# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Civil Division**

Central District, Stanley Mosk Courthouse, Department 56

**BC695401** August 28, 2019
**KYRA GROVES ET AL VS MAPLEBEAR INC** 8:30 AM

Judge: Honorable Holly J. Fujie
Judicial Assistant: O.Chavez
Courtroom Assistant: B.Chavez

CSR: Cesar Rodriguez, CSR #13269
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Shannon Liss-Riordan

For Defendant(s): No Appearances

Other Appearance Notes: Allen Graves

**NATURE OF PROCEEDINGS:** Hearing on Motion for Order Motion for Preliminary Approval

The matter is held.

All counsel submitted to the Court's tentative ruling.

The Motion re: MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT filed by Javier Cortez, Catherine Hammons, Kyra Groves, Donna Burks, Seth Blackham, Timothy Pierce on 03/22/2019 is Granted.

MOVING PARTIES: Plaintiffs Kyra Groves, Catherine Hammons, Timothy Pierce, Javier Cortez, Donna Burks, and Seth Blackham

RESPONDING PARTIES: Paul Taylor ("Taylor") and Sarah Lozano ("Lozano")

The Court has considered the moving, opposition, reply papers, and supplemental briefs provided by the parties.

BACKGROUND

On January 29, 2019, Plaintiffs filed the operative first amended class action and collective action complaint for damages and representative action for civil penalties under the Private Attorney General Act of 2004 (the "complaint").

Plaintiffs' complaint arises from the alleged wrongful misclassification of Plaintiffs and other individuals who performed grocery shopping and delivery services in California as independent contractors for Defendant. Plaintiffs complaint alleges counts for: (1) failure to pay minimum wage & overtime in violation of the FLSA; (2) expense reimbursement; (3) willful

misclassification; (4) minimum wage; (5) overtime; (6) pay statements; (7) failure to pay wages on termination; (8) failure to timely pay wages; (9) unfair business practices; (10) failure to pay wages for meal and rest breaks; (11) conversion; (12) penalties pursuant to the California Labor Code Private Attorneys General Act ("PAGA") of 2004.

On May 9, 2019, the Court ordered Plaintiffs to address the relative strengths and weaknesses of all the causes of action in the FAC, and not just the expense reimbursement, overtime, and minimum wage claims that had been previously addressed in the moving and reply papers submitted by Plaintiffs. While Paul Taylor ("Taylor") and Sarah Lozano ("Lozano") objected to the proposed settlement initially and filed oppositions, after engaging in extensive discussions, Taylor and Lozano and all the Parties have agreed upon an Amendment to the Settlement Agreement ("Amendment 1") and Notice that would address their respective concerns with the settlement. (Liss-Riordan Supp. Decl. ¶ 4; Liss-Riordan Supp. Decl. at Exhibit 1.)

Key Settlement Terms

Plaintiffs and Defendant entered into a proposed class action settlement agreement. The class period is from September 1, 2017 until the earlier of the preliminary approval date or May 9, 2019. (Liss-Riordan Decl., Exhibit A at I. (9).) The settlement agreement provides that Defendant will pay a non-reversionary $10,965,000.00 (the "Gross Common Fund") to fully resolve the claims in this action. (Liss-Riordan Decl., Exhibit A at III. 2. (a).) Nevertheless, certain expenses will be paid out of the Gross Common Fund including: (1) claims administration; (2) attorneys' fees and costs; (3) incentive payments in varying amounts for each named Plaintiff; and a PAGA payment to the LWDA of which the settlement agreement allocates $150,000.00 to Plaintiffs' PAGA claims. (Id. at III. 2. (b).) Non-monetary relief will also be provided in that Defendant has agreed to make various changes to its business practices in California pursuant to the settlement agreement. (Id. at III. 3. (b).) Attorneys' fees shall not exceed more than one-third of the Gross Common Fund which amounts to $3,655,000. (Id. at III. 14. (c).) Litigation costs are not to exceed $30,000.00 for class counsel. (Id. at I. 26.) Payments for class representatives are not to exceed a certain amount for each of the named Plaintiffs. (Id. at III. 14. (e).) The Claims Administrator shall receive up to $180,000.00. (Id. at III. 14. (f).) The settlement agreement resolves the instant action as well as the separate Cortez lawsuit that was stayed pending approval of this settlement. (Id. at II. (2)- II. (5) and II. (7)- II. (16.)

