KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleykingsley.com
KELSEY M. SZAMET, Esq. (SBN 260264)
kelsey@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
(818) 990-8300, Fax (818) 990-2903

Attorneys for Plaintiff and the Proposed Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

ADINA MEZA an individual, on behalf of herself and others similarly situated

PLAINTIFF,

v.

TRACKIN, CO.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

CASE NO. CGC-19-573185

[Case Assigned for All Purposes to Hon. Garrett L. Wong, in Dept. 610]

NOTICE OF SECOND MOTION AND SECOND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declaration of Kelsey Szamet, Declaration of Filippo Beretta, and [Proposed] Order Thereon]

Date: March 16, 2021
Time: 9:30 a.m.
Dept.: 302

Trial Date:	None Set
Complaint Filed:	January 25, 2019
FAC Filed:	April 2, 2019

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 16, 2021 at 9:30 a.m. in Department 302 of the above-entitled court, Plaintiff ADINA MEZA will move the Court for an Order of Preliminary Approval of the Class Action Settlement Agreement and Release of Claims, and Amendment thereto (collectively the "Settlement Agreement"), a copy of which is filed concurrently with the Declaration of Kelsey M. Szamet.

The Motion will be made on the grounds that the proposed Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Class and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Filippo Beretta, and the Declaration of Kelsey M. Szamet, the Settlement Agreement and Release, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: February 22, 2021

KINGSLEY & KINGSLEY, APC

By: _____

Kelsey M. Szamet
Attorneys for Plaintiff ADINA MEZA and the proposed class

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Regulations

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ADINA MEZA ("Plaintiff") submits this Memorandum of Points and Authorities in support of Plaintiff's Second Motion for Preliminary Approval of the Class Action Settlement Agreement and Release of Claims, and Amendment thereto, (collectively "Settlement" or "Settlement Agreement") reached between Plaintiff and Defendant TRACKIN, CO. ("Defendant").

Having considered the Court's July 24, 2020 tentative ruling, the Parties have executed an Amendment to the Settlement, addressing Defendant's payment of the payroll taxes owed. Additionally, Plaintiff has provided an in-depth analysis of the maximum exposure for each claim, and the facts warranting the discounted settlement in light of Defendant's solvency issues. By this Motion, Plaintiff requests that the Court:

(1) Grant preliminary approval of the fully-executed Settlement Agreement. A true and correct copy of the Settlement Agreement and amendment thereto is attached to the concurrently filed Declaration of Kelsey Szamet as Exhibit "1";

(2) Approve the proposed Notice of Class Action Settlement to Class Members, a copy of which is attached to the Settlement Agreement as Exhibit "A," and direct that the Notice be sent to Class Members in the manner set forth in the Settlement Agreement; and

(3) Schedule a hearing on final approval of the proposed Settlement and Plaintiff's counsel's application for an award of attorney's fees and litigation costs at which Class Members may be heard ("Final Approval Hearing").

II. FACTUAL BACKGROUND

A. Litigation Overview

On January 24, 2019, Plaintiff submitted a notice letter to the Labor Workforce Development Agency and Defendant regarding her intent to file an action seeking civil penalties under the Labor Code Private Attorneys General Act of 2004, §2699, et seq. ("PAGA"). (Declaration of Kelsey M. Szamet, "Szamet Decl.," ¶4.) The following day, on January 25, 2019, Plaintiff filed a complaint alleging that Defendant misclassified Plaintiff and other drivers as

independent contractors and, as a result, failed to: pay wages/ overtime, provide lawful meal and rest breaks, to reimburse business expenses, issue lawful itemized wage statements, pay wages owed upon termination/resignation, and engaged in unfair business practices based on these alleged Labor Code violations. (Szamet Decl., ¶4; Settlement Agreement §III, ¶2)

On April 2, 2019, Plaintiff filed a First Amended Complaint ("FAC"), adding an eighth cause of action pursuant to PAGA based upon the Labor Code violations previously alleged in the complaint. (Szamet Decl. ¶5; Settlement Agreement § III, ¶3.) Defendant answered on May 7, 2019. (*Ibid.*)

The Parties subsequently began to engage in informal discovery to understand the nature of the allegations and the scope of potential liability. (Szamet Decl. ¶6; Settlement Agreement § III, ¶3.) Defendant provided the complete payroll and timekeeping records for the class that it had available, including an accounting of pay for each delivery/shift worked by drivers from 2016 through the present and an aggregate count of the total deliveries made by each driver. (Szamet Decl. ¶7; Settlement Agreement § III, ¶3.)

Defendant also provided information regarding the releases that it obtained from certain drivers during the course of litigation, including a list of the drivers who signed releases, the total amount of money paid to release those drivers' claims, and the number of deliveries made by each releasing and non-releasing driver. (Szamet Decl. ¶8; Settlement Agreement § III, ¶4.)

In order to avoid the delay and expense of litigating these claims, the Parties agreed to mediate this dispute. (Szamet Decl. ¶9; Settlement Agreement § III, ¶6.) On July 9, 2019, the Parties attended a full-day mediation with mediator Hon. George Hernandez (Ret.). (*Id*.) Although the Parties did not resolve the matter that day, they continued their settlement efforts in the weeks following the mediation and reached a settlement on July 19, 2019 to resolve Plaintiffs claims on a class-wide basis. *Id.*

At the mediation, Defendant presented arguments regarding its financial solvency and presented its 2018 and 2019 profit and loss statements and balance sheets to verify its financial status. (Declaration of Filippo Beretta, "Beretta Decl." ¶ 4; Szamet Decl., ¶9.) Additionally, Class Counsel also spoke with Defendant's Treasurer who explained that Defendant was merely a startup

company who had yet to see any profits and was at risk of ceasing its business in light of the Action. (Beretta Decl. ¶ 5; *Id.*) Specifically, the documents provided in mediation showed that the company's net income from April–June 2019 was negative $107,383.13 and total liabilities and equity on June 30, 2019 was $304,973.42. (Beretta Decl. ¶ 4.)

Furthermore, Defendant denies any liability or wrongdoing of any kind associated with the claims asserted in Plaintiff's Complaint, disputes that its workers were misclassified, and contends the damages and penalties claimed by Plaintiff, and further contends that, for any purpose other than settlement, Plaintiff's claims are not appropriate for class or representative treatment. (Szamet Decl. ¶10; Settlement Agreement § III, ¶5.) The recent passage of Proposition 22 has created additional risks to Plaintiffs' misclassification claims, *i.e.* that the ABC test will not be applied to determine whether Plaintiffs are employees or independent contractors. (Note that any references herein to the Class Members as "employees" or the Defendant as an "employer" of the Class Members are disputed by Defendant.)

Class Counsel investigated the facts relevant to the Lawsuit, including reviewing documents and information provided by Defendant. (Szamet Decl. ¶11.) Based on their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement with Defendant is fair, reasonable and adequate, and in the best interest of the Settlement Class in light of all known facts and circumstances, including Defendant's financial status, the risks of significant delay, defenses asserted by Defendant, uncertainties regarding a class trial, and numerous potential appellate issues. (Szamet Decl. ¶12; Settlement Agreement § III, ¶7.) Although Defendant denies any liability, Defendant is agreeing to this Settlement solely to avoid the cost of further litigation. Accordingly, the Parties and their counsel desire to fully, finally, and forever settle, compromise and discharge all disputes and claims arising from or relating to the Action on the terms set forth herein. *Id.*

B. Previous Motion for Preliminary Approval

Plaintiff filed his original motion for preliminary approval of class settlement on February 19, 2020. (See court docket on file herein.) This Court issued a tentative ruling on July 24, 2020 denying Plaintiff's Motion without prejudice and outlining the issues to be addressed with

Plaintiff's second papers. All of the issues have been addressed below.

