**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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JOSE ORTEGA, on his own
behalf, and on behalf of those similarly situated,

Plaintiff,

- against - Case No.15-cv-07387-NGG-JO

UBER TECHNOLOGIES, INC., RASIER, LLC, UBER USA, LLC, UBER NEW YORK LLC, UBER TRANSPORTATION LLC, JOHN DOE "UBER AFFILIATES," fictitious name used to identify presently Unknown entities,

Defendants.
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# MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF MODIFIED CLASS ACTION SETTLEMENT


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## I. PRELIMINARY STATEMENT

On January 19, 2018, the Court denied Plaintiff Jose Ortega's ("Plaintiff") motion for preliminary approval of the parties' initial proposed class action settlement, without prejudice, "because of two seemingly 'obvious defects.'" Specifically, the Court took issue with (i) the "conditional" nature of the parties' stipulation regarding Plaintiff Ortega's ability to file a second amended complaint, and (ii) payment of Martinez's "Named Plaintiff Settlement Payment" from the Gross Settlement Sum. Dk. No. 76. Both of these issues have been remedied.

Defendants consent to the filing of Ortega's Second Amended Complaint. In addition, pursuant to the terms of the parties' proposed Modified Class Action Settlement Agreement and Release (the "Settlement Agreement" or the "Settlement"), Martinez's Individual Settlement Payment shall not be taken or deducted from the three million dollar ($3,000,000.00) Gross Settlement Sum, but will be paid separately, and on top of, that amount.

Accordingly, pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff moves this Court for an order preliminarily approving the proposed Settlement entered into between Plaintiff and Defendants Uber Technologies, Inc., Uber USA, LLC, and Rasier, LLC (collectively, "Uber").[1] The parties have agreed to settle Plaintiff's individual claims, as well as the breach of contract and false advertising claims he asserted on behalf of the class. The

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[1] Plaintiff Joce Martinez, whose claims were dismissed from this case and ordered to individual arbitration in accordance with the terms of the arbitration provision to which he agreed, is also a party to the Agreement in an individual capacity because the parties elected to settle his claims on an individual basis. Specifically, Uber has agreed to pay Plaintiff Martinez a gross sum of two-thousand five-hundred dollars ($2,500.00) in exchange for a general release of claims, including claims under the Fair Labor Standards Act, which release shall later be presented to the Court for approval. *See generally Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). Pursuant to the parties' Agreement, this Payment will not be taken or deducted from the three-million dollar Gross Settlement Sum, but shall be paid separately from, and on top of, that amount. See paragraph 23__ of Agreement.

remaining class claims in the case – including those premised upon the theory that Uber misclassified individuals who have provided transportation services arranged using Uber Technologies, Inc.'s software application (the "Uber App") as independent contractors ("drivers") – shall be dismissed without prejudice.

Under the terms of the proposed Settlement, Uber will establish a three-million dollar ($3,000,000.00) common fund to be distributed to the Settlement Class after payment of Plaintiff Ortega's Service Payment and Individual Settlement Payment, attorneys' fees and costs, and settlement administration expenses. As stated above, Martinez's Individual Settlement Payment shall not be taken or deducted from this amount.

The Settlement Class consists of all individuals who: (i) have provided transportation services arranged using the Uber App within the State of New York at any time between December 29, 2009 and the date on which the Court enters the Preliminary Approval Order, and (ii) purported to opt-out of arbitration, or whose most recent agreement with Uber or its subsidiaries otherwise does not contain an arbitration provision, as determined by Uber's records. The Settlement Class does not include individuals who exclusively provided transportation services arranged using Uber's "uberTAXI" product. There are approximately 2,421 members of the Settlement Class.

Through this motion, Plaintiff seeks, inter alia, provisional certification of the proposed Settlement Class for settlement purposes only under Federal Rules 23(e) and (b)(3), and preliminary approval of the Agreement, claims procedure, and the proposed form and method of class notice.

The parties reached the proposed Settlement after an extensive mediation before an experienced mediator, Alfred G. Feliu. As set forth below, the Settlement is fair, reasonable and

adequate. Provisional certification of the Settlement Class is in the best interest of class members and satisfies the requirements Federal Rule 23. Accordingly, Plaintiff requests that the Court enter an order: (i) granting preliminary approval of the Settlement, (ii) appointing Plaintiff as the Class Representative, and provisionally certifying the Settlement Class for settlement purposes, (iii) approving the proposed notice plan, (iv) appointing Mark J. Held, Philip M. Hines and Scott B. Richman of Held & Hines, LLP and Jonathan W. Greenbaum of Coburn & Greenbaum, PLLC as Class Counsel, (v) scheduling a final approval hearing, and (vi) appointing Garden City Group as the Settlement Administrator.