After the May 9, 2019 hearing, the parties and objectors agreed to revise portions of the Settlement Agreement. (Liss-Riordan Supp. Decl. at ¶¶ 3-4.) The parties have effectuated amendments to the Settlement Agreement which changes some provisions of the Settlement

Agreement. Amendment 1 to the settlement agreement to which the parties have agreed sets aside $175,000.00 of the existing settlement fund to serve as a separate fund for the sub-class of eighty-two drivers who opted out of Defendant's arbitration clause. (Liss-Riordan Supp. Decl. at ¶ 5; Liss-Riordan Supp. Decl. at Exhibit 1.) Moreover, Amendment 1 includes an agreement to seek incentive payments for objectors Lozano, Taylor, Timothy Hearl ("Hearl"), and Mimi Hayes ("Hayes") (collectively, the "Objectors") as well as allowing counsel for the Objectors to share in the fee award and seek costs n terms agreed by the Parties and the Objectors. (Id.) Pursuant to Amendment 1, the Objectors have agreed to withdraw all of their objections to the proposed settlement and stay their cases pending approval of the settlement. (Id.) Pursuant to Amendment 1, if and when the settlement is approved, Objectors would dismiss their respective cases. (Id.)

Amendment Number Two ("Amendment 2") to the Settlement Agreement corrects the previously incorrect California Civil Code, Section 1542 language in Section 14(b) of the Parties' Settlement Agreement. (Liss-Riordan Supp. Decl. at ¶ 6; Liss-Riordan Supp. Decl. at Exhibit 2.) The parties also made some revisions to the Settlement Notice. (Liss-Riordan Supp. Decl. at Exhibits 3 and 4.)

The Settlement Agreement provides that upon preliminary approval of the settlement, notices will be distributed to the settlement class within 45 days via U.S. Mail. (Liss-Riordan Supp. Decl., Exhibit 7 at III. (9) (c) (ii).) Members of the settlement class may opt-out of the settlement. (Id. at III. (9) (d)(i.).) The settlement agreement also sets forth an allocation formula for determining the amount of payment to a respective class member. (Id. at III. (13)(c).)

Plaintiffs' Motion for Preliminary Approval

Plaintiffs filed a motion for preliminary approval of the class action settlement on behalf of themselves and all other similarly situated class members for an order preliminarily approving the class action settlement agreement and ordering that notice be issued to the settling class.

DISCUSSION

"[T]o prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class action requires court approval." (Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1800.) "The court must determine that the settlement is fair, adequate, and reasonable." (Id.) "The purpose of the requirement is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (Id.) "The trial court has broad discretion to determine whether the settlement is fair." (Id.) "[A]

presumption of 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." (Id.)

THE PRESUMPTION OF FAIRNESS

Arms-Length Bargaining

Here, counsel agreed to mediation beginning in the summer of 2018 to seek a global resolution of matters they were litigating related to Defendant. (Liss-Riordan Decl. at ¶ 5.) The parties engaged an experienced wage-and-hour mediator named Michael Dickstein. (Id.) Mediation took place in July 2018 without a resolution. (Id.) The parties then mediated again, in two additional full-day sessions, in August and September 2018. (Id.) The parties exchanged extensive data and were involved in in-depth and exhaustive discussions. (Id.)

Thus, the settlement was conducted at arms-length.

Sufficient Investigation and Discovery

According to counsel, the parties engaged in extensive exchanges of data. (Id.) Moreover, before this action was filed against Defendant, Plaintiffs' counsel litigated a case against Defendant that alleged claims for misclassification, expense reimbursement, and minimum wage under Massachusetts law. Plaintiffs' motion expresses that counsel was intimately aware of the ways Defendant's contracts operated with respect to its delivery drivers and full-service shoppers and were familiar with the strengths and weaknesses of Defendant's arguments with respect to expense reimbursement, minimum wage claims, and misclassification. Plaintiffs' motion also indicates that their counsel received comprehensive class-related data in advance of the mediation sessions. Plaintiffs' motion indicates that their counsel had in-depth discussions with the named Plaintiffs and mediator with respect to the contours of possible non-monetary relief that were incorporated into the settlement. In their motion, Plaintiffs assert that counsel made reasonable calculations of the potential damages in this action to account for various risk factors associated with the theories of recovery.

Therefore, the Court finds that there was sufficient investigation and discovery.

Experience of Counsel

The Court finds that Plaintiffs' counsel is experienced. Counsel has experience representing "gig economy" workers in California misclassification cases. (Id. at ¶ 4.) Moreover, counsel has over 15 years of experience litigating misclassification cases under the "ABC" test that the California Supreme Court adopted in Dynamex Operations W. v. Superior Court. (Id.)

Percentage of Objectors

The number of objectors to the proposed settlement cannot be determined until after the preliminary settlement is approved. (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116.)

Thus, the Court finds that the proposed settlement agreement is entitled to the presumption of fairness.

FAIRNESS, ADEQUACY, AND REASONABLENESS OF THE SETTLEMENT

In the determination of whether a proposed class action settlement is fair, the court "should consider relevant factors, such as the strength of plaintiffs' case, the risk, the expense, complexity and likely duration of further litigation, the risk of maintaining class status through trial, the amount offered in settlement, the extent of discovery completed and the stage of proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801.)

Issue No. 1: Strength of Plaintiffs' Case

In assessing the fairness, adequacy, and reasonableness of a proposed class action settlement, "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Plaintiffs' counsel's reply declaration begins to provide some indication of the strength of Plaintiffs' case. Counsel does provide estimates of total exposure and the basis for those estimates for Plaintiffs' claims for expense reimbursement, minimum wage, overtime, and PAGA claims. (Liss-Riordan Reply Decl. at ¶¶ 12-16.) Counsel declares that for expense reimbursement, she estimated the total exposure at approximately $24 million. (Id. at ¶ 12.) Counsel declares that there are obstacles to succeeding on this claim class-wide because it is not clear whether the Dynamex test will apply to expense reimbursement claims and thus it would

make it more difficult to prove employee-status for purposes of this claim. (Id. at ¶ 13.) Counsel estimates potential exposure for the minimum wage claim to be approximately $17 million and explained her methods of calculating the potential total exposure. (Id. at ¶ 14.) Counsel expresses obstacles to succeeding on this claim include establishing what time is compensable time and cites to O'Connor v. Uber Technologies, Inc. (Id.) Counsel calculated a total exposure of $17 million for Plaintiffs' overtime claim and believes that a barrier to success on this claim includes defeating Defendant's arbitration clause and the uncertainty of whether a court would certify a claim for drivers who only worked overtime hours. (Id.) With respect to the PAGA claim, and explaining her calculation methodology, Plaintiffs' counsel indicates that without stacking the PAGA exposure could be as little as $26.3 million or with stacking could be as high as $131.75 million. (Id. at ¶ 16.) Nonetheless, counsel declares that stacking figure is not the maximum value of claims as it is highly likely that a court would reduce PAGA penalties to a much smaller figure. (Id.)

Counsel declares that misclassification cases that resulted in settlement against Defendant—in Summerlin v. Maple bear, Inc. dba Instacart and Camp v. Maplebear Inc. dba Instacart—resulted in lower settlement amounts for longer time periods than at issue here. (Liss-Riordian Reply Decl. at ¶ 11.) Counsel declares that the Sumerlin settlement provided $2,000,000.00 for 11,890 California class members; moreover, counsel declares that Camp provided $4,625,000.00 for 57,020 California class members. (Id.) Thus, counsel declares that the proposed settlement here is in line or even better than those in Sumerlin and Camp. (Id.)

Willful Misclassification Claim

With respect to the willful misclassification claim, Plaintiffs assert in their supplemental brief that they assigned negligible value to the claim for willful misclassification because they believed they would not recover on a class-wide basis on this claim for a number of reasons.

"There is no language suggesting a private plaintiff may bring a direct action under section 226.8 action or that a misclassified employee may collect the penalties described within the statute." (Noe v. Superior Court (2015) 237 Cal.App.4th 316, 338.) Moreover, a finding of willfulness is required to support a claim under Section 226.8 and "it [is] reasonable for Plaintiffs' counsel to assign little or no value to these claims when considering the overall full-verdict value." (O'Connor v. Uber Techs., Inc. (N.D. Cal. Mar. 29, 2019, No. 13-CV-03826-EMC) 2019 WL 1437101 at *11, n. 6).)

The supplemental brief asserts that due to the applicable case law, there is a good chance that Plaintiffs would not be able to recover on the willful misclassification claim and due to the

statute requiring a showing of willfulness, it may be difficult to meet in the face of ongoing litigation and uncertainty in this area.