III. THE SETTLEMENT

A. The Settlement Class

For purposes of Settlement, the Settlement Class is defined as: "all persons working as drivers for Trackin, Co. in the State of California since January 25, 2015 to September 7, 2019" (*See* Settlement Agreement, Ex. 1 at § I, ¶5.)

Based on documents and other informal discovery produced by Defendant, there are approximately 205 employees in the Settlement Class. (Settlement Agreement § VII, ¶18.; Szamet Decl. ¶13.)

B. Total Settlement Amount

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to pay a Total Settlement Amount of $160,000.00, which includes any approved Class Counsel Award, Class Representative Enhancement Award, Individual Settlement Payments, PAGA Payment, and Settlement Administrator Costs. (Settlement Agreement § I, ¶35.; § VII, ¶8.; Szamet Decl. ¶14.)

The Net Settlement Fund is the Total Settlement Amount minus any award of Class Counsel Award, Class Representative Enhancement Award, PAGA Payment, and Settlement Administration Costs. (Settlement Agreement § I, ¶19.; *Id* at § VII, ¶8.) This is a non-reversionary Settlement meaning Defendant will pay the Total Settlement Amount and no portion will revert to Defendant. *Id*.

The amount of each Participating Class Member's Individual Settlement Payment is determined on a pro rata basis based upon the number of deliveries made by a Settlement Class Member during the Class Period. Individual Settlement Payments will be paid from the Net Settlement Fund and shall be paid pursuant to the settlement formula set forth in the Settlement Agreement. (Settlement Agreement § I, ¶¶17, 25.; *Id* at § VII, ¶9(a).) The Settlement Agreement provides for a specific and detailed delivery dispute process. (Settlement Agreement § VII, ¶6(c).)

///

///

C. Process for Administering Settlement after Preliminary Approval

The detailed Notice Procedure established by the Settlement Agreement will efficiently and accurately ensure that Notice is provided to the Settlement Class Members. (Settlement Agreement § VII, ¶¶6., 13(a).)

The Parties have agreed to use a reputable third-party claims administrator, ILYM Group, Inc., to administer the Settlement. (Settlement Agreement § I, ¶33; *Id* at § VII, ¶6.)

D. Process for Settlement Class Members to Respond to Class Notice

As detailed in the Settlement Agreement, Settlement Class Members will have an opportunity to request exclusion from the Settlement Class (i.e. opt out) and to object to the Settlement at the Final Approval Hearing. (Settlement Agreement § VII, ¶6(e)-(f).)

E. Amendments to the Settlement Agreement

1. Amendment to Settlement Regarding Tax Payments

Section VII(3) of the Settlement Agreement, entitled "Tax Liability and Medicare," was amended as follows:

Defendant shall be responsible for paying, in addition to the Total Settlement Amount, the employers' share of payroll taxes it is required to pay as the employer of the Plaintiff and Class Members, if any such payroll taxes are required. For tax purposes, Individual Settlement Payments shall be allocated and treated as: 1) one-third (1/3) as wages for which IRS Forms W-2 will be issued; and 2) two-thirds (2/3) as penalties and interest, not subject to withholdings, and reported on a 1099 form to be issued by the Settlement Administrator. Moreover, this Agreement is based upon a good faith determination of the Parties to resolve a disputed claim. The Parties have not shifted responsibility of medical treatment to Medicare in contravention of 42 U.S.C. Sec. 1395y(b), especially since this is strictly a wage and hour case. The Parties resolved this matter in compliance with both state and federal law. The Parties made every effort to adequately protect Medicare's interest and incorporate such into the settlement terms. Plaintiff warrants that he is not a Medicare beneficiary as of the date of this Agreement. Because Plaintiff is not a Medicare recipient as of the date of this Agreement, no conditional payments have been made by Medicare. Amendment 1 to Settlement Agreement.

2. Amendment to Class Notice

Exhibit "A" to the Settlement Agreement, the class notice, was amended as follows:

5. What are the terms of the settlement and how much will I receive?

Under the proposed settlement, in exchange for a full release of claims against it, Trackin will pay $160,000. Under the proposed settlement, the following amounts will be deducted before any payments are made to employees, all subject to final approval by the Court:

• Attorneys' fees: $53,333.33

• Litigation Costs: $6,500.00

• Claims Administration Costs: $10,000.00

• Class Representative Enhancement Award to Class Representative: $5,000.00

After these deductions, $85,166.67 will be available for payment to the Settlement Class Members receiving this notice ("Net Settlement Fund").

Each Participating Class Member's Individual Settlement Payment is determined on a pro rata basis based upon the number of deliveries made during the relevant time period in proportion to the total number of deliveries made by all Settlement Class Members during the relevant time period.

All Individual Settlement Payments will be allocated as follows: 1) one-third (1/3) as wages; and 2) two-thirds (2/3) as penalties and interest. Trackin will pay the employers' share of payroll taxes.

According to Trackin's records, the total number of deliveries that you made during the relevant time period is _____. If you disagree with this information and would like someone to look into the matter, please follow the procedure below. Based on these deliveries, your estimated settlement amount is _____.

Amendment 2 to Settlement Agreement.

IV. ARGUMENT

A. Plaintiff Requests Preliminary Approval of This Class Action Settlement

The case of *Kullar v. Foot Locker Retail, Inc* (2008) 168 Cal.App.4th 116, 128, sets forth several factors that the Court should analyze in determining whether to approve a class action

settlement. These factors include: (1) the strength of plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the amount offered in settlement; (5) the extent of discovery completed and 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. The proposed settlement satisfies each of these factors.

1. The Strength and Weaknesses of Plaintiff's Case

a) The Risks Associated with the Minimum Wage/Overtime Claim

California Labor Code § 1197 states that "the minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful." The Labor Code and Wage Orders' minimum wage provisions are enforceable by private civil action pursuant to Labor Code § 1194(a), and § 1194.2 provides for "liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon."

Here, Plaintiff contends that Defendant implemented a policy of regularly requiring drivers to work without pay. (Szamet Decl. ¶15.) Specifically, instead of paying for hours actually worked, Plaintiff alleged that Defendant only paid for the time it expected drivers should take to complete their assigned jobs, which was consistently longer than the hours scheduled by Defendant. (*Id*.) Plaintiff alleged that these uncompensated hours caused drivers to work in excess of eight (8) hours per day and/or forty (40) hours per week. (*Id*.) Plaintiff also contends that Defendant, by the use of its mobile application, would track employees' locations and stop their time clock when they were near their respective locations even if the job was not complete, thereby understating their hours worked. (Szamet Decl. ¶16.)

In reaching this settlement, the parties also discussed Defendant's solvency. (Szamet Decl. ¶¶ 60-63.) Defendant raised its financial status as a potential issue. (Beretta Decl. ¶¶ 4-5.)

///

///

///

i. Plaintiff argued that Plaintiff and other class members were misclassified as Independent Contractors.

