VEENA DUBAL, SBN 249268
Associate Professor Law
University of California, Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 565-4860
Facsimile: (415) 565-4698
Email: dubalv@uchastings.edu

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS O'CONNOR, THOMAS COLOPY, MATHEW MANAHAN, AND ELIE GURFINKEL, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBER TECHNOLOGIES, INC.,

Defendant.

HAKAN YUCESOY, ABDI MAHAMMED, MOKHTAR TALHA, BIRAN MORRIS, and PEDRO SANCHEZ, individually and on behalf of all similarly situated,

Plaintiffs,

vs.

UBER TECHNOLOGIES, INC.,

Defendant.

Case No. 13-3826-EMC
Case No. 15-00262-EMC

DECLARATION OF VEENA DUBAL IN SUPPORT OF OBJECTIONS TO CLASS ACTION SETTLEMENT FILED BY ADHAM SHAHEEN, GLADYS QUINONES, MAHMOOD NOORI, and EDWARD ESCOBAR, MOHAMMAD ZADRAN

I, Veena Dubal, declare as follows:

1. I am an Associate Professor of Law at the University of California, Hastings College of Law, where I teach employment law and employment discrimination law. My current research focuses on work law, regulation, and worker representation, specifically of Uber drivers. Prior to my current position, I was a post-doctoral scholar at Stanford University where I researched and wrote on work law and worker organizing in the taxi and transportation network industries. My doctoral dissertation, *Driving Freedom, Navigating Neoliberalism: San Francisco Taxi Workers, Juridical Precarity, and the Politics of Work Law*, completed in 2014, was based on a multi-year legal ethnography of the San Francisco taxi industry. Before earning my Ph.D. at the University of California at Berkeley, I was a staff attorney at the Asian Law Caucus in San Francisco where I founded a project to advocate with and for taxi workers. My knowledge and experience with transportation workers, worker grievances, and worker organizing is long and intimate. I am also representing the following Objectors: Adham Shaheen, Gladys Quinones, Mahmood Noori, Edward Escobar, and Mohammad Zadran.

2. I have personal and professional knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

3. This declaration is written to provide perspective on the terms of the proposed settlement and to support the objections of Adham Shaheen, Gladys Quinones, Mahmood Noori, Edward Escobar, and Mohammad Zadran (the "Objectors").[1] These current and former Uber drivers are founders and/or affiliates of the San Francisco Bay Area Driver Association ("SFBADA") which was founded in February 2016. SFBADA currently has 400 affiliated drivers. They have initiated and participated in protests at the San Francisco International Airport ("SFO") holding lot and in front Uber's San Francisco headquarters. SFBADA maintains a permit and a parking space at SFO that they use as a platform to educate, support, and organize drivers. In the atomized, rights-stripped workplace produced through and by Uber,

[1] I met these Objectors through the course of my research and have conducted numerous interviews with them.

the advocacy and organizing of Plaintiff Objectors and SFBADA is nothing short of historic and extraordinarily courageous.

4. Plaintiff Objector Adham Shaheen began driving for Uber in March 2015 to supplement his work as a grocery store manager. Mr. Shaheen had heard about Uber from friends, and he reasoned that working extra hours would help to support his family and pay off student debt. Mr. Shaheen's car was not eligible for Uber, so he purchased a 2014 Nissan Sentra and drove nights starting at 8:30pm and typically ending at 5:30am. On the weekends, he sometimes drove constantly, only stopping to take naps. Mr. Shaheen did not make the wages that he expected to make driving for Uber. Despite his long and dangerous hours, he struggled to pay his bills and support his wife and 5-year-old son who, because of the unpredictable and risky nature of his income, have moved to Jordan. Currently, Mr. Shaheen drives roughly 50 hours a week. In just over a year, he has logged 73,000 miles on his car. Mr. Shaheen, like many who work in San Francisco but cannot afford to reside there, lives a one-hour drive outside of the city. For fear of losing time and fares, he often sleeps in his car, parking it wherever his fare might take him – one night in Hayward, another in Oakland. Mr. Shaheen is currently the President of the Board of SFBADA. In his limited spare time, he works passionately to educate and organize workers around workers' rights long-established for employees in the United States.

5. Gladys Quinones is a 62-year-old immigrant from Venezuela who has been driving for Uber since March 2015. She attended college in the U.S. and graduated with a degree in Materials Engineering; subsequently, she worked in the semiconductor industry for many years. She got married and established and operated a small business with then husband. After her divorce, Ms. Quinones became ill and could not hold a steady job because of a medically-induced need to take frequent and unpredictable rest breaks. Rather than filing for disability, Ms. Quinones decided to start driving for Uber. Ms. Quinones drives an average of 30 hours per week depending on her physical ability. Upset at what she describes as "the dishonesty, lies, abuse, manipulability and uncontrolled business practices" of Uber, Ms. Quinones decided to organize drivers and advocate on their behalf.

6. Mahmood Noori, a 59-year-old refugee from Afghanistan, is a long-time veteran of the chauffeur industry. Prior to December 2014 when he began driving for Uber, Mr. Noori drove for a taxi company in the East Bay. When Uber's popularity surged, Mr. Noori's income from taxi driving was devastated – reduced by more than one half. He could not manage financially, and so he purchased a minivan and left the taxi industry to begin driving for Uber. Mr. Noori's wife, who has a heart condition, was also forced to find part-time work to make ends meet. Mr. Noori currently works for Uber XL, and he has logged more than 90,000 miles driving for Uber in his minivan. Because he can take up to 7 passengers in his vehicle, he does not accept as many fares as Uber would like. He is frequently threatened with deactivation and constantly worried about the stability of job.[2] Mr. Noori hardly ever takes bathroom breaks or stops to eat. His poor working conditions, even when compared to the East Bay taxi industry, have compelled Mr. Noori to join forces with other vulnerable workers to support driver organizing and advocacy.