Pay Statements

To recover for a cause of action for failure to provide itemized pay statements that comport with all the information required by law, an employee must show injury in that they were not provided with a pay statement at all (Cal. Labor Code § 226(e)(2)) or when the wage statement is deficient and the employee cannot identify: (1) the total hours worked; (2) piece rate units earned, if applicable; (3) all deductions; (4) inclusive dates of the pay period; and (5) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. (Cal. Labor Code § 226(a)(2)-(9).) An injury under Section 226 requires that an employee cannot "quickly verify earnings when looking at the wage statements." (Holak v. K Mart Corp. (E.D. Cal. Sept. 30, 2014) 2014 WL 4930762 at *7).) Courts have permitted employers to assert a good faith defense at or after trial to defeat the knowing and intentional requirement that makes a violation of Section 226 actionable. (Dalton v. Lee Publications, Inc. (S.D. Cal. Mar. 22, 2011, No. 08CV1072 BTM NLS) 2011 WL 1045107 at *5).)

Plaintiffs assert that it would have been difficult to show injury here because Defendant would likely argue that its pay statements set forth the information required under Section 226(a)(2). Also, Plaintiffs assert that due to the prior Sumerlin and Camp settlements, Defendant agreed to provide more detailed information to its shoppers. Plaintiffs assert that they would have had difficulty overcoming Defendant's good faith defenses to this claim including that it had a good faith belief that shoppers were classified correctly, and not subject to the requirements of Section 226. As such, Plaintiffs assigned little value to this claim.

Failure to Pay Wages on Termination and Failure to Timely Pay Wages

California Labor Code, Section 201(a) requires an employer to pay wages earned and unpaid at the time of discharge are due immediately and if an employee is laid off then wages must be paid within a reasonable time not to exceed 72 hours. California Labor Code, Section 202(a) says that "[i]f an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter." California Labor Code, Section 203(a) allows waiting time penalties to be assessed when "an employer willfully fails to pay . . . in accordance with Sections 201 [and] 202." California Labor Code, Section 204(a) requires that "[a]ll wages . . . earned by any person in any employment are due and payable twice during each calendar month" while California Labor Code, Section 204(b)

requires that "all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period."

Plaintiffs assert that given the dispute of whether shoppers are employees or independent contractors, and the lack of a definite court ruling on this inquiry, Plaintiffs contend it would be difficult for them to prevail on claims requiring a finding of willfulness. (Dalton v. Lee Publications, Inc. (S.D. Cal. Mar. 22, 2011, No. 08CV1072 BTM NLS) 2011WL 1045107 at *5).) Plaintiffs contend that because employees have to prove that the time was compensable work time to recover damages for waiting time pursuant to California Code of Regulations, Title 8 Section 11090, the nature of the Instacart system makes this difficult to prove. Plaintiff asserts that the nature of the app allows shoppers to choose to decline or accept customer orders that are offered to them, and as such it would be difficult to show that the shoppers were under the control of Defendant. As such, those are the reasons Plaintiff believed there would be a substantial risk of no recovery on the above claims.

Meal and Rest Break Claims

"The employer properly provides an off-duty break if it relieves its employee of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede of discourage them from doing so." (Safeway, Inc. v. Superior Court (2015) 238 Cal.App.4th 1138, 1148.) What constitutes a meal and rest break "may vary from industry to industry." (Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1040.)

Plaintiffs assert that this claim would be difficult to prove because shoppers are provided with a "take a break" button in the app that they can tap when they wish to stop receiving orders, and take a twenty-minute break from shopping or delivering orders. Plaintiff also presents the argument that the app is designed to allow shoppers to log on or off at will, thus during which time Defendant has no control whatsoever over a shopper's activity. As such, Plaintiffs state they would have difficulty prevailing on this claim due to the nature of the app. Moreover, with respect to meal and rest break claims, liability is shown from an employer denying a rest break. (Cummings v. Starbucks Corp. (C.D. Cal. Mar. 24, 2014) 2014 WL 1379119 at *19).) As such, Plaintiffs contend they were unlikely to succeed on the meal and rest break claims, and as such they were assigned no value for settlement purposes.

Conversion and UCL Claims

Plaintiffs assert that to the extent the above claims would have resulted in any restitution to

Plaintiffs, they already accounted for such recovery when assigning a value to the underlying wage claims and expense reimbursement claims in this case.