California presumes that workers are employees "and places the burden on the hirer to establish that the worker is an independent contractor." (*Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903, 913, 951, n. 23.) For purposes of wage claims, the California Supreme Court recently held that a worker may only be considered an independent contractor if she or he meets all three prongs of the "ABC" test:

(A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) the worker performs work that is outside the usual course of the hiring entity's business; and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

The definition of "employee" under the California Wage Orders is "intended to be broader and more inclusive" than the common law test, and than the federal "economic reality" standard. (*Id*. at 953, 956.) In contrast to the common law, which provides the narrowest definition of an employee in order "to limit one's vicarious liability for the misconduct of a person rendering service to him," *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 , 350 ("*Borello*") (italics added.), California "adopt[s] a distinct standard that provides broader coverage of workers with regard to the very fundamental protections afforded by wage and hour laws and wage orders." (*Dynamex*, 4 Ca1.5th at 949.)

Plaintiff argued that Settlement Class Members are employees as they were hired, trained, and required to perform the delivery and catering services that Defendant is in the business of providing. If an employer is unable to show "that the worker performs work that is outside the usual course of the hiring entity's business," then that worker is an employee pursuant to the ABC test. *(Dynamex,* 4 Cal.5th at 964.) For example, while a plumber hired for a discrete project by a business that does not itself offer plumbing services may be said to work outside the usual course of the hiring entity's business, a work-at-home seamstresses making dresses for a clothing

company, or a cake decorator working on a regular basis for a bakery on custom-designed cakes, would both be said to work within the hiring entity's regular business. *(Id.* at pp. 959-960.)

Here, Defendant is in the food delivery and catering business, which it advertises to its customers as such. Plaintiff contends that she and other employees were recruited, hired, and trained by Defendant to perform activities at the core of Defendant's business. In fact, Plaintiff argued that Defendant advertises its drivers as "the face of the company." Plaintiff argued that the facts of this case are akin to the situation discussed in *Dynamex* where a "bakery hires cake decorators to work on a regular basis on its custom-designed cakes." *(Dynamex,* 4 Cal.5th at 959-60.) Plaintiff maintained that Defendant will be unable to carry its burden under part B of the ABC test, and Plaintiff and the Settlement Class Members will show that they have suffered wage and hour violations due to misclassification. Even though employee status can be established without examining parts A and C of the test, Plaintiff will briefly address each in turn.

Plaintiff maintained that Settlement Class Members are employees since Defendant controlled the details of their work. If an employer is unable to show "that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact," then the worker is an employee pursuant to part A of the ABC test. (*Dynamex*, 4 Cal.5th at p. 964.) Thus, if the employer has either the right to control or actual control over how the worker accomplishes the desired result, then the worker is an employee under part A. (*Id*. at p. 958; see also *Tieberg v. Unemployment Ins. App. Bd*., 2 Cal.3d 943, 946-4 7 (1970) ["If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established."].)

Borello is instructive on this point. In that case, the California Supreme Court found that an employer had control over the means by which employees harvested the employer's crops. (*Borello,* 48 Cal.3d at 356.) "*Borello,* whose business is the production and sale of agricultural crops, exercises 'pervasive control over the operation as a whole.' [Citation.]" *Id*.

> Without any participation by the sharefarmers, Borello decides to grow cucumbers, obtains a sale price formula from the only available buyer, plants the crop, and cultivates it throughout most of

> its growing cycle. The harvest takes place on Borello's premises, at a time determined by the crop's maturity. During the harvest itself, Borello supplies the sorting bins and boxes, removes the harvest from the field, transports it to market, sells it, maintains documentation on the workers' proceeds, and hands out their checks.

Id. Accordingly, the Court found that '"[a]ll meaningful aspects of this business relationship: price, crop cultivation, fertilization and insect prevention, payment, [and] right to deal with buyers... are controlled by [Borello].' [Citation.]" *Id.*, fns. omitted." *Id.* at 357.

Here, Plaintiff argued that Defendant had the right to control the manner of Plaintiff and the Settlement Class Members' work. Plaintiff argued that she and all Settlement Class Members were not only trained by Defendant, but also supervised and directed by Defendant on when and where to complete deliveries, how to dress, the types of containers to use for keeping food warm, how to deliver and arrange dishes for catering, how to serve food when such service was required, and how to tear-down and clean up after a delivery. Plaintiff asserted that she and the Settlement Class Members were required to follow a detailed list of duties and to arrive and depart according to Defendant's schedule. Thus, like in *Borello,* Plaintiff maintains that all meaningful aspects of the business relationship-the when, where, and how of the job-were controlled by Defendant, and Defendant will be unable to carry its burden to show a lack of control over Plaintiff and the Settlement Class Members, under part A of the ABC test.

Lastly, Plaintiff argued that Settlement Class Members are employees since they did not operate independent businesses while they worked Defendant. If an employer is unable to show "that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity" then that worker is an employee pursuant to part C of the ABC test. *Dynamex,* 4 Cal. 5th at p. 964. The appropriate inquiry under part C is '"whether the person ...actually has such an independent business, occupation, or profession, not whether he or she could have one.'" *Id.* at 962, n.30. Moreover, an independent contractor "generally takes the usual steps to establish and promote his or her independent business-for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of

potential customers, and the like." *Id.*

Plaintiff argued that she and the Settlement Class Members did not operate independent catering or food delivery businesses while they worked for Defendant. A catering company, like Defendant's, hires and trains its employees in order to provide the full list of services advertised on Defendant's website.

In conclusion, if part A, B, *or* C of the ABC test is not met, then a worker is an employee for purposes of Wage Order violations. *Dynamex, supra,* 4 Cal.5th 964. Plaintiff argued that Defendant cannot carry its burden on any part of the test. Therefore, Plaintiff contends that she and the Settlement Class Members are employees under the California Wage Orders and are entitled to minimum wage protections, wage statement penalties, waiting time penalties, and civil penalties under PAGA. Defendant disputes Plaintiffs' allegations.

Plaintiff does acknowledge that there is risk associated with Plaintiff's ability to prove the Minimum Wage/Overtime claim. (Szamet Decl. ¶17.) Plaintiff would have to rely largely on oral testimony of Plaintiff and other Settlement Class Members. (Szamet Decl. ¶18.) This testimony could be inconsistent and fail to support Plaintiff's arguments. (Szamet Decl. ¶19.) Defendant would certainly capitalize on any variability or inconsistency in the testimony. (Szamet Decl. ¶20.) Based on this risk, and those articulated below, Plaintiff believes that the Settlement is fair and reasonable.

i. <u>The Passage of Proposition 22 Creates Additional Risk.</u>

The Settlement Class Members are primarily gig workers connected by Defendant to businesses and restaurants. (Beretta Decl. ¶2.) As discussed above, the gravamen of their claims is that they were misclassified as independent contractors, and thus were not provided overtime, breaks, or other employee-only benefits. However, on November 3, 2020, Californians passed Proposition 22, "App-Based Drivers as Contractors and Labor Policies Initiative (2020)" ("Prop. 22."), a ballot initiative that detrimentally affects the basis of Plaintiffs' claims.

As applicable here, Prop. 22 provides that, "[n]othwithstanding any other provision of law, including, but not limited to, the Labor Code," "app-based drivers" are classified as independent contractors if the following four conditions are met:

> (a) The network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform.
>
> (b) The network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform.
>
> (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time.
>
> (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business.