## II. BACKGROUND

The case was filed by Plaintiffs Jose Ortega and Joce Martinez on December 29, 2015. Plaintiffs Ortega and Martinez filed suit on behalf of themselves, and other drivers in New York State, asserting, among other things, violations of the New York Labor Law, and breach of contract and conversion claims. On April 25, 2016, Plaintiffs filed an Amended Complaint, adding additional facts in support of their breach of contract claim, and a false advertising claim under New York Gen. Bus. Law § 350. In the Amended Complaint, Plaintiffs alleged, inter alia, the following facts in support of their breach of contract claim:

> § 90. Under Uber's agreement with Class Members, Uber agrees to remit to Class Members (a) the fare less Uber's applicable service fee, (b) the tolls, and (c) depending on the region certain added taxes and ancillary fees, which in New York City includes the Black Car Fund.
>
> § 91. Uber does not remit to the Class Members all the applicable taxes and ancillary fees, including state and local sales tax and other ancillary fees.
>
> § 92. Uber includes as its fee a portion of the taxes and ancillary fees that should be paid by the riders in a way that the Class Members bear a larger percentage of such

> amounts even though they should not bear any part of such charges as spelled out in the Uber agreements and applicable law and regulation. The end result is Uber's service fee, which is taken out of the Class Members pay is inflated beyond the amount set forth in the applicable agreement to financial detriment and primarily loss to the Class Members.

Dk. No. 16 (April 25, 2016). Plaintiffs also alleged that Uber unlawfully failed to remit to Plaintiffs and other drivers in New York State applicable taxes and ancillary fees, including [N.Y.] sales tax and Black Car Fund, in breach of its agreements with drivers in New York. First Am. Compl. ¶ 132. (Dk. No. 16); Second Amended Complaint Count V (Dk. No. 69__.) Plaintiffs further alleged that Uber breached these contracts by failing to remit to drivers the total proceeds of all gratuities received.

As stated above, the Amended Complaint also included a new claim for false advertising under N.Y. Gen. Bus. Law §350. See First Am. Cmplt. (Dk. No. 16) ¶'s 32, 33, 47, 48, 49, 144-153; Second Amended Complaint. The Amended Complaint contained an example of an allegedly misleading advertisement. The advertisement stated: "DRIVE & MAKE $5,000 Guaranteed, during your first month." In the Amended Complaint, Plaintiffs alleged that this advertisement, and others, did not display the conditions allegedly imposed by Uber with respect to its efforts to attract drivers to the platform. Plaintiff Ortega further alleged that he quit his job to become an "Uber driver" after seeing the advertisement(s) and guarantee.

Uber subsequently moved to dismiss the claims averred by Plaintiff Ortega in the Amended Complaint, pursuant to Fed. R. Civ. Pro. 12(b)(6) and 9(b).[2] The Court granted in part and denied in part Uber's motion. Dk. No. 42. Specifically, the Court dismissed Plaintiff

[2] As stated above, Uber also moved to compel Plaintiff Martinez to submit his claims to individual arbitration. The Court granted Uber's motion, and Plaintiff Martinez's claims were dismissed from the case.

Ortega's minimum wage, tortious interference, breach of contract, and conversion claims. The Court also dismissed the portion of Plaintiff Ortega's unlawful deductions claim based upon Uber's alleged failure to reimburse him for business expenses. Plaintiff Ortega's claims for false advertising, unlawfully retained gratuities, failure to provide accurate wage statements, and failure to pay overtime, and the portion of his claim for unlawful deductions based upon Uber's alleged deductions for inefficient routes and customer complaints, were not dismissed.

Approximately two-months after the Court dismissed Plaintiff's breach of contract claim, Uber voluntarily issued a payout to approximately 96,000 drivers in New York State. The payout was made in connection with an ambiguity in Uber's November 2014, April 2015, and December 2015 licensing agreements, which Plaintiff contends should be interpreted to require Uber to calculate its service fee "net" of the taxes and fees, including sales tax and Black Car Fund fees, charged to riders, rather than on the gross amount charged. Uber maintains that, out of an abundance of caution, it calculated the amounts (including interest) that would have been owed to drivers in New York under this interpretation of the licensing agreements, and voluntarily remitted those amounts to all affected drivers. The payout totaled over eighty-million dollars. See Dk. No. 56 and 56-1 (articles dated May 23, 2017 announcing Uber's contractual underpayment).

Plaintiff had asserted similar allegations over one year earlier in his Amended Complaint. See ¶ 92, Dk. No. 16 (April 25, 2016). Accordingly, on May 25, 2017, two days after Uber announced the payout, Plaintiff filed a pre-motion letter with the Court to reinstate his contract claims and/or to file a second amended complaint on the breach of contract claim. Dk. No. 56. The court scheduled a pre-motion conference on this issue, but the parties later agreed to mediate Plaintiff's false advertising and breach of contract claims. At the pre-motion conference on July

11, 2017, the parties advised the Court that they had agreed to mediate the false advertising and breach of contract claims, and had selected a mediator.

The parties selected an experienced mediator, Alfred G. Feliu of Feliu Neutral Services to mediate the case. The parties spoke with Mr. Feliu together and separately prior to the mediation session, and submitted mediation briefs to the mediator. Prior to the mediation, the parties engaged in extensive informal discovery. Specifically, Uber produced thousands of documents, including driver-facing advertisements used in New York State during the relevant time period, comprehensive putative class data regarding driver earnings, sales tax charges, Black Car Fund fees, and Uber's service fees, and an explanation of the formula Uber used to calculate the amounts that were allegedly owed, and ultimately paid, to drivers in connection with the voluntary payout, which enabled counsel to accurately ascertain possible damages. The parties met with Mr. Feliu on October 5, 2017 for mediation, but the case did not settle that day. The mediator had several follow-up discussions with the parties and made a "mediator's proposal," which was ultimately accepted by both parties after consultation with their respective clients. The parties thereafter worked together to finalize settlement terms and memorialize them in a long-form settlement agreement.