PAGA Violations

In the FAC, Plaintiffs sought penalties pursuant to the PAGA under California Labor Code, Sections 351, 201, 202, 203, 204, and 226.8. As discussed above, Plaintiffs have advanced reasons why they assigned no additional value to violations of California Labor Code, Sections 201-204 and 226.8.

Plaintiff's predicate violation of California Labor Code, Section 351 is based on the fact that Defendant failed to remit the full amount of gratuities to eligible employees by charging a "service fee" that qualifies as a tip under California law and not distributing them in full to eligible drivers. Plaintiff, however, indicates that as part of the Camp settlement, Defendant undertook measures to modify its app to clarify the difference between a service fee and a tip. Moreover, Plaintiff asserts that in Camp, the Court accepted the Plaintiffs' explanation that significant obstacles existed to recovering under Section 351.

Issue No. 2: Risk, Expense, Complexity, and Duration of Further Litigation

Given the nature of class claims, the case is likely to be expensive and lengthy to try as procedural obstacles exist.

Issue No. 3: Risk of Maintaining Class Status Through Trial

Even if a class is certified, there is always a risk of decertification. (Weinstat v. Dentsply Intern., Inc. (2010) 180 Cal.App.4th 1213, 1226.) Counsel acknowledges the risks inherent in maintaining this class action. (Liss-Riordan Reply Decl. at ¶ 8.)

Issue No. 4: Amount Offered in Settlement

The maximum settlement amount is $10,965,000.00 which is described as the "Gross Common Fund." (Liss-Riordan Supp. Decl., Exhibit 7 at ¶ 19.) The following disbursements of the settlement amount will be made: (1) payments to settlement class members; (2) attorneys' fees not to exceed $3,655,000.00 for class counsel and counsel in related cases; (3) litigation costs not to exceed $50,000.00 for class counsel and counsel in related cases; (4) administration expenses estimated at $180,000.00; (5) payment to the Labor Workforce Development Agency of $150,000.00 in the lawsuit for PAGA penalties; (6) a subclass fund of $175,000.00 set aside for

class members who opted out of the arbitration provision of their independent contractor agreements with Defendant; (7) awards not to exceed $20,000.00 each to Plaintiffs Groves, Hammons and to Plaintiffs in four related cases: Hearl, Hayes, Taylor, and Lozano; (8) awards not to exceed $5,000.00 each to Plaintiffs Pierce and Cortez; (9) awards not to exceed $1,000.00 each to Plaintiffs Burk and Blackham; and (10) taxes arising from payments under the settlement, including employer payroll taxes. (Liss-Riordan Supp. Decl. at Exhibit 3.) Counsel declares that the settlement class would ultimately be comprised of approximately 55,000 people. (Liss-Riordan Decl., Exhibit A at III. 10.)

Issue No. 5: Extent of Discovery Completed

As explained above, at the time of settlement, the parties exchanged extensive data.

Issue No. 6: Experience and Views of Counsel

As explained above, counsel who negotiated and endorsed the proposed class action settlement is experienced in the type of litigation that is the subject of this case.

Issue No. 7: Presence of a Governmental Participant

This factor is not applicable in this action.

Issue No. 8: Reactions of Class Members

As explained above, the reactions of all class members are unknown until they are given the opportunity to object or opt-out of the class settlement.

Conditional Class Certification

California Code of Civil Procedure, Section 382 provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members." (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.) "The community of interest requirement involves three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (Id.) "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed

litigation and the plaintiff's interests are not antagonistic to the interests of the class." (McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450.)

Here, the class is composed of approximately 66,000 class members making it sufficiently numerous. Moreover, the class is ascertainable because the class members were all individuals who performed grocery shopping or delivery services for Defendant since September 1, 2017. Common questions of fact or law predominate as the class members seek redress for the same alleged wrongs. Moreover, Plaintiffs' claims are typical of the class as Plaintiffs each performed grocery shopping or delivery services for Defendant. (City of San Diego v. Haas (2012) 207 Cal.App.4th 472, 501.) Additionally, adequacy of representation is present here as no conflict exists between Plaintiffs and the other class members and Plaintiffs' attorney is qualified. The class action appears to be superior to separate individual actions by the class members.

Therefore, certification of the settlement class is appropriate.

The Court GRANTS Plaintiffs' motion for preliminary approval of class action settlement.

Moving Party is ordered to give notice of this ruling.

Dated this 28th day of August 2019

HOLLY J. FUJIE

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Hon. Holly J. Fujie
Judge of the Superior Court