(Prop. 22 Article 2, section 7451.)

App-based drivers is defined to include individuals who, like Plaintiff, provide delivery services, "meaning the pickup from any location of any item or items and the delivery of the items . . . to a location selected by the customer . . ." (*Id.* at Article 6, section 7463.) Defendant contends that, as a factual matter, each of the four conditions described above are met here and that the Plaintiffs are "app-based drivers." Accordingly, neither the ABC test nor the *Borello* test are applicable, but rather Plaintiffs "[are] independent contractor[s] … notwithstanding any other provision of law." (Id. at Article 2, section 7451.) Defendant also contends that Proposition 22 will apply retroactively to the class period at issue. This is an additional risk for Plaintiff's claims.

b) The Risks Associated with the Meal Break Claims

Labor Code § 512 provides:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . . An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Under this rule, "[e]mployers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.) In order for a meal period to qualify as a lawful break under California law, an employer must (1) relieve its employees of all duty; (2) relinquish control over their activities; (3) permit them a reasonable opportunity to take an uninterrupted 30-minute break; and (4) not impede or discourage them from

doing so. (*Id*. at p. 1040.)

The applicable wage order requires employers not only to provide meal periods in the manner described above, but also "to record having done so." (*Brinker, supra,* 53 Cal.4th at pp. 1052-53 (J. Werdegar, concurring) [citations omitted].) A long-standing application of burden-shifting occurs when an employer's records are so incomplete or inaccurate that an employee cannot prove his or her damages. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-88; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188-1190; *Safeway, Inc. v. Superior Court of Los Angeles Cnty.* (2015) 238 Cal.App.4th 1138.)

Here, Plaintiff contends that Defendant never maintained a lawful policy providing meal periods on shifts of over five hours. (Szamet Decl. ¶21.) Rather, Defendant maintains that the proposed Settlement Class Members were properly classified as independent contractors, and never entitled to meal breaks to begin with. (*Id*.) While Plaintiff argues that Defendant cannot overcome its burden of establishing the requisite prongs under *Dynamex*, and thus has no defense for not providing meal periods under *Brinker*, there are certainly risks associated with Plaintiff's ability to prove the Meal Period Claim. (Szamet Decl. ¶22.)

Defendant vehemently denies Plaintiff's allegations and contends that its written policies were compliant and that required meal periods were provided. (Szamet Decl. ¶23.) Plaintiff also anticipated that Defendant would argue that there were opportunities to take timely breaks and all class members were well-aware that they can and did take breaks. (Szamet Decl. ¶24.)

c) The Risks Associated with the Rest Break Claims

Employers must authorize and permit a consecutive ten-minute paid rest period for every four hours of work or "major fraction thereof." *Brinker*, 53 Cal.4th at 1029. Insofar as practicable, all rest periods must be in the middle of each work period. *Id*. at 1028.

Plaintiff maintains that she and all Settlement Class Members consistently worked shifts of at least three-and-a-half (3.5) hours and were not authorized or permitted to take rest breaks. (Szamet Decl. ¶25.) Therefore, pursuant to Labor Code section 226.7, for each work day that each class member was not provided with a rest period, Defendants are liable for one (1) additional hour of pay at the employee's regular rate of compensation. (Lab. Code 226.7, subd. (b); Code

Regs., tit. 8, § 11070 (12)(B).)

Here, just as with meal periods, Plaintiff maintains that Defendants failed to maintain an accurate policy advising Plaintiff and class members of their right to take paid rest breaks. (Szamet Decl. ¶26.) Defendant argues that the proposed class members were properly classified as independent contractors, but maintains that the written policy is compliant and that employees were provided the opportunity to take compliant rest periods. (Szamet Decl. ¶27.)

Plaintiff believed that Defendant would argue that class members were well-aware of how many rest breaks they should take and when they should be taken. (Szamet Decl. ¶28.) Defendant would argue, as with meal periods, that there were plenty of opportunities to take rest breaks and Class Members did in fact take compliant rest breaks. (Szamet Decl. ¶29.)

d) The Risks Associated with the Reimbursement Claim

Under California Labor Code§ 2802(a) an employer "shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." An employee acts in "discharge of his duties," for purposes of this Section when the employee acts within the "course and scope of employment." See *O'Hara v. Teamsters Union Local No. 856,* C.A.9 (Cal.)1998, 151 F.3d 1152.

Plaintiff alleges that Defendant required employees to incur business expenditures for which they were never reimbursed, including the costs of bags and carts necessary to perform their duties. (Szamet Decl. ¶30.) Defendant's written policy states: "The Contractor shall provide the necessary equipment to perform the Services."

> If the Contractor does not have adequate catering equipment, being a minimum of 2 bags unbranded with any other business logos. The Contractor will be required to place a deposit for equipment provided by MobyDish. A minimum of 2 bags and a maximum of 6 bags can be given on time of onboarding. Each bag will require a $25 deposit. If a cart is needed you can deposit an additional $75 and a cart will be issued.

Plaintiff further alleges that class members also incurred the costs of gas, mileage, and cell phone service in performing their work duties. (Szamet Decl. ¶31.) Plaintiff asserts that as a condition of work for Defendant, Defendant requires employees to have: (1) a smartphone with

GPS abilities; and (2) a car or van with an active insurance policy. (*Id*.) Plaintiff contends that Class Members were never reimbursed for these necessary business expenses. (*Id*.)

Plaintiff contends that despite these written policies, Defendant had a practice of requiring class members to use their cell phones and vehicles without reimbursement. (Szamet Decl. ¶32.) Defendant disputes these allegations.

e) The Risks Associated with the Tip and Gratuity Wage Claim

Labor Code § 351 bars employers from retaining any part of a tip left for an employee by a patron of the employer's business. Such a gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for."

Plaintiff alleges that Defendant implemented a company-wide policy of retaining tips and gratuity payments made by its customers to its employees. Specifically, customers would leave tips for drivers through Defendant's mobile app. Plaintiff argues that Defendant deducted sixty percent (60%) of the tip amount and split this portion of the tip among itself and its restaurant vendor clients with the remaining forty percent (40%) paid to the employee. As these monies were left as gratuities by Defendant's customers to its employees, Plaintiff contends that Defendant violated Section 351 by retaining part of these amounts from its employees' wages.

f) The Risks Associated with the Inaccurate Wage Statement Claim

Labor Code § 226(a) provides:

> An employer … shall furnish to his or her employee … an accurate itemized statement in writing showing … (2) total hours worked by the employee…, (4) all deductions from the employees' wages…, (6) the inclusive dates for each pay period, (7) the last four digits of the employees' social security number or the employees' identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee….

These statements must be appended to the detachable part of the check for the employee's wages twice per month, or each time wages are paid.

///

Plaintiff alleges that Defendant failed to provide employees with accurate itemized wage statements, as required by the Labor Code, because Defendant did not issue its drivers wage statements at all. (Szamet Decl. ¶33.) Wage statement penalties are "fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)." Labor Code § 226(e)(1).

There is some risk associated with Plaintiff's claim. Defendant contends that the class members were, in fact, properly classified as independent contractors, and therefore itemized wage statements were not required. (Szamet Decl. ¶34.) Defendant also maintains that all wages were properly paid to Class Members. This claim is ultimately tied to Plaintiff's misclassification claim. (Szamet Decl. ¶35.) If Plaintiff's Misclassification claim fails, so does the derivative Labor Code Section 226 claim.

g) The Risks Associated with the Waiting Time Penalty Claim

This claim alleges that Defendant failed to pay all wages due and owing upon termination or resignation. Labor Code § 203(a) provides:

> If an employer willfully fails to pay … any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Under Labor Code § 203, a "'willful' failure to pay wages … occurs when an employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs., tit. 8, § 13520; *see also Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859 ("willful" simply means that "the employer intentionally failed or refused to perform an act which was required to be done[.] Willful … does not necessarily imply anything blameable, or any malice or wrong toward the other party").

Here, Plaintiff contends that Defendant failed to properly pay overtime for any work in excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶36.) The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claim discussed above. . (Szamet Decl. ¶37.) If Defendant could prove, as it

contends, that class members were properly classified and paid for all hours worked, there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶38.)

Plaintiff also alleged that Defendant owes waiting time penalties by not paying former employees all wages owed and all premium payments for non-compliant meal or rest periods. Labor Code § 226.7. Pursuant to *Murphy v. Kenneth Cole Productions, Inc.* (2002) 40 Cal.4th 1094, 1120, Plaintiff contended that break premium payments constitute "wages" under Labor Code § 203. ("We hold that section 226.7's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage, not a penalty"). (Szamet Decl. ¶39.) However, the Court in *Naranjo* recently held that unpaid break premiums do not entitle employees to additional remedies under the California Labor Code for waiting time penalties. *Naranjo, et al. v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444.

Further, to establish liability for waiting time penalties, Plaintiff would have to establish not only that the underlying violations occurred, but also that Defendant's conduct was "willful." Labor Code § 203.

h) The Risks Associated with the PAGA Claim

PAGA permits private litigants to recover civil penalties for violations of the Labor Code. PAGA provides that plaintiffs may recover previously established civil penalties (section 2699(a)) or, if none were established, plaintiffs may recover default penalties provided in section 2699(f) in the amount of $100 per employee per pay period for the initial violation and $200 for subsequent violations.

Plaintiff discounted the PAGA claim for multiple reasons. First, the aggrieved employees' PAGA claims are derivative of all the foregoing class claims and the attendant risks discussed above will attach. Second, a court has discretion to award less than the maximum penalty. Labor 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 e.g.*, *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 Cal.Rptr.3d 647, 669

(affirming award of 10% of maximum PAGA penalty). Finally, the Class is compensated for these violations in the proposed settlement, and thus any PAGA recovery for these same violations would be duplicative. Had this matter involved claims strictly under the PAGA, the PAGA allocation would have been significantly higher. However, the Parties have attributed more funds toward the underlying class claims resulting in a higher net disbursement to Class Members.

As such, Plaintiff's Counsel believes that the Settlement's contemplated PAGA payment of $20,000.00 is appropriate. (Szamet Decl. ¶40.) *See Nordstrom Commissions Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming settlement allocating $0 of $6.4 million settlement to PAGA penalties).

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Given the risks outlined above, the issues in this case were complex and the risk for Plaintiff and the Settlement Class Members associated with this litigation was high, given the uncertainty. (Szamet Decl. ¶41.) Moreover, there is significant expense associated with the class certification process, which the Parties can avoid by entering into the contemplated settlement. (*Id*.) If the Court did eventually certify a meal or wage statement class, trial of a case involving approximately 205 Settlement Class Members could require the retention of expensive expert witnesses, the accrual of extensive litigation costs, and a significant time overlay by the parties. (Szamet Decl. ¶42.) Finally, given the complexity and unsettled nature of the issues in this case it is likely that any outcome at trial would have resulted in a lengthy and costly appeal. (Szamet Decl. ¶43.) An appeal would result in further delay for the Settlement Class Members who are waiting for a resolution in this matter. (*Id*.)

3. The Risk of Maintaining Class Action Status through Trial

This case has not been certified to be tried as a class action. (Szamet Decl. ¶44.) While Plaintiff believes there is strong evidence to support certification of several possible subclasses, certification is always hard fought and subject to judicial discretion. Moreover, in class actions, decertification is always a possibility. (*Id*.) In attempting to certify a class, the parties would need to conduct multiple depositions, including of the named Plaintiff and person(s) most knowledgeable regarding Defendant's policies. (*Id*.) There is a risk for both sides as to what these

depositions will reveal and whether they will support class certification to the extent expected. (*Id*.)

4. The Amount Offered in Settlement

It was very difficult for the Parties to reach this Settlement. (Szamet Decl. ¶45.) They arrived at it only after a full-day mediation and then several rounds of negotiation, aided by Judge Hernandez, and a careful evaluation of the information substantiating the amount of damages reasonably likely to be awarded to the class were the jury to award them the full value of their claims. (*Id*.) As such, there can be no doubt that this settlement is the result of adversarial, non-collusive, and arm's-length negotiations.

a) Plaintiff's Assessment of Defendant's Maximum Exposure

As an initial matter, it is important to note that there is a small difference between the maximum exposure numbers discussed in this second motion and those in Plaintiff's original papers. (Szamet Decl. ¶46). The reason for this is that the original calculations were derived from Microsoft Excel, which performs calculations using several digits more than one-hundredth of a decimal; far narrower than the calculations performed above, resulting in rounded fractions of a penny. (*Id.*) Accordingly, as these fractions are compounded for over thousands of workdays, the final summations vary slightly. (*Id.*)

Plaintiff assessed the Class Members'[1] alleged full value of the Minimum Wage/Overtime claim, without any discount, at $108,425.58. (Szamet Decl., ¶46.) A representative sampling of data for class members was provided to Class Counsel in advance of mediation. (Szamet Decl., ¶¶ 9, 11, 13; Beretta Decl. ¶ 4.) The sampling that Plaintiff reviewed in anticipation of mediation was taken from the total group of employees at issue, including class member as well as non-participating individuals who had previously entered a release with Defendant. (Szamet Decl., ¶46.) Class Counsel was able to determine that about 43.07% of the data pertained to these released individuals. (*Id.*) Thus, a 43.07% discount was taken off the top to account for the remaining

[1] Plaintiff learned during settlement negotiations that Defendant had secured release agreements from 10 employees. Those individuals were deemed "releasors" and their potential damages were excluded from Plaintiff's analysis as appropriate.

damages applicable to Class Members. (*Id.*)

Having reviewed a representative sampling of class data, Class counsel was able to determine an average hourly rate of $35.11 for Class Members. Additionally, the data showed about 10,850 applicable workdays at issue, for the entire Class Period. (Szamet Decl., ¶48.) Finally, this calculation assumed that Settlement Class Members worked .5 unpaid hours per applicable workday. (Szamet Decl., ¶47.) Class Counsel derived a total of $190,471.75 in unpaid wages for all employees [$35.11 x 0.5 hours x 10,850 days = $190,471.75]. (*Id.*) However, reducing this amount to reflect only the wages owed to Class Members, the maximum exposure, with no discount, for all Class Members is **$108,435.56** [$190,471.75 reduced by 43.07%]. (Szamet Decl., ¶46.)

The full value of the Meal Period claim, without any discount, was assessed at $21,487.23. (Szamet Decl. ¶49.) Based on the analysis of the data produced, Class Counsel determined a total of 1,075 shifts where Class Members would be entitled to a meal period. (*Id.*) Assuming a 100% violation rate, the total amount of meal-period penalties allegedly owed under Section 226.7 is $37,743.25. (*Id.*) Again, reducing this amount to reflect only the penalties owed to Class Members, the maximum exposure, with no discount, for all Class Members is **$21,487.23** [$37,743.25 reduced by 43.07%]. (*Id.*)

Similar to the meal period claim, the full value of the rest break claim, without any discount, was assessed at $21,487.23. (Szamet Decl. ¶50.) Based on the analysis of the data produced, Class Counsel determined a total of 1,075 shifts where Class Members would be entitled to at least one rest break. (Szamet Decl. ¶ 49.) Assuming a 100% violation rate, the total amount of rest break penalties allegedly owed under Section 226.7 is $37,743.25. (Szamet Decl. ¶50.) Again, reducing this amount to reflect only the penalties owed to Class Members, the maximum exposure, with no discount, for all Class Members is **$21,487.23** [$37,743.25 reduced by 43.07%]. (*Id.*)

Plaintiff valued the Wage Statement Claim, without discount, at $15,665.75. (Szamet Decl. ¶51.) From the data produced, Class Counsel determined that there were approximately 275 wage statements issued to all employees in the one-year statutory period under Section 226.

Plaintiff calculated this number by taking the 3,848 PAGA workdays and dividing that number by 14, to equal approximately 275 total PAGA pay periods (3,848/14 = 274.86). (*Id*.) Plaintiff used $100 for each pay period, arriving at a total of $27,500 in penalties under Section 226(e). (Szamet Decl. ¶¶ 51-52.) Just as above, this amount was reduced to reflect only the penalties owed to Class Members, for a total of **$15,665.75**. [$27,500 reduced by 43.07%]. (*Id.*) Furthermore, this figure is overstated because Labor Code §226(e)(1) uses $50 for the initial pay period (not $100) and puts a $4,000 cap on wage statement penalties per employee. (Szamet Decl. ¶ 53.)

Plaintiff valued the Waiting Time Claim, tied to the Wage/Overtime claim, at $168,192.11. (Szamet Decl. ¶54.) From the data produced, Class Counsel determined that there were a total of 171 formerly employed employees at issue. (*Id*.) Additionally, Class Counsel was able to determine an average daily wage amount of $57.59. (*Id*.) Of note, this wage was low compared to the average hourly rate of $35.11 for class members (above at pg. 20, line 5) because Plaintiff and other similarly situated employees allege that they were often forced to wait in between deliveries while working for Defendant, and they were not compensated for this time. (*Id*.) Thus, the maximum amount of penalties under Section 203 for all employees was estimated to be $295,436.70 [171 former employees x $57.59 in daily wages x 30 days = $295,436.70]. (*Id*.) Just as above, this amount was reduced to reflect only the penalties owed to Class Members, for a total of **$168,192.11.** [$295,436.70 reduced by 43.07%]. (Szamet Decl. ¶ 46.)

Plaintiff valued the tip deduction claim at $31,222.18. (Szamet Decl. ¶55.) Through the data produced, Plaintiff determined the total tips received was $91,405.21 and asserts that 60% of this amount was unlawfully diverted from Class Members, for a total of $54,843.12 owed to all employees. (Szamet Decl. ¶56.) Just as above, this amount was reduced to reflect only the tips owed to Class Members, for a total of **$31,222.18.** [$54,843.12 reduced by 43.07%]. (*Id.*; Szamet Decl. ¶ 46.)

Finally, Plaintiffs calculated the value of the PAGA claim for the alleged misclassification at $900,000.00 for Settlement Class Members. (Szamet Decl. ¶57.) This number is arrived at by multiplying 90 (the number of alleged employees during the PAGA statutory period by the maximum potential penalty of $10,000 per alleged employee, which Defendant would argue is

grossly excessive in light of the facts of this case. (*Id*.)

Additionally, and as discussed above, a court has discretion to award less than the maximum penalty. Labor 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 e.g., *Carrington v. Starbucks Corporation* (2018) 30 Cal.App.5th 504, 241 (affirming award of 10% of maximum PAGA penalty). In *Carrington*, the California Court of Appeal upheld the trial court's discretion in reducing the PAGA penalty award **to 0.6%** of the anticipated exposure (from $25,000,000 to $150,000). Although Courts commonly exercise their discretion to significantly reduce the civil penalty awarded under PAGA, the Court may also award a lesser amount than the maximum civil penalty as specified under Labor Code 226.8(c): "If the Labor and Workforce Development Agency or a court issues a determination that a person or employer has engaged in any of the enumerated violations of subdivision (a) and the person or employer has engaged in or is engaging in a pattern or practice of these violations, the person or employer shall be subject to a civil penalty of not less than ten thousand dollars ($10,000) and not more than twenty-five thousand dollars ($25,000) for each violation, in addition to any other penalties or fines permitted by law."

Finally, the PAGA penalties are entirely derivative of the underlying class claims. The Class is already being compensated for the alleged violations in the proposed settlement, and thus any PAGA recovery for the same violations would be duplicative. (Szamet Decl., ¶ 40.) Had this matter involved claims strictly under the PAGA, the Parties would have attributed more funds toward the PAGA claim. However, in an effort to ensure the best possible recovery for Class Members, the Parties have attributed more funds toward the underlying class claims resulting in a higher net disbursement to Class Members. (*Id*.)

Per Plaintiff's assessment, the maximum potential value of all of Plaintiff's and the Class claims was approximately $1,266,490.06. (Szamet Decl., ¶58.) Based upon the forgoing risks on the merits, Class Counsel believes proposed Total Settlement Amount of $160,000.00 is fair and reasonable. (Szamet Decl., ¶59.)

b) Defendant's Financial Status

One of the material factors affecting settlement of this action was Defendant's financial status. (Szamet Decl. ¶60.) Class Counsel had to consider Defendant's ability to pay any sizeable judgment against it. (Szamet Decl., ¶61.) Defendant is a start-up catering app and lacks the financial resources of bigger delivery and driver companies to pay a settlement or judgment against it. (Szamet Decl., ¶62; Beretta Decl., ¶ 5.) Class Counsel worked closely with Judge Hernandez to verify the information and representations made by Defendant regarding solvency. (Szamet Decl., ¶63.) Counsel determined that obtaining a settlement on behalf of the Class now, as opposed to protracted litigation with the uncertainty of Defendant's ability to pay made the most practical sense. (Szamet Decl., ¶64.)

Defendant presented arguments regarding its financial solvency and presented its 2018 and 2019 profit and loss statements and balance sheets to verify its financial status. (Beretta Decl. ¶2, 4; Szamet Decl., ¶ 9.) Additionally, Defendant's Treasurer has declared that Defendant was a startup company who had yet to see any profits. (Beretta Decl., ¶¶ 4-5.)

Specifically, the documents provided in mediation indicated that the company's net income from April–June 2019 was negative $107,383.13 and total liabilities and equity on June 30, 2019 was $304,973.42. (Beretta Decl. ¶4.) Defendant's Treasurer explained that Defendant did not have significant assets, was not generating a profit, and was at risk of ceasing its business in light of the lawsuit. (Beretta Decl., ¶5.)

5. The Experience and Views of Counsel

Kingsley & Kingsley, APC is very experienced in prosecuting complex employment litigation, and the firm has focused its practice since the year 2000 on wage, hour, and working condition violations. (Szamet Decl. ¶¶65-67.) The firm is well versed in class action litigation and has diligently and aggressively pursued this action. (*Id*.) Kingsley & Kingsley currently serves as class counsel for dozens of pending class action lawsuits in Northern, Central, and Southern California. (*Id*.) A list of representative cases that Kingsley & Kingsley has handled is included in the accompanying declaration of counsel. (*Id*.) After factoring in the risks explained above, Class Counsel believes that the proposed settlement is fair and reasonable. (Szamet Decl., ¶68.)

6. The Proposed Plan of Allocation Is Fair and Reasonable

Plans of allocation are subject to the same standard of review as class action settlements; they must be "fair, adequate and reasonable." (*See, e.g., Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 624–625, 629–630.) Here, the proposed plan of allocation compensates Class Members pro rata based on the number of deliveries made by the Class Member during the Class Period. The lump sum payment to each member of the Settlement Class not excluding him/ herself will be determined by the number of deliveries made by a Settlement Class Member during the Class Period in proportion to the aggregate number of deliveries made by all Settlement Class Members during the Class Period. (Settlement Agreement at § VII, ¶9(a).) This allocation distributes Settlement funds proportionally to each class member's damages, and should therefore be approved as fair, adequate, and reasonable. (*Id*.)

7. The Proposed Notice Fairly Apprises the Settlement Class Members of the Terms of the Settlement and of the Class Members' Rights under the Settlement

Plaintiff requests that the Court approve the proposed plan and form of Class Notice attached to the Settlement Agreement as Exhibit "A". (Szamet Decl. ¶69.) The standard for determining the adequacy of notice is whether the notice has "a reasonable chance of reaching a substantial percentage of the class members." (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) Pursuant to the Settlement Agreement, the Notice will be sent to the last known address of all Settlement Class Members, or to an updated address if one is located in the National Change of Address Database. (Settlement Agreement § VII, ¶6(a).; *Id.* at Settlement Agreement § VII, ¶9(a).) If any Notices are returned as undeliverable, the Administrator will undertake another reasonable address verification measure to locate a valid mailing address and will promptly send the Notice to the new address. (Settlement Agreement § VII, ¶6(b).) As such, the Notice is likely to reach most, if not all, Settlement Class Members.

With respect to the contents of the Notice, the "notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members." (*Trotsky v. L.A. Fed. Sav. & Loan Ass'n* (1975) 48 Cal.App.3d 134, 151–52.)

The purpose of a class notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. (*Ibid*.)

Here, the Notice clearly explains the proposed Settlement and the options to opt out of the Settlement or object to it at the Final Approval Hearing. (Settlement Agreement § VII, ¶6(e).) Plaintiff requests that the Court approve the proposed Class Notice because it describes the proposed settlement with enough specificity to allow Class Members to make an informed choice regarding whether to participate. (Szamet Decl. ¶70.)

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever "the question [in a case] 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 . . . ." (Code Civ. Proc. § 382; see, e.g., *Fireside Bank v. Sup. Court* (2007) 40 Cal.4th 1069, 1078.) They serve an important function by "establishing a technique whereby the claims of many individuals can be resolved at the same time" thereby "eliminat[ing] the possibility of repetitious litigation and provid[ing] small claimants with a method of obtaining redress." (*Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 469.) Public policy supports the use of class actions to enforce wage and overtime laws for the benefit of workers. (See *Sav-on Drug Stores, Inc. v. Sup. Court* (2004) 34 Cal.4th 319, 340.)

The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439–440.) A court ruling on a certification motion must determine "whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

The California Supreme Court has identified three certification requirements: (1) "the existence of an ascertainable and sufficiently numerous class"; (2) "a well-defined community of

interest"; and, (3) "substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) The "community of interest" requirement includes three additional requirements: (1) common questions of law or fact predominant over individual questions; (2) the class representatives have claims or defenses typical of the class; and (3) the class representatives can adequately represent the class. (Ibid, citing *Fireside Bank*, *supra*, 40 Cal.4th 1069 at p. 1089.)

Class certification for settlement purposes is proper in this case as the proposed Settlement Class satisfies each of the requirements under Code of Civil Procedure § 382. Accordingly, this Court should certify the putative settlement class.

A. The Proposed Classes Are Ascertainable and Sufficiently Numerous

1. Ascertainability

Putative class members are deemed "ascertainable" when they may be "readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.) In determining whether a class is ascertainable, a court scrutinizes the class definition, the size of the class and the means of identifying class members. (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.)

Here, Plaintiff maintains the proposed Settlement Class is ascertainable for several reasons. First, Defendant has agreed in the Settlement Agreement to provide a class list to the Settlement Administrator containing the name, last known mailing address, last known telephone number, social security number, and start and end dates of work for Defendant for all putative class members after issuance of the preliminary approval order. (Settlement Agreement § VII, ¶6.) Second, class members consist of Defendant's hourly employees, and Defendant is required to keep records of its hourly employees' names, home addresses, and social security numbers. (*See* Wage Order 9-2001, subsection 7(c).) Third and finally, Defendant informally produced data for putative class members for purposes of mediation, which confirms that all class members may be readily identified based on Defendant's records. (Szamet Decl. ¶71.)

///

///

2. Numerosity

There is no set number that is required as a matter of law to maintain a class action. (*See, e.g.*, *Rose v. City of Hayward*, *supra*, 126 Cal.App.3d at p. 934.) Here, the proposed Class contains, based upon information and belief, approximately 205 employees in the State of California. Plaintiff maintains that she will be able to establish that the proposed Class is ascertainable and sufficiently numerous. (Szamet Decl. ¶72.)

B. There Is a Well-Defined Community of Interest

1. There Are Predominant Questions of Law and Fact

In deciding whether questions of common or general interest predominate, a court must determine whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238; *accord, Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) As a general matter, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916, 107; *accord, Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.)

Here, Plaintiff maintains that there are questions of law and fact common to the proposed Class that predominate over any questions affecting only individual Class Members. These common questions include:

1) Whether Defendant misclassified its employees as independent contractors;

2) Whether Defendant failed to pay all wages and/or overtime compensation;

3) Whether Defendant failed to provide lawfully required meal periods and/or failed to compensate employees one (1) hour's wages in lieu thereof;

4) Whether Defendant failed to provide lawfully required rest periods and/or failed to compensate employees one (1) hour's wages in lieu thereof;

5) Whether Defendant failed to reimburse expenses;

6) Whether Defendant failed to provide accurate itemized wage statements;

7) Whether Defendant failed to pay compensation due and owning upon separation from Defendant; and,

8) Whether Defendant engaged in unfair competition.

9) Whether Defendant violated § 2699, et seq. of the Labor Code by engaging in the acts previously alleged.

(Szamet Decl. ¶73.)

Plaintiff asserts that her challenge to Defendants' uniform policies and practices involves common factual and legal issues that are amenable to class treatment. (Szamet Decl. ¶74.) As the California Supreme Court has emphasized, "[c]aims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker*, *supra*, 53 Cal.4th at p. 1033; *see also Bradley, supra,* 211 Cal.App.4th at 1141-1146.) Moreover, a class of similarly situated employees may be certified based on common questions of fact or law, even if each employee has to establish the amount of his or her damages. (*See Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 741; *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 340.) Here, Plaintiff argues that the proposed Settlement Class Members suffered the same injuries, in the same manner: (1) class members were misclassified and not properly paid all wages/overtime, including tips, as a result; (2) class members did not receive their meal and rest periods as required; and (3) class members were not paid all wages owed upon termination/resignation. Because the Settlement Class Members worked in the same capacity for the same employer and were subject to the same work policies and practices, Plaintiff argues that the questions of fact and claims regarding the status of these employees are the same for each member of the class. Accordingly, for purposes of settlement, Plaintiff's Counsel believes that certification for settlement purposes is appropriate. (Szamet Decl. ¶75.)

2. The Class Representative Has Claims Typical of the Proposed Class

A putative class representative's claim must be "typical," but not necessarily identical, to the claims of other class members. The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the Class Representatives, and whether other class members have been injured by the same course of

conduct." (*Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.) Thus, it is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. (*See, e.g., Classen v. Weller* (1983) 145 Cal.App.3d 27, 45.) It is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (*Wershba v. Apple Computer, Inc. (*2001) 91 Cal.App.4th 224, 238.)

Plaintiff was hired by Defendant on October 10, 2017, to work as a driver among Defendant's Delivery Crew, earning $20 per hour. She alleges that she was regularly required to: (1) work without being paid the minimum wage/overtime, including tip and gratuity payments; (2) work without being provided meal/rest periods as required by law; and (3) work without being provided accurate itemized wage statements. She also alleges that she experienced derivative claims for waiting time penalties (Labor Code § 203), unfair business competition (B&P Code § 17200), and Labor Code §2699, et seq. Counsel has reviewed Plaintiff's personnel file and time and pay records. (Szamet Decl. ¶76.) Plaintiff contends that her claims are typical of those of the settlement class. (Szamet Decl. ¶77.)

3. The Class Representative Has and Will Fairly Represent the Interests of the Settlement Class Members

A putative class representative must show that she can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.App.4th 1096, 1104.) The representative, through qualified counsel, must be capable of "vigorously and tenaciously" protecting the interests of the class members. (*Simons v. Horowitz* (1984) 151 Cal.App.3d 834, 846.)

Plaintiff maintains that she is capable of fairly representing and adequately protecting the interests of the proposed Settlement Class Members. (Szamet Decl. ¶78.) Plaintiff's interests in this litigation are coextensive with the interests of the proposed Settlement Class Members. (Szamet Decl. ¶79.) The members of the proposed Settlement Class all worked for Defendant during the relevant time period and incurred the same type of alleged damages with regard to Defendant's alleged violations of the law. (Szamet Decl. ¶80.) Moreover, Plaintiff has agreed to serve as Class Representative and has retained qualified Counsel who is experienced in prosecuting wage and hour class actions. (Szamet Decl. ¶81.) This demonstrates her commitment to bringing

about the best possible results for the benefit of the proposed Class. (Szamet Decl. ¶82.) Plaintiff has provided her Counsel with all necessary and pertinent information. She also attended the full-day mediation in this matter and participated in the Settlement negotiations. (Szamet Decl. ¶83.) Therefore, Plaintiff believes that she has and will continue to adequately represent the proposed Settlement Class Members. (Szamet Decl. ¶84.)

C. The Class Action Vehicle Is Superior to the Alternatives

"The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Lockheed Martin Corp., supra*, 29 Cal.App.4th 1096, 1104–1105.) The California Supreme Court has directed the courts to utilize the class action device to fashion "an effective and inclusive group remedy." (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal.3d 462, 469.) Normally, in making its class certification decision, the Court must determine that a class action would be superior to alternate means for a fair and efficient adjudication. If the causes of action may be adjudicated in a single proceeding, thereby saving time, reducing waste, and limiting duplication of effort, class certification is superior to individual litigation. (*See, e.g., Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 816.) Since the Parties agreed to a settlement in principal and now seek Court approval of that Settlement, Plaintiff submits that there is not as much need as there would be in an ordinary motion for class certification for the Court to determine that the case can be manageably tried.

Plaintiff maintains that Class treatment would be the superior method of managing this case. (Szamet Decl. ¶85.) A class action is superior to individual litigation "when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) In cases such as this, where individual damages may be small, the class action device is the most feasible method of recovery. (*See, e.g. Lockheed, supra*, 29 Cal.4th a p. 1131.) In this regard, Plaintiff argues that the superiority of class treatment is evident here because many of the class members were drivers, and individual pursuit of their claims would thus not be

economically viable. (Szamet Decl. ¶86.) The only alternative to certification would be to force over 205 employees to join this action, file individual, uniform actions, or abandon their legal rights altogether. This economic reality would result in a windfall for Defendant if this case were not certified. (Szamet Decl. ¶87.)

VI. THE SERVICE AWARD TO THE NAMED PLAINTIFF

Counsel requests an enhancement award for Plaintiff's valiant effort and time expended in this matter. (Szamet Decl. ¶88.) The time spent by Plaintiff Meza includes providing information to Class Counsel regarding the nature of the work at Defendant, compiling documents, regularly corresponding with her attorneys to discuss the status of the case, responding promptly to Class Counsel's communications regarding settlement, attending a full-day mediation, and participating the Settlement negotiations and documentation process (*Id*.) Thus, in addition to the sums paid to Settlement Class Members, Plaintiff requests a proposed litigation enhancement in the amount of $5,000.00, to be paid from the Total Settlement Amount. (Settlement Agreement § I, ¶35; § VII, ¶¶9, 11.)

Class Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶89.) The enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Settlement Class Members. (*Id*.) Plaintiff will provide a detailed declaration with the Final Approval Motion detailing her participation and further justification for the enhancement. (*Id*.)

VII. SUBMISSION TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY

As indicated on the Proof of Service, Plaintiff's Motion for Approval of Class Action Settlement ("Motion") will be concurrently uploaded to the Labor and Workforce Development Agency's ("LWDA") website on the date this Motion is filed as required by statute. Proof of submission of Plaintiff's Motion, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Counsel as Exhibit "2." (Szamet Decl. ¶90.)

VIII. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, reasonable, and in the best interest of the Class. Therefore, the Parties respectfully request that the Court (1) grant

preliminary approval of the Settlement Agreement, and all of its terms; (2) approve the proposed form of notice, and direct that the Notice be sent to Settlement Class Members in the manner set forth in the Settlement Agreement; and (3) schedule a hearing on final approval of the Settlement and Class Counsel's application for an award of attorney's fees and litigation costs.

DATED: February 22, 2021

KINGSLEY & KINGSLEY, APC

By: _____

Kelsey M. Szamet
Attorneys for Plaintiff ADINA MEZA and the proposed class

(PROOF OF SERVICE)
[CCP 1013(a)(3)]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On February 22, 2021, I served all interested parties in this action the following documents described as **NOTICE OF SECOND MOTION AND SECOND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Galen P. Sallomi
Steven L. Friedlander
SV Employment Law Firm PC
160 Bovet Road, Suite 401
San Mateo, CA 94402
gsallomi@svelf.com
sfriedlander@svelf.com

[] **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[XX] **BY ELECTRONIC MAIL TRANSMISSION:** I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] **BY ELECTRONIC SERVICE**: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (https://dir.tfaforms.net/271) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 22, 2021, at Woodland Hills, California.

Michelle Tanzer