On January 19, 2018, the Court denied Plaintiff's initial motion for preliminary approval, without prejudice, "because of two seemingly 'obvious defects.'" Specifically, the Court took issue with (i) the "conditional" nature of the parties' stipulation regarding Plaintiff Ortega's ability to file a second amended complaint, and (ii) payment of Martinez's "Named Plaintiff Settlement Payment" from the Gross Settlement Sum. Dk. No. 76. Both of these issues have been remedied.

Uber subsequently stipulated to grant Plaintiff Ortega leave to file the Second Amended Complaint (Dk. No. 69), and under the terms of the Agreement, Martinez's Individual Settlement Payment will no longer be taken or deducted from the three million dollar ($3,000,000.00) Gross Settlement Sum.

## III. THE PROPOSED SETTLEMENT

The Settlement Class consists of all individuals who: (i) have provided transportation services arranged using the Uber App within the State of New York at any time between December 29, 2009 and the date on which the Court enters the Preliminary Approval Order, and (ii) purported to opt-out of arbitration, or whose most recent agreement otherwise does not contain an arbitration provision, as determined by Uber's records. The Settlement Class does not include individuals who exclusively provided transportation services arranged using Uber's "uberTAXI" product.

Under the Settlement, Uber has agreed to establish a three-million dollar ($3,000,000.00) fund (the "Gross Settlement Sum") to be distributed to Settlement Class Members, after deductions for costs of notice and administration, attorneys' fees and other costs, Plaintiff Ortega's Service Payment and Individual Settlement Payment ("Net Settlement Sum").

Each Settlement Class Member who completed a trip and/or received payment for a completed trip in New York State at any time between December 29, 2012, through the date on which the Court enters the Preliminary Approval Order (which coincides with the statute of limitations period applicable to Plaintiffs' false advertising claim), shall receive a flat amount of one-hundred dollars ($100.00), in connection with the settlement of Plaintiff's false advertising claim. These amounts shall be taken from the Net Settlement Sum. Exhibit 1 ¶ 42. This is

consistent with New York Gen. Bus. Law §350-e, which provides for an award of actual damages or a flat award of five-hundred dollars, whichever is greater.

Settlement payments for the breach of contract claim will be calculated by taking (a) the remaining amount of the Net Settlement Sum, (b) divided by the total amount of New York State sales tax and Black Car fund fees charged for rides for which all Settlement Class Members received payment at any time from December 29, 2009, through the date on which the Court enters the Preliminary Approval Order, (c) multiplied by the amount of New York State sales tax and Black Car Fund fees charged for rides for which each Settlement Class Member received payment during this time period, as determined by Uber's records, and allocating those amounts accordingly. See Exhibit 1 ¶ 42.

**Notice and Settlement Administration**

The parties have agreed to retain Garden City Group as the Settlement Administrator. Garden City Group will be responsible for, among other things, effecting class notice. The Settlement provides that notice will first be distributed by email. If any e-mails are returned as undeliverable, the Settlement Administrator will send a copy of the Settlement Notice to the Settlement Class Member by mail.

Settlement Class Members will have an opportunity to exclude themselves from the Settlement or object to its approval. Settlement Agreement (Exhibit 1) ¶45-46. The procedures and deadlines for filing opt out requests and objections will be referenced in the Notice.[3] Exhibit A to Settlement Agreement. With respect to objections, the Notice informs Settlement Class

[3] Under the terms of the first iteration of the parties' proposed settlement, Settlement Class Members would have been entitled to opt-out or object to the settlement within thirty (30) days of the date on which the Settlement Administrator sent the Settlement Notice by electronic mail. Under the terms of the modified Agreement, Settlement Class Members will have forty-five (45) days to do so. Exhibit 1 ¶ 46(e)__.

Members how to submit objections, and indicates that the Final Approval Hearing will be their opportunity to appear and have their objections heard. The Notice also informs Settlement Class Members that they will be bound by the release unless they timely exercise their right to exclude themselves from the Settlement. Exhibit A to Agreement.

Settlement payments will be made by check. Settlement Class Members need not submit a claim form in order to receive payment, and the settlement is non-reversionary, which means that no funds from the Settlement will revert to Uber, unless Settlement Class Members fail to timely cash or deposit their settlement checks. Under the proposed Settlement, Settlement Class Members will have ninety (90) calendar days from the date of mailing to cash or deposit their Settlement Checks (the "Initial Check Cashing Period"). Settlement Checks not cashed within ninety (90) calendar days will be void. Any amounts attributable to void and uncashed Settlement Checks from the Initial Check Cashing Period shall be redistributed to Settlement Class Members who have already cashed or deposited their Settlement Checks, based on their pro rata share of the NSS. Those Settlement Class Members will then have an additional sixty (60) calendar days (the "Additional Check Cashing Period") to cash or deposit the additional Settlement Checks. Additional Settlement Checks not cashed within the Additional Check Cashing Period will be void, and any amounts attributable to those Settlement Checks will revert to Uber. Otherwise, the full amount of the Net Settlement Sum will be paid to Class Members.