7. Edward Escobar is a 51-year-old San Francisco native, the son of a Cuban father and a Puerto Rican mother. He identifies as first-generation Hispanic-American. Mr. Escobar has been driving for Uber since April 2014. Prior to driving for Uber, Mr. Escobar worked at a failed tech startup. As a driver, he averages driving 70-80 hours per week. Mr. Escobar believes that in order for the Uber model to be successful, it needs to be sustainable for riders and workers. To achieve that vision, Mr. Escobar has been working with his fellow drivers.

8. When he is not driving, Mohammad Zadran, a 55-year-old Afghan immigrant, lives in the Central Valley with his wife and three dependent children. He is the sole source of income in the family. Prior to driving for Uber, Mr. Zadran was a long-time veteran of the taxi industry. In 2004, Mr. Zadran organized his fellow taxi workers in a fight against their employer

---

[2] Note that the "sufficient cause" for deactivation terms of the settlement (discussed herein) would not benefit Mr. Noori because one of the "sufficient causes" published in Uber's new policy is not accepting fares. Despite the fact that Uber maintains that these workers are "independent contractors" or small businessmen, they are prohibited from making the simple "business decision" to decide which fares to take.

Friendly Cab in Oakland, and founded the East Bay Taxi Workers Association.[3] Mr. Zadran zealously took their cause to the 9th Circuit which affirmed the National Labor Relations Board's ruling that he and his fellow taxi drivers were employees of Friendly Cab and that they had the legal right to form a union.[4] In March-April 2014, Mr. Zadran began driving for Uber. He worked roughly 100 hours a week, frequently sleeping in his vehicle. In October 2015, Mr. Zadran was "deactivated" for refusing to take a non-service animal in his car. Mr. Zadran, allergic to the animal, submitted a doctor's confirmation of this allergy to Uber, but he was nonetheless taken off the platform.[5] Subsequently, Mr. Zadran began driving for Lyft. Despite his low wages and the stress of the job, Mr. Zadran has maintained his fighting spirit and continues to support his fellow workers through the SFBADA.

I. INTRODUCTION

9. Plaintiffs in the class certified by this court are among the most vulnerable workers in the United States. Purportedly living "flexible" work lives, drivers have no guaranteed income and no job security. Drivers in my research, like Plaintiff Objectors, report a myriad of problems on the job, but chief among them are an unstable income and the insecurities posed by deactivation. Drivers' unpredictable wages are not determined by how long or hard they work, but rather, by Uber's unilaterally determined and oft-changing rates and the unregulated number of other transportation network company workers in their area.

10. This case addresses the most pressing and urgent issue facing workers like the SFBADA objectors and their families: the potential for wage stability. California's definition and legal analysis of who is an "employee" for wage and hour purposes is one of the most inclusive in the nation. This is the result of carefully weighed legal and policy considerations by

---

[3] *See* Patrick Hoge, *Cabbies Join Union After Board Rules They're Employees*, S.F. CHRONICLE, July 28, 2004.
[4] *See N.L.R.B. v. Friendly Cab, Inc.*, 512 F.3d 1090 (9th Cir. 2008).
[5] Mr. Zadran's 2015 deactivation would fit under the "quality" cause enumerated in the "new" sufficient cause deactivation policy. Like Mr. Noori, he would not have benefited from the broad terms of this new policy.

the California Supreme Court and State Legislature, recognizing the importance of wage stability for economic vibrancy and individual security.

11. In sharp contrast to legally-cognized employees in the state of California, an Uber driver can work for hours with no guarantee of income, much less a living wage, at the end of the day. Revealingly, many drivers' surveyed in my on-going research report that when calculating their wages, they do not account for gas, insurance, and wear and tear on their vehicle because their need for cash is acute. When drivers do account for these expenses, many report making less than minimum wage. As one driver put it, "If you do the numbers long-term, you lose. I guess it's good if you need the money now and can't wait."

12. The uncertainty of wages, compounded by frequently lowered rates, has had devastating implications for workers and their families. Many workers, having lost their jobs in the Great Recession of 2007-2009, purchased a vehicle, either on their own or through Uber-sponsored lending programs. Under such programs, these drivers became financially tethered to their new cars and are obliged to continue to drive for Uber, regardless of the inadequacies and uncertainties of remuneration. When Uber dropped their rates in the Los Angeles area to $.90 per mile, for example, one SFBADA board member traveled to San Francisco where the rates were slightly higher, slept in his vehicle, and drove for two weeks to support his wife and children in Orange County. Subsequently, he went home for a few days, only to return to the Bay Area and repeat the process.

13. The consequences of settling this case extend far beyond the class. As many legal scholars and expert commentators have pointed out, Uber's business model has proliferated into a micro-economy of its own.[6] A recognition of employee status in this case could prove a boon for workers across industries.[7] Leaving Uber's business model untouched per the terms of the

---

[6] *See, e.g.*, Gerald F. Davis, *What Might Replace the Modern Corporation?: Uberization and the Webpage Enterprise*, 39 SEATTLE UNIV. L. REV. 501 (2016); Jen Schradie, Digital Labