassification against "gig economy" companies similar to Instacart; the firm has been approved as Class Counsel in those cases, including a class action settlement of claims involving Massachusetts Instacart Shoppers, as well as

numerous other wage and hour class actions. See Liss-Riordan Final Approval at ¶¶ 36-37.[7] Here, there has only been one objection, and those Shoppers who have opted out are almost exclusively represented by a single, late joining law firm. See Chappell Decl. at ¶¶ 29-30, Liss-Riordan Final Approval Decl. at ¶ 32-34.

Taken together, these factors clearly establish the presumption of fairness.

B. The Kullar Factors at the Final Approval Stage

In determining whether a class settlement should be approved – viewed through the prism of the presumption of fairness – the trial courts evaluate (1) the strength of plaintiffs'

---

[7] Plaintiffs' counsel has received much attention for her work in this area. She was appointed class counsel in the first (and only to date) certified class action on behalf of "gig economy" workers in California challenging their classification as independent contractors. See O'Connor v. Uber Technologies, Inc. (N.D. Cal., Sept. 1, 2015), 2015 WL 5138097, rev'd on other grounds, (9th Cir. 2018) 904 F.3d 1087 (certifying class of 240,000 Uber drivers on misclassification claim). She took the first "gig economy" misclassification case to trial in California. See Lawson v. GrubHub, Inc. (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir. Appeal No. 18-15386. She has handled many other similar cases and is well known for her aggressive and successful litigation on behalf of low wage workers, particularly those claiming misclassification. See Kapp, Diana, "Uber's Worst Nightmare", San Francisco Magazine (May 18, 2016) (**Exhibit B** to Liss-Riordan Final Approval Decl.) (describing her work on misclassification cases against "gig economy" companies and noting that "Liss-Riordan has achieved a kind of celebrity unseen in the legal world since Ralph Nader sued General Motors"). In California, Plaintiffs' counsel obtained the first ruling applying Dynamex, in which the Orange County Superior Court (Judge Claster) granted summary judgment to plaintiffs on their claim that they have been misclassified under the "ABC" test. See Johnson v. VCG-IS, LLC (San Diego Super. Ct. Sept. 5, 2018) Case No. 30-2015-00802813, Ruling on Motions for Summ. J. (**Exhibit C** to Liss-Riordan Final Approval Decl.). Additionally, she has won a number of ground-breaking wage cases across a variety of industries at trial and has also won numerous appeals on behalf of employees in wage and hour cases. See Liss-Riordan Final Approval Decl. at ¶ 36-37, n. 10 & 11. She has won significant cases on appeal for misclassified workers throughout the country, including in California, see, e.g., Vazquez v. Jan-Pro Franchising International, Inc. (9th Cir. 2019) 930 F.3d 1107, reinstated in part, Vazquez v. Jan-Pro Franchising International, Inc. (9th Cir. 2019) 939 F.3d 1050 (holding that Dynamex applies to misclassified "franchisees. Just last week, she won a significant victory on behalf of misclassified workers who were subject to an unfair and inadequate settlement reached by The Tidrick Law Firm. See Roes, 1-2 v. SFBSC Management, LLC (9th Cir., Dec. 11, 2019, No. 17-17079) 2019 WL 6721190 (reversing approval of class settlement obtained by The Tidrick Law Firm that included a reversion, an inadequate notice process, and provided less than 4% recovery of potential damages on primary claims).

case; (2) the risk, expenses, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in the settlement; (5) the extent of discovery contemplated and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, 128. The list of factors is not exclusive, and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. Wershba, 91 Cal. App. 4th at 245.

Plaintiffs have previously addressed, and the Court has considered, the first seven Kullar factors at the preliminary approval stage. See Plaintiffs' Mot. for Prelim. Appr. at pp. 11-15; see also Order Granting Prelim. Appr. at pp. 5-10. However, for the Court's convenience, Plaintiffs will address all factors here:

1. The Strength of Plaintiffs' Case

"The merits of the underlying class claims are not a basis for upsetting the settlement of a class action[,] [and] [t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." Wershba, 91 Cal. App. 4th at 246. "In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement was reasonable under all of the circumstances." Id. at 250.

Nonetheless, Plaintiffs have provided "a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated." Kullar, 168 Cal. App. 4th at pp. 132–133. Plaintiffs have discussed in detail the nature and magnitude of the claims at issue in this litigation and Plaintiffs' basis for concluding that the settlement is a reasonable compromise. See Suppl. Br. of June 13, 2019 (summarizing the strength and weaknesses of various claims); see also Plfs' Second Reply in Support of Prelim Appr. at pp. 1-4. For the convenience of the court, Plaintiffs have summarized their valuation of the claims that are being released here in the accompanying Declaration of Shannon Liss-Riordan in support of

Plaintiffs' Motion for Final Approval at ⁋⁋ 12-31. Plaintiffs calculated that mileage reimbursement claim in this case – by far the most valuable claim – would be worth approximately $24 million. Id. at ⁋⁋ 13. Thus, this settlement represents close to a one-half recovery on the most significant claim in this case – a remarkable achievement, particularly given the obstacles presented by Instacart's arbitration provision.

This Court already reached the same conclusion in its Order granting preliminary approval, in which it went through each of the claims being released in the First Amended Complaint and considered Plaintiffs' explanation of the potential value and risks associated with recovering on each of these claims. See Prelim. Approval Order at pp. 5-9. Thus, for all the same reasons the Court granted preliminary approval, it should find that the strength of plaintiffs' case on the merits weighs in favor of granting final approval of the settlement because the $10,965,000 gross settlement fund represents approximately 46% of the maximum theoretical recovery for the most valuable claim in the case (expense reimbursement), or approximately 19% of the maximum theoretical recovery for expense reimbursement, overtime, and minimum wage claims, and the other Labor Code claims have negligible value. See Reply in Support of Prelim. Appr. at pp. 7-8; Liss-Riordan Final Approval Decl. at ⁋⁋ 12-15.

2. The Risks of Further Litigation

While Plaintiffs were optimistic that they would succeed in this action, in reaching this settlement, they reasonably considered certain risks. Chief among these risks was that Plaintiffs would be compelled to individual arbitration and 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, some courts have already found Instacart's arbitration agreement, including its class action waiver, to be enforceable. 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).[8]

Additionally, while Plaintiffs were very confident regarding the merits of this case in light of the California Supreme Court's recent Dynamex decision, there is still a lot of ongoing litigation regarding issues pertaining to the decision, including questions of what Labor Code claims it will apply to (as the decision specifically declined to address whether it applies to expense reimbursement claims, which is one of the primary claims Plaintiffs alleged against Instacart) and whether it applies retroactively to the time period before it was issued in April 2018. See, e.g., Garcia v. Border Transportation Grp., LLC (Cal. Ct. App. 2018) 28 Cal. App. 5th 558 (suggesting that certain Labor Code claims are not covered by the "ABC" test announced in Dynamex); Karl v. Zimmer Biomet Holdings Inc. (N.D. Cal. Nov. 6, 2018) 2018 WL 5809428 *3 (same); but see Johnson v. VCG-IS, LLC (San Diego Super. Ct. July 18, 2018) Case No. 30-2015-00802813, Ruling on Motion in Limine, *4-5. Underscoring these risks, the California Supreme Court recently accepted certification of the question of whether Dynamex

[8] 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, 135 S. Ct. 1155 (2015), Instacart would have challenged that those claims were manageable on a representative basis. Moreover, there would have been the significant risk that any potential penalties would have been reduced by the Court to a fraction of what might have been recovered as damages, given a potential finding that Instacart classified class members as independent contractors in good faith or that the higher penalty amounts were confiscatory. Courts have abundant discretion to reduce PAGA penalties. See Cal. Lab. Code § 2699(e)(2) ("a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"); see also Harris v. Radioshack Corp. (N.D. Cal. Aug. 9, 2010) 2010 WL 3155645, *3-4 (Chen, J.) (granting motion for final settlement approval and finding that although Plaintiffs "could arguably get more ... because they [were] entitled to penalties under the PAGA, it [was] not clear that they could get a significant amount" more because of Section 2699(e)); Fleming v. Covidien Inc. (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, at *3-4 (invoking§ 2699(e)(2) and reducing PAGA penalty award from $2.8 million to $500,000); Makabi v. Gedalia (Cal. Ct. App. Mar. 2, 2016) 2016 WL 815937, at *2 & n.3 (unpublished) (noting that the trial court invoked § 2699(e)(2) and declined to apply any PAGA penalties, despite finding that defendants violated PAGA).

applies retroactively from the Ninth Circuit. See Vazquez v. Jan-Pro Franchising Int'l Inc., (Nov. 20, 2019) S258191 (accepting certified question). Likewise, there was a risk that the Court would find a part of the "ABC" test announced in Dynamex was preempted, as Instacart has strenuously argued in both Massachusetts and California.[9] 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 "gig economy" companies still intend to challenge this legal development by launching a ballot initiative next year to carve these companies out of the law. See John Myers, "Uber, Lyft, DoorDash launch a $90-million fight against California labor law", Los Angeles Times (Oct. 29, 2019) (attached as Ex. D to Liss-Riordan Final Approval Decl.). This Court agreed in granting preliminary approval, noting that "[g]iven the nature of class claims, the case is likely to be expensive and lengthy to try as procedural obstacles exist." See Prelim. Approval Order at p. 9.

3. The Risks of Maintaining Class Action Status through Trial

As noted, there were significant risks associated with maintaining class action status through trial, including enforcement of Instacart's arbitration agreement, or, even if Plaintiffs were able to overcome that obstacle, the risk of an adverse order on an opposed motion for class certification. Additionally, even if Plaintiffs were successful on a motion for class certification, Instacart would likely argue for decertification on various grounds. This Court recognized as much in its Order granting preliminary approval, noting that "[e]ven if a class is certified, there is always a risk of decertification." See Prelim. Approval Order at p. 9.

4. The Amount Offered in Settlement

The monetary component of the settlement is, of course, a compromise; and, in this case, it is a favorable one given the value of Plaintiffs' claims. The settlement provides more funds to the class over a shorter period of time than the settlements previously approved by this Court in

[9] See Mass. Delivery Ass'n v. Healey (1st Cir. 2016) 821 F.3d 187, 189-93; Schwann v. FedEx Ground Package Sys., Inc. (1st Cir. 2016) 813 F.3d 429, 436-40.

the Sumerlin and Camp settlements ($2 million for a California class covering a 4.5 year period in Sumerlin and $4.625 million for a nationwide class covering a nearly 6 year period in Camp). Here, the $10.96 million fund covers just nineteen months of work by California Instacart Shoppers. Further, and significantly, Instacart has agreed to revise its practices applicable to class members, as described above, and these non-monetary components of the settlement provide further benefit to class members.

5. The Extent of Discovery Completed and the Stage of Proceedings

Plaintiffs here had the information they needed to determine that this is a reasonable settlement, as this court previously found in its Order granting preliminary approval. See Prelim. Approval Order at p. 9.

First, as the Court has already noted, the parties exchanged extensive data as part of their settlement negotiations, which spanned three full days of mediation over the course of several months. See Liss-Riordan Decl. in support of Prelim. Appr. at ⁋ 5.

Second, for nearly three years before filing the instant case in February 2018, Plaintiffs' counsel exhaustively litigated a case against Instacart that alleged claims for misclassification, expense reimbursement, and minimum wage under Massachusetts law (or, under California law in the alternative) on behalf of a class of Massachusetts Instacart Shoppers in Busick v. Maplebear Inc. dba Instacart, JAMS Ref. No. 1100081511. In the Busick matter, Plaintiffs' counsel briefed and argued issues relating to class arbitration and certification and got a class certified in arbitration (under an earlier version of Instacart's contract, which did not contain an express class action waiver). Thus, Plaintiffs' counsel are intimately aware of the ways that Instacart's contract and practices with respect to its delivery drivers and full-service shoppers have changed over time and are familiar with the strengths and weaknesses of Instacart's arguments regarding misclassification and class members' expense reimbursement and minimum wage claims.

Finally, Plaintiffs were confident that, had they somehow overcome the arbitration provision, they would have had enough information to defeat a motion for summary judgment

on the misclassification issue, particularly as Plaintiffs' counsel has heavily litigated this issue in very similar cases. See Lawson v. Grubhub, Inc. (N.D. Cal., July 10, 2017, No. 15-CV-05128-JSC) 2017 WL 2951608, at *1 (denying defendant's motion for summary judgment on misclassification-based claims); O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2015) 82 F. Supp. 3d 1133 (same); Cotter v. Lyft, Inc. (N.D. Cal. 2015) 60 F.Supp.3d 1067 (same). The tremendous amount of work performed in the Busick case on behalf of Massachusetts Instacart Shoppers as well as those cases against other "gig economy" companies significantly aided counsel's analysis in this case. When combined with the voluminous information relating to potential damages and penalties provided by Instacart in connection with mediation, and informal discovery and investigation concerning the merits of this case, Plaintiffs had ample information to make a thorough evaluation of merits of the settlement.

Moreover, early resolution of cases provides at least one obvious benefit for class members – a relatively quick and assured recovery (and, in this case, implementation of non-monetary benefits). See California v. eBay, Inc. (N.D. Cal. Sept. 3, 2015) 2015 WL 5168666, *4 ("Since a negotiated resolution provides for a certain recovery in the face of uncertainty in litigation, this factor weighs in favor of settlement"); Oppenlander v. Standard Oil Co. (D. Colo. 1974) 64 F.R.D. 597, 624 ("It has been held proper to take the bird in hand instead of a prospective flock in the bush."). Thus, this factor continues to support granting final approval of the settlement.

6. The Experience and View of Counsel

Plaintiffs' counsel are highly experienced in wage and hour class actions and believe this settlement is a reasonable compromise given the value – both monetary and non-monetary – of the settlement, the value of Plaintiffs' claims, and the risks of further litigation.[10] This Court

[10] Over the last several years, Plaintiffs' counsel has developed special experience litigating against numerous "gig economy" companies that have classified their workers as independent contractors. Counsel was the first to obtain class certification in one of these cases (see O'Connor v. Uber Technologies, Inc. (N.D. Cal., Sept. 1, 2015, No. C-13-3826 EMC) 2015 WL 5138097, O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2015) 311 F.R.D. 547, rev'd on (*cont'd*)

noted as much in its Order granting preliminary approval, finding that "counsel who negotiated and endorsed the proposed class action settlement is experienced in the type of litigation that is the subject of this case." See Prelim. Approval Order at p. 10. Moreover, counsel for Plaintiffs Lozano and Taylor, who are likewise highly experienced in wage and hour class actions, have now endorsed the settlement with the inclusion of Amendment No. 1 after they were given the opportunity by the Court to review confidential data relating to the settlement. Thus, this factor continues to support granting final approval of the settlement.

7. The State of California Has Not Objected to the Settlement in General or the PAGA Allocation Specifically.

Here, as the Court concluded, there is no governmental participant in this action per se. See Prelim. Appr. Order at p. 10. To the extent the state of California is considered to be a governmental participant with respect to the PAGA claim, the fact that the state has not objected to the settlement or the PAGA allocation weighs in favor of granting final approval.

---

other grounds (9th Cir. 2018) 904 F.3d 1087 (certifying class of 240,000 Uber drivers on misclassification claim and expense reimbursement and gratuities claims). Counsel also brought the first such case to trial (see Lawson v. Grubhub, Inc. (N.D. Cal. 2018) 302 F.Supp.3d 1071, appeal pending, Ninth Cir. Appeal No. 18-15386). Counsel has also defeated summary judgment motions brought by other "gig economy" companies on the misclassification issue. See, e.g., Cotter, 60 F.Supp.3d at 1067 (denying the defendant's Motion for Summary Judgment); O'Connor v. Uber Technologies, Inc. (N.D. Cal. 2015) 82 F.Supp.3d 1133 (same); Lawson v. Grubhub, Inc. (N.D. Cal., July 10, 2017, No. 15-CV-05128-JSC) 2017 WL 2951608, at *1 (same). Counsel is currently litigating many of these cases in state and federal court, and she has successfully settled a number of them as well. See, e.g., Cotter v. Lyft, Inc. (N.D. Cal. 2016) 193 F.Supp.3d 1030; Singer v. Postmates, Inc. (N.D. Cal., Sept. 1, 2017, No. 4:15-CV-01284-JSW) 2017 WL 4842334, at *4; Marciano v. DoorDash Inc. (July 12, 2018) CGC-15-548101.

Moreover, at the end of April, the California Supreme Court decided Dynamex Operations W. v. Superior Court (2018) 4 Cal. 5th 903, 956, n. 23, reh'g denied (June 20, 2018), and announced a new test for employee-status in California for wage claims arising under the Wage Orders, which tracks the "ABC" test currently utilized in Massachusetts. Plaintiffs' counsel is based in Massachusetts and has been litigating cases under this very incarnation of the "ABC" test for 15 years, originating much of the caselaw under the Massachusetts test. Thus, Plaintiffs' counsel is uniquely situated to appreciate the strengths and potential weaknesses of the claims at issue in this case after Dynamex.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Under the terms of the settlement, the parties allocated $175,000 to the PAGA claims. See Agreement at ¶ III(2)(b). Plaintiffs estimated that these penalties could theoretically reach $131,750,000, an amount certainly far beyond any amount Defendant would agree to voluntarily in a settlement. See Reply in support of Prelim Appr. at pp. 8-9. However, as noted in their preliminary approval motion, it is unclear whether "stacking" of penalties for multiple Labor Code violations would be permitted, which would result in a much lower total exposure for this claim. Id. at p. 8. Moreover, an exact exposure number for the PAGA claim is inherently speculative because of the Court's discretion to reduce a PAGA penalty on grounds that it is "unjust" or "oppressive." Cal. Lab. Code § 2699 (e)(2). Thus, many courts have routinely approved lesser allocations for PAGA penalties in settlements that provide sufficient classwide recovery. See, e.g., del Toro Lopez v. Uber Techs., Inc., 2018 WL 5982506, at *8 (N.D. Cal. Nov. 14, 2018) (granting final approval to $50,000 PAGA payment out of $10 million settlement fund); Ahmed v. Beverly Health & Rehab. Servs., Inc., 2018 WL 746393, at *10 (E.D. Cal. Feb. 7, 2018) (granting preliminary approval to $4,500 PAGA payment out of $450,000 settlement fund); Martin v. Legacy Supply Chain Servs. II, Inc., 2018 WL 828131, at *2 (S.D. Cal. Feb. 12, 2018) (granting preliminary approval to PAGA allocation of $10,000 out of $625,000 settlement fund); Chu v. Wells Fargo Investments, LLC (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, *1 (approving PAGA settlement payment of $7,500 to the LWDA out of $6.9 million common-fund settlement); Franco v. Ruiz Food Products, Inc. (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, *13 (approving PAGA settlement payment of $7,500 to the LWDA out of $2.5 million common-fund settlement).[11] Such resolutions provide immediate benefit to

[11] See also Viceral v. Mistras Group, Inc. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *9 ("[W]here a settlement for a Rule 23 class is robust, the statutory purposes of PAGA may be fulfilled even with a relatively small award on the PAGA claim itself, because such 'a settlement not only vindicates the rights of the class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA.'"); see also O'Connor v. Uber Technologies Inc., (N.D. Cal.) Civ. A. No. 13-3826, Dkt. No. 736 at p. 4 (Letter from LWDA) ("The LWDA recognizes that this Court does not review the PAGA allocation in isolation, but rather reviews the settlement as a whole, (*cont'd*)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

class members, as well as additional funding for the State, and the State of California has not objected to such allocations. Other courts have regularly approved such settlements, including ones with proportionately lower allocations for PAGA penalties.

Moreover, Plaintiffs provided specific notice to the Labor Commissioner regarding the PAGA allocation and the terms of this settlement back in April 2019. Liss-Riordan Final Approval Decl. at ¶ 6. Despite this specific notice, the State did not respond to the notice or submit any comments or objections to this settlement. The LWDA has also twice declined to participate in this litigation pursuant to Plaintiffs' two PAGA notice letters. Id.; see also Liss-Riordan Reply Decl. at ¶ 3 (noting that Plaintiffs sent PAGA letters on two separate occasions in this action). The State's silence on this settlement, despite numerous opportunities to comment, supports the parties' contention here that the PAGA allocation in this class settlement is adequate and weighs in favor of final approval. See Schuchardt v. Law Office of Rory W. Clark (N.D. Cal. 2016) 314 F.R.D. 673, 685 (where state or federal officials are notified of a settlement and do not object, the "governmental participant" factor weighs in favor of final approval) (citing Holman v. Experian Information Solutions, Inc. (N.D. Cal., Dec. 12, 2014, No. 11-CV-0180 CW (DMR)) 2014 WL 7186207, *3)).

8. The Positive Reaction of Class Members Supports Final Approval

Lack of objections and opt-outs from class members is also a significant factor in favor of final approval. See Vasquez v. USM Inc. (N.D. Cal. Feb. 16, 2016) 2016 WL 612906, *3 (citing Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc. (C.D. Cal. 2004) 221 F.R.D. 523, 529 ("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 are favorable to the class members"). Here, there has been only a single objection to the settlement, which only reflects

---

to determine whether it is fundamentally fair, reasonable and adequate, with primary consideration for the interests of absent class members.").

the views of the Tidrick Law Firm. Plaintiffs consider the fact that there is only one objector to be a positive reaction to the settlement. See, e.g., In re Omnivision Techs., Inc. (N.D. Cal. 2008) 559 F. Supp. 2d 1036, 1043 (approving settlement where "the Court received objections from only 3 out of 57,630 potential Class Members who received the notice"). Plaintiffs will separately address the substance of the Objection in their Response to the Objection, which they will submit on January 3, 2020, pursuant to the schedule set forth in the Court-approved Settlement Agreement and submitted during the preliminary approval process.

Moreover, although approximately 1.35% of class members timely and validly opted out of the settlement (assuming the opt-out requests submitted by the Tidrick Law Firm are deemed valid, which should be tested), Plaintiffs nonetheless believe that the overall reaction to the settlement has been overwhelmingly positive.[12] First, Plaintiffs again emphasize that 99% of these "opt outs" are the product of a campaign by a single law firm, The Tidrick Law Firm, who also purports to represent the lone objector to the settlement, who was a plaintiff who signed the settlement agreement.[13] Courts have noted that where "many … [opt outs] use similar language or similar forms, which is evidence that some of the objections are the product of 'an organized campaign[,]' " this fact weighs against giving any particular weight to the number of opt outs because the numbers may not be reflective of the true sentiments of the class. See Speaks v. U.S. Tobacco Coop., Inc. (E.D.N.C. 2018) 324 F.R.D. 112, 148, judgment entered, (E.D.N.C. Feb. 27, 2018) 2018 WL 1089995; see also Manual Complex Lit. (4th ed.) § 21.62 at 318 ("[A]n apparently high number of objections may reflect an organized campaign, rather than the

[12] Relatedly, the fact that certain class members did opt out indicates that class members were able to understand their rights as described in the Class Notice(s). See Ching v. Siemens Indus., Inc. (N.D. Cal. June 27, 2014) 2014 WL 2926210, *6 ("The fact that some members opted out also indicates that the class members read the Notice and understood the settlement, such that they were able to make an informed decision whether to participate.").

[13] To be precise, only 11 of the-opt outs appear to have been sent by individual class members who wished not be included in the settlement; the remaining 907 were sent on a cookie-cutter form crafted by the Tidrick Law Firm and submitted by Tidrick. See Liss-Riordan Final Approval Decl. at ¶ 32; Chappell Decl. at ⁋ 29.

sentiments of the class at large. A similar phenomenon is the organized opt-out campaign."); In re Serzone Prod. Liab. Litig. (S.D.W. Va. 2005) 231 F.R.D. 221, 245 ("If class members opt-out, the court should examine the circumstances to determine whether the opt-outs reflect an organized campaign or the sentiments of the class at large.").

Here, there is no question that the Tidrick Law Firm engaged in a campaign to flood the claims administrator with thousands of opt-out requests, using similar language and similar forms, in an indiscriminate and questionable matter, without making any effort to verify whether the opt-out request was being submitted by an actual class member, and without making any effort to remove duplicate requests from the boxes of paper sent to the claims administrator. The claims administrator incurred substantial costs and invested substantial resources reviewing the opt-out requests submitted by the Tidrick Law Firms for duplicates and to verify whether the request came from an actual class member. Chappell Decl. at ⁋ 26. The fact that the Tidrick Law Firm submitted hundreds of opt-out requests for individuals who are not even part of the settlement class calls into serious question the validity of every opt-out request it has submitted and demonstrates that the opt-out requests do not represent the sentiments of the class. Rather, they represent only the sentiments of the Tidrick Law Firm. The Court should consider these facts regarding the Tidrick Law Firm's bulk opt-out requests, as well as the administrative burden and costs borne by the claims administrator and the class to review thousands of invalid and duplicate opt-out requests submitted by the Tidrick Law Firm, when considering the weight to give to these opt-out requests.[14]

Moreover, courts have consistently approved settlements that are fair, reasonable, and adequate, even in the face of a far larger number of opt outs than exists here. See, e.g., Marshall

[14] Given the large volume of opt-out requests submitted by the Tidrick Law Firm for individuals who are not part of the settlement class, the Tidrick Law Firm should be ordered to explain whether and how it verified that each individual for whom it submitted an opt-out request actually consented to opt-out of the settlement before the opt-out requests were submitted. If such verifications took place, surely the Tidrick Law Firm would have discovered that hundreds of those individuals were not part of the settlement class.

v. Nat'l Football League (8th Cir. 2015) 787 F.3d 502, 513 ("The fact that less than ten percent of the entire class opted out of the settlement—despite conscious efforts by some class members to persuade the other class members of unfairness—suggests it was favorable to what most members believed their claims were worth."); Jones v. Singing River Health Servs. Found. (5th Cir. 2017) 865 F.3d 285, 299–300, cert. denied sub nom. Almond v. Singing River Health Sys., (2018) 138 S. Ct. 1000 (approving settlement where 6.66% of the class objected).

Further, the claims rate to date, in which 5,452 class members have submitted claims is a significant claim rate for this type of settlement, particularly given that there is still nearly a month left in the claim period, during which time Plaintiffs expect that the claim rate will continue to rise. See Chappell Decl. at ¶ 31. Indeed, this claim rate is quite high compared to other wage and hour settlements that have been routinely approved in California and by this Court. See, e.g., Bautista v. Harvest Management Sub LLC (C.D. Cal., July 14, 2014) 2014 WL 12579822, *9 (approving settlement with claims rate of 25.01% and noting that the rate is "within the range of other wage and hour cases in which the courts have approved settlements") (citing cases); Barcia v. Contain-A-Way, Inc. (S.D. Cal., Mar. 6, 2009) 2009 WL 587844, *5 (25.3% claims rate); Rodriguez v. W. Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 967 (affirming approval of class action settlement with 13% favorable response rate); Rodriguez v. D.M. Camp & Sons (E.D. Cal. 2013) 2013 WL 2146927, *4 (15.05% claims rate). The claims process will have the added benefit of resulting in more substantial payments to those people who take the time to follow a very simple online claims process. See Miller v. Ghirardelli Chocolate Co. (N.D. Cal. Oct. 2, 2014) 2014 WL 4978433, at *4 (reasoning that claims process was appropriate in part because it "directs available funds to those who most care about the alleged deception and thus are willing to file a claim.").

In sum, there has been an overall positive reaction to the settlement, with nearly all class members having received notice of it multiple times. Accordingly, this factor, along with all other Kullar factors, weighs in favor of final approval.

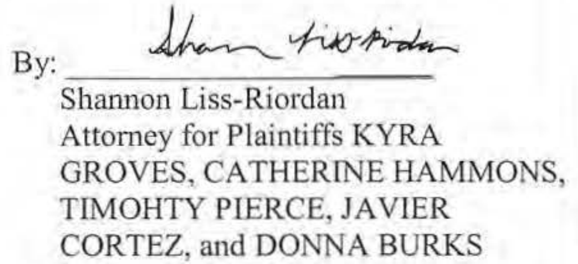
IV. CONCLUSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Based upon the foregoing, and the papers filed in support of this Motion and Plaintiffs' Motion for Preliminary Approval, this settlement should be approved by the Court. Plaintiffs respectfully request that the Court grant this motion and permit class members to obtain the benefits of this hard-fought settlement.

Dated: December 17, 2019

LICHTEN & LISS-RIORDAN, P.C.



By: ______________________
Shannon Liss-Riordan
Attorney for Plaintiffs KYRA GROVES, CATHERINE HAMMONS, TIMOHTY PIERCE, JAVIER CORTEZ, and DONNA BURKS