**Attorneys' Fees, Costs, And Incentive Award**

Under the proposed Settlement, attorneys' fees and costs are to be paid out of the Gross Settlement Sum. Class counsel intends to apply for fees not to exceed 33.3% (one-third) of the Gross Settlement Sum. Exhibit 1 ¶13. Uber has agreed not to oppose a request for up to that amount. Plaintiff's costs are twenty-nine thousand and fifty five dollars ($29,055.00), which

includes forensic accounting fees, mediation fees, filing costs and travel related expenses. Plaintiff notes that he has not piggybacked on to any previous case in asserting the claims at issue in this Settlement. In addition, Uber's voluntary payout to drivers for their alleged payment of inflated service fees post-dated the Amended Complaint.

In awarding fees from a common fund created after settlement, the trend in the Second Circuit has been toward the employment of a percentage of recovery as the preferred method of calculating the award for class counsel. *See Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.* 396 F. 3d 96 (2d Cir. 2005). This Circuit reasons that the percentage method [as opposed to the lodestar method] directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation. *Wal-Mart Stores, Inc. v. Visa, U.S.A., Inc.,* 396 F.3d at 6, 121 (and cases cited therein). This Court has noted that a 33% fee as a percentage of the common fund is reasonable, especially considering an early resolution of the matter. *Facian v. Rapid Park Holding Corp.,* 2010 U.S. Dist. LEXIS 64382 (E.D.N.Y. June 29, 2010) (noting that lodestar method discourages early settlement). Regardless of what method is employed, a district court has considerable discretion to award a fee reflecting a lodestar enhancement designed to compensate attorneys for inter alia, "the risk of the litigation and the performance of the attorneys." *Athale v. Sinotech Energy Ltd.* 2013 U.S. Dist. LEXIS 199696. (S.D.N.Y. Sept. 4, 2013) (collecting examples of courts awarding lodestar multipliers of between four and five); *Malex v. Del Global Telik, Inc.,* Sec. Litig. 576 F. Supp 2d 570, 590 (S.D.N.Y. 2008) (lodestar multiplier of over 4 routinely awarded.)

An attorney fee request for one third of the fund is considered reasonable and "consistent with the norms of class litigation in this Circuit." *See,* e.g. *Willix v. Healthfirst, Inc.* 2011 U.S. Dist. LEXIS 21102 (E.D.N.Y. Feb. 18, 2011) (awarding class counsel one-third of $7,675.00

settlement fund); *Stefaniak v. HSBC Bank USA,* 2008 U.S. Dist. LEXIS 53872 (W.D.N.Y. June 28, 2008) (awarding 33% of $2.9 million dollar settlement); *Toure v. Amerigroup Corp.,* 2012 U.S. Dist. LEXIS 110300 (E.D.N.Y. Aug. 6, 2012) (awarding 33% of settlement fund to class counsel); *Mohney v. Shelly's Prime Steak,* 2009 U.S. Dist. LEXIS 27899 (S.D.N.Y. March 31, 2009) (awarding 33% of $3,265.00 settlement fund); *Faican v. Rapid Park Holding Corp.,* 2010 U.S. Dist. LEXIS 64382 (June 29, 2010 E.D.N.Y.) (33% attorney fee for $522,741.06 common fund).

Uber has also agreed to pay out of the fund, subject to Court approval, the Service Payment to Plaintiff Ortega, of two-thousand dollars ($2,000.00). Exhibit 1 ¶29. This service award is based upon Plaintiff Ortega's efforts in the case and in bringing to bear added value (i.e. factual expertise). *Berkson v. Gogo, LLC*, 147 F. Supp. 3d. 123 (E.D.N.Y. 2015).

**Release Of Liability**

In exchange for the monetary and other relief described in the Settlement, each Settlement Class Member who does not exclude himself or herself will be deemed to have released and discharged Uber and the other released parties from any claims related to or arising out of the false advertising and breach of contract claims, allegations, and theories asserted in this case, including those asserted in the Complaint, First Amended Complaint, and Second Amended Complaint.[4] Exhibit 1 ¶32.[5]

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[4] The release covers similar claims based on the same or substantially similar theories and factual allegations asserted in *Haider v. Uber Technologies, Inc., et al.*, S.D.N.Y. Case No. 16-cv-4098-AKH ("*Haider*"). The *Haider* case was filed in June 2016, several months after the instant action.

[5] Since the Court denied Plaintiff's initial motion for preliminary approval, the parties made a few minor modifications to the release in the Agreement. Specifically, the parties agreed to expressly list "conversion" as a claim released by the Settlement, and to specifically make reference to Plaintiff's Complaint, First Amended Complaint, and Second Amended Complaint, to further clarify that all of the theories related to Plaintiff's breach of contract allegations are

## IV. PRELIMINARY APPROVAL & CERTIFICATION

### A. The Proposed Settlement Warrants Preliminary Approval

There is a strong judicial policy in favor of settlement, particularly in the class action context. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005). The compromise of complex litigation is encouraged by the Courts and favored by public policy. *Denny v. Jenkins & Gilchrist,* 230 F.R.D. 317, 328 (S.D.N.Y.). The proposed settlement provides substantial monetary relief to the Settlement Class and represents a fair and reasonable resolution of this dispute. As such, it warrants Court approval, along with Notice to the Settlement Class Members.

Approval of a proposed class action requires a finding that the settlement agreement is "fair, reasonable and adequate." Fed. R. Civ. P. 23 (e)(2); *Berkson v. Gojo,* 147 F. Supp. 3d 123 (E.D.N.Y. 2015) *quoting In re Sony Corp. SXR,* 448 F. App'x 85, 86 (2d. Cir. 2011). This determination begins with a preliminary review by the Court of the fairness of the proposed settlement agreement. *Passafiume v. NRG Grp., LLC*, 274 F.R.D. 424, 430 (E.D.N.Y. 2010). Then District Court Judge Sifton stated:

> Preliminary approval of a proposed settlement is appropriate where it is the result of serious, informed, non-collusive ("arms-length") negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies (such as unduly preferential treatment of class representatives or of segments of the class) and where the settlement appears to fall within the range of possible approval.

*Cohen v. J.P. Morgan Chase & Co*., 262 F.R.D. 153, 157 (E.D.N.Y. 2009). When determining whether a proposed settlement meets this preliminary standard, courts should be hesitant to

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included in the release, even those no longer asserted in the operative Second Amended Complaint (e.g., conversion).

substitute [their] judgment for that of the parties who negotiated the settlement. *In re EVCI Career Colls. Holding Corp.*, Sec. Litig. Nos. 2007 U.S. Dist. LEXIS 57918 (S.D.N.Y July 27, 2007).

This preliminary stage determines whether the proposed settlement is "within the range of possible approval." Conte & Newberg, 4 Newberg on Class Actions, § 11.25 at 38-39. The preliminary approval evaluation is not a final fairness hearing. It is an evaluation to determine whether the class should be notified of the settlement and to proceed to a fairness hearing. Id. If the Court finds a settlement proposal "within the range of possible approval," the case proceeds to the second step in the review process, which is a final approval hearing. At that stage, the Court will be able to evaluate the settlement with the benefit of the class members' input.[6]

**i. The Settlement Falls Within The Range Of Possible Approval**

To determine whether a settlement falls within the range of possible approval, courts focus on substantive fairness and adequacy. Generally, a plaintiff's expected recovery is balanced against the settlement and a risk/benefit analysis must inform counsel's valuation of the claims. Judging whether a settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken & Assocs*. Sec. Lit., 150 F.R.D. 57, 66 (S.D.N.Y. 1993). Rather, "there is a range of reasonableness with respect to a settlement,

[6] At the second stage, to evaluate whether a class settlement is fair, the court examines (1) the negotiations that led to the settlement and (2) the substantive terms of the settlement. The "fairness" of the substantive terms of the settlement is governed by the "Grinnell" factors. *City of Detroit v. Grinnell Corp.,* 495 F. 2d 448, 46) (2d Cir. 1974), *abrogated on other grounds, Goldberger v. Integrated Res. Inc.* 209 F.3d 43 (2d Cir. 2000). These factors include (1) the complexity, expense and likely duration of litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) (approving settlement for $5 million where potential liability was $35 million); *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 453 (2d Cir. 1974) (no reason why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery); *Cagan v. Anchor Sav. Bank FSB,* 1990 U.S. Dist. LEXIS 11450 (E.D.N.Y. May 22, 1990) (approving 2.3 million class action settlement where maximum potential recovery was approximately $121 million). The proposed Settlement here easily falls within the range of possible approval.

**a. False Advertising Claim**

In support of his false advertising claim, Plaintiff alleges that he did not receive the guaranteed earnings Uber allegedly promised in its advertising displays. For example, Plaintiff contends that Uber displayed an advertisement for drivers guaranteeing $5,000 for the first month of signing-up to use the Uber App as a driver. This advertisement is illustrated in the First and Second Amended Complaints at Count VI. Plaintiff alleges that he did not receive these guarantees, and that any conditions allegedly imposed with respect to receiving the guaranteed payments were not prominently displayed. False advertising under the statute also applies to advertisements concerning terms and conditions of an employment opportunity, if such advertisements are misleading. The advertising of an employment opportunity is misleading in a material respect if it fails to reveal whether the employment opportunity requires or is conditioned upon the purchase or leasing of supplies, material or equipment. Plaintiff asserts that the advertisements concerned "employment opportunities" and further asserts that performing transportation services arranged using the Uber App required the purchase or leasing

of supplies, material or equipment, but that this requirement is not contained in Uber's advertisement.

Plaintiff believes his false advertising claim is strong. Plaintiff is aware, however, that Uber denies the allegations, denies the advertisements relate to "employment opportunities," and denies that its advertisements were misleading. Uber has raised defenses, which if successful, could result in Plaintiff and the proposed Settlement Class receiving no payment whatsoever. For example, Uber may argue that Plaintiff's false advertising claim is too individualized for class treatment. *See Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 217 (App. Div. 3d Dep't 2010) ("As Supreme Court correctly noted, such a claim would require individualized proof that predominates over common questions, such as whether individual class members relied upon or were even aware of the allegedly false advertisements when purchasing their cell phone plan. … Moreover, the record before us reveals that plaintiffs themselves were exposed to different and/or multiple versions of defendant's advertisements. Consequently, as to each member of the class, it would also be necessary to prove which particular advertisement was viewed by each individual class member"); *In re Avon*, 2015 WL 5730022, *7 (S.D.N.Y. Sept. 30, 2015) (finding that plaintiffs failed to meet Rule 23(b)(3)'s predominance requirement where although the "predominating question [of] whether Avon's statements on avon.com were materially misleading … may be amenable to generalized proof … the question is overwhelmed by individualized issues" related to causation and harm). Uber may also argue, inter alia, that (i) any potentially problematic advertisements were few in number, (ii) drivers often earned the amounts advertised, and/or (iii) the terms applicable to advertised offers were disclosed in the advertisements themselves or in other materials. In addition, Uber contests that the advertisements related to "employment opportunities," which would therefore require Plaintiff to

establish that independent contractor misclassification could be pursued on a class basis, and that his claims of misclassification had merit, both of which are far from certain.

Taking these various defenses into account, and recognizing the risks of litigation, the Settlement represents an excellent result for the Settlement Class. Plaintiff also maintains that it would be infeasible for an individual driver to bring such a claim given the relatively small amount of injury per driver and damages available under the statute.

**b. Breach Of Contract Claim**

Plaintiff's breach of contract claim is premised on several different theories. First, Plaintiff alleges that Uber unlawfully charged drivers a gross service fee on amounts that included sales tax and Black Car Fund fees, rather than charging the service fee net of such taxes and fees. Uber contends it calculated its service fees properly under the agreements in question. However, as discussed above, over a year after Plaintiffs Ortega and Martinez filed the First Amended Complaint, Uber has also calculated all monies that would have been owed to drivers in New York under this interpretation of the licensing agreements, and voluntarily remitted those amounts to all affected drivers.[7]

Second, Plaintiff alleges that, contrary to its agreements with drivers, Uber improperly deducted sales tax and Black Car Fund fees directly from drivers' earnings. However, Uber contends that, consistent with its agreements with drivers, these amounts were not paid by drivers out of their share of the rider payment, but included in the amounts charged to riders.

Third, Plaintiff alleges that Uber failed to remit gratuities to driver in breach of its written agreements, but the Court rejected this theory based on a plain reading of the agreements.

[7] Plaintiff contends he served as a catalyst for the payment to drivers in New York.

Given the risks of litigation, the monies already paid out to the Settlement Class, and the significant recovery provided for by the proposed Settlement, the Settlement is in the best interests of the Settlement Class. Indeed, if Uber were to demonstrate that, as it contends, Settlement Class Members were already made whole through the voluntary payout discussed above, Settlement Class Members would be entitled to no further recovery. In addition, the relatively small amounts at issue for each driver would make any individual action infeasible, especially in light of this proposed Settlement.[8]

The proposed Settlement is also in the best interest of the class because Settlement Class Members are eligible for an immediate and meaningful payment, rather than having to wait for the litigation (and possibly appeals to run their course). This factor favors approval. *See Teachers' Ret. Sys. v. A.C.L. N. Led.,* 2004 U.S. Dist. LEXIS 8608 (S.D.N.Y. May 14, 2004); *In re Agent Orange prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985).

Finally, considering the defenses Uber intends to raise as to the merits and to class certification, Class Members may receive no benefit in the absence of this Settlement.

**ii. The Settlement Is The Product Of Informed, Non-Collusive Negotiations**

The parties were armed with sufficient information about the claims to have been able to reasonably access the strengths and value of same. Prior to the mediation, Uber produced thousands of documents, including driver-facing advertisements used in New York State during the relevant time period, comprehensive putative class data regarding driver earnings, sales tax, Black Car Fund fees, and Uber's service fees, and an explanation of the formula Uber used to calculate the amounts that were allegedly owed, and ultimately paid, to drivers in connection with the voluntary payout. Plaintiff also had the benefit of informal interviews with Class

[8] For example, Plaintiff Ortega received roughly $2,420.08 from the voluntary payout.

Members, as well as non-class member drivers who were bound by the same contracts as Plaintiff. In addition, the parties had the assistance of an experienced mediator, which confirms the process was non-collusive. *See Satchell v. Fed. Express Corp.,* 2007 U.S. Dist. LEXIS 99066 (N.D. Ca. April 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"); *Toure v. Amerigroup Corp.,* 1012 U.S. Dist. LEXIS 110300 (E.D.N.Y. Aug. 6, 2012) (arms-length negotiations involving counsel and mediator raise a presumption that the settlement achieved meets the requirements of due process). Indeed, at one point during the negotiations, the parties reached impasse, but the mediator further assisted the parties by developing a compromise that took into account his review of each sides' positions, and his view of the merits of the action, and its value. *See Stefaniak v. HSBC Bank USA, N.A.,* 2008U.S. Dist. LEXIS 53872 (W.D.N.Y. July 8, 2008) (final approval of class action settlement; case had settled at mediation before mediator Alfred G. Feliu).

**iii. There Are No Obvious Deficiencies**

A court should also consider possible deficiencies in a settlement, including an overly broad release of claims, an insufficient timeframe for notice, an inadequate form of payment or an unreasonable attorney fee request. *Custom LED, LLC v. eBay, Inc.,* 2013 U.S. Dist LEXIS 165881 (N.D.Ca. November 20, 2013). None of these deficiencies exists here.

The Settlement involves only claims for false advertising, breach of contract, and related claims that were already or could have been raised in the action based on similar facts or theories. The remaining class claims in the Amended Complaint, including Plaintiff's wage and hour claims, will be dismissed without prejudice. The distribution of funds will be distributed to the drivers fairly and equitably, based proportionately on the amount of Black Car Fund fees and

sales tax charged to riders on trips for which each driver received payment. Settlement Class Members need not submit a claim form in order to receive payment, and no settlement funds will revert to Uber, unless Settlement Class Members fail to timely cash or deposit their checks after a second distribution. Likewise, as stated previously, the attorney fee provision is in accord with other class action settlements in this district.

### B. The Proposed Settlement Meets The Requirements For Provisional Certification For Settlement Purposes[9]

Prior to granting preliminary approval of a settlement, courts must first find that the proposed settlement class is a proper class for settlement purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Denney v. Jenkens & Gilchrist*, 230 F.R.D 317, 347 (S.D.N.Y 2005) *rev'd on other grounds*, *Denny v. BDO Seidman, LLP*, 412 F.3d 58 (2d Cir. 2005); *see also* Manual for Complex Litigation, Fourth § 21.632. Courts can certify a class where plaintiffs demonstrate that the proposed class and class representatives meet the prerequisites in Rule 23(a) and one of the three requirements of Rule 23 (b). Fed. R. Civ. P. 23; *see also In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 132-33 (2d Cir. 2001) *superseded by statute on other grounds*; *Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D 82 (S.D.N.Y. 2006).

#### i. The Proposed Settlement Class Is Ascertainable

The proposed Settlement Class consists of all individuals who: (i) have provided transportation services arranged using the Uber App within the State of New York at any time between December 29, 2009 and the date on which the Court enters the Preliminary Approval Order, and (ii) purported to opt-out of arbitration, or whose most recent agreement with Uber or its subsidiaries otherwise does not contain an arbitration provision, as determined by Uber's

[9] Uber disputes that certification is appropriate for any other purpose other than settlement.

records. Uber is in possession of contact information for such individuals, including the last known e-mail addresses provided by drivers, and maintains records reflecting the particular agreement(s) these individuals accepted, and copies of any requests to opt-out of the arbitration provisions contained in those agreements. Thus, the proposed Settlement Class is readily ascertainable for settlement purposes.

**ii. The Proposed Settlement Meets The Requirements For Provisional Certification Under Federal Rule 23(a) And 23(b)**

Under Rule 23, a settlement class may be maintained if all the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at (b)(3).

**a. Numerosity**

"[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995) (citation omitted). Here, the parties agree that the Settlement Class has more than 40 members.

**b. Commonality**

Plaintiffs contend that the Rule 23 Class also satisfies the commonalty requirement, the purpose of which is to test "whether the named plaintiff's claim and the class are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw v. Falcon*, 457 U.S. 147, 1576 n. 13 (1982).

Here, Plaintiff asserts that he and the Settlement Class Members share the common contention that they were subject to the same false advertising campaigns from Uber promising guaranteed earnings, without specifying any conditions imposed on such guaranteed earnings in the advertisements. Plaintiff further contends that Settlement Class Members were subject to the same contract terms with Uber under the licensing agreements they accepted, which form the basis of Plaintiff's breach of contract claim. These common questions are sufficient to satisfy the commonality requirement for settlement purposes. *See Puglisi v. TD Bank*, N.A. No. 13 Civ. 637, 2015 US Dist. LEXIS 15966 (E.D.N.Y. Feb. 9, 2015*)* (commonality met where class members "share[d] common issues of fact and law) (citation omitted); *Hernandez v. Merrill Lynch & Co*., No. 11 Civ. 8472, 2012 US Dist. LEXIS 165771 (S.D.N.Y. Nov. 15, 2012) ("Plaintiffs satisfy Federal Rule of Civil Procedure 23(a)(2) because they and the class members share common issues of fact and law) (citation omitted).

**c. Typicality**

Rule 23 requires that the claims of the representative parties be typical of the claims of the classes they seek to represent. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174,182 (W.D.N.Y. 2005). Typicality is often satisfied "when each class member's claim arises from the same course of events, and each class member makes

similar legal arguments to prove the defendant's liability." *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotation marks omitted).

Here, Plaintiff contends he suffered the same alleged injury as the Settlement Class Members he seeks to represent based on breaches of the same contract(s), and the fact that he was exposed to the same advertising campaign by Uber. Plaintiff alleges that he was induced to use the Uber App as a driver after seeing an advertisement guaranteeing certain pay, but he did not receive such guaranteed amounts. Plaintiff further contends that his claim arises from the same set of advertisements to which other drivers in New York were allegedly exposed. Plaintiff contends the breach of contract claim is also typical, as Plaintiff and Class Members were subject to the same contract(s), and Plaintiff contends the contract was applied the same to each driver.

Significantly, as a result of the voluntary payout made by Uber, each driver who allegedly paid an inflated service fee to Uber has already received payment in full, plus interest, for the alleged overpayment.

**d. Adequacy**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement exists to ensure that the named representative will "have an interest in vigorously pursuing the claims of the class, and … have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank* AG, 443 F.3d 253, 268 (2d Cir. 2006). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 US Dist. LEXIS 38701 at *6 (E.D.N.Y. May 29, 2007) *(internal quotation marks and citations omitted).*

Plaintiff contends that he does not have interests that are antagonistic to or at odds with Class Members' interests. *See Lizondro-Garcia v. Kefi LLC,* 300 F.R.D. 169, 176 (S.D.N.Y. 2014) (adequacy requirement met where there was no evidence that named plaintiffs' and class members' interests were at odds). Plaintiff has also selected attorneys who are adequate to represent Class Members' interests, and are experienced and competent counsel who regularly engage in complex class litigation. See Declaration of Jonathan W. Greenbaum attached hereto as Exhibit 2 and Declaration of Philip Hines, attached hereto as Exhibit 3.

**e. Certification For Settlement Purposes Is Proper Under Rule 23(b)(3)**

Rule 23(b)(3) requires that the common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R.Civ. P. 23 (b)(3). The inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) *(quoting Amchen Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997)). These requirements are met for settlement purposes here.

**1. Common Questions Predominate**

To establish predominance, Plaintiffs must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, … predominate over those issues that are subject only to individualize proof." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc*., 4502 F.3d 91, 107-08 (2d Cir. 2007) (internal quotation marks and citations omitted). The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney*

*Antitrust Litig.,* 280 F.3d 124, 139 (2d Cir. 2001)*, abrogated on other grounds by Miles v. Merrill Lynch & Co., Inc. (In re Initial Pub. Offering sec Litig)*, 471 f.3d 24 (2d Cir. 2006).

Here, Plaintiff contends that individualized proof would not be required. With respect to Plaintiff's false advertising claim under N.Y. GBL § 350, Some New York courts have held that individualized proof is not necessary, or is otherwise insignificant with respect to class certification. *Taylor v. American Bankers Ins. Grp.,* 267 A.D. 2d 178, 700 N.Y.S. 2d 458 (App. Div. 1999) *supra.*

Plaintiff also contends that his breach of contract claim likewise would not require individual proof, as Class Members were subject to the same alleged breach under the same or similar written agreements.

**2. A Class Action Is A Superior Mechanism**

The second part of the Rule 23(b)(3) analysis examines whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.,* 406 F.2d 291, 301 (2d Cir. 1968). The superiority analysis considers four factors: (1) individual interest of class members in controlling prosecution of the action; (2) the extent of similar, prior litigation commenced by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties of managing the class action. Fed. R. Civ. P. 23(b)(3).

Plaintiff contends that each factor favors certification for settlement purposes. Individual class members have not expressed an interest in controlling the prosecution of the action. It does not appear that any of the claims resolved by the proposed Settlement have been brought against

Uber by Class Members on an individual basis.[10] Concentrating the litigation in this Court will achieve economies of scale, will conserve the resources of the judicial system, and will avoid the waste and delay of repetitive proceedings in inconsistent adjudications of similar issues and claims. *See, e.g., Damassia v. Duane Reade, Inc.,* 250 F.R.D. 152, 164 (S.D.N.Y. 2008) ("[C]lass action is superior … because it allows for a more cost-efficient and fair litigation of common disputes.").

With regard to manageability, "[c]confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods.*, 521 U.S. at 620. Plaintiff contends there is no basis to conclude that here.

## V. <u>PLAINTIFF'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL</u>

Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria courts must consider in evaluating the adequacy of proposed counsel: (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Court may also consider" any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23 (g)(1)(B). The Advisory Committee has noted that "[n]o single factor should necessarily be determinative in a given case." Fed. R. Civ. P. 23(g) advisory committee's note, 2003 amendments.

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[10] Plaintiff contends it would be difficult and infeasible for an individual driver to pursue an individual claim against Uber, as the amounts at issue for each individual driver are not substantial enough to prosecute a case individually.

Plaintiff contends that Plaintiff's Counsel satisfies these criteria. They have done substantial work identifying, investigating, litigating, negotiating, and settling Plaintiff's and Class Members' claims. Greenbaum Declaration Exhibit 2; Hines Declaration Exhibit 3. *See de Munecas v. Bold Food, LLC*, 2010 U.S. Dist. LEXIS 38229 (S.D.N.Y. April 19, 2010) ("The work Plaintiffs' counsel has done in settling the case demonstrates their commitment to the class and to representing class's interests").

Moreover, Plaintiff's counsel have substantial experience litigating complex commercial and labor cases, and class cases. See www.coburngreenbaum.com.

## VI. THE PROPOSED NOTICE PLAN IS APPROPRIATE

The proposed Notice fully complies with due process and Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain easily understood language:
>
> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). The proposed Settlement Notice is attached as Exhibit A to the Agreement.

The Notice satisfies each of these requirements. The Notice is written in plain English and organized and formatted to be as clear as possible. The Notice also describes the nature of the case, the Settlement Class, and the terms of the Settlement, informs Class Members about the allocation of attorneys' fees and costs, and provides specific information regarding the date, time, and place of the final approval hearing. The Notice also describes the process for submitting objections to, and requests for exclusions from, the Settlement.

Notices will be sent to the last-known e-mail address of each Class Member within 30 days of the Court's preliminary approval order. Exhibit 1. If any e-mails transmitting the Settlement Notice are returned as undeliverable, the Settlement Administrator shall send a copy of the Settlement Notice to the Settlement Class Member by mail. The Settlement Administrator shall then re-mail any Settlement Notice returned by the Post Office with a forwarding address. After receiving any undelivered envelopes, the Settlement Administrator will perform one skip trace using Social Security Numbers, as needed, to verify the accuracy of the addresses provided and re-mail the Settlement Notice for those forms returned to sender. Exhibit 1.

## VII. CONCLUSION

For the foregoing reasons, Plaintiff Ortega respectfully requests that the Court grant his Motion for Preliminary Approval, and enter the Proposed Order submitted therewith.

Respectfully submitted,

/s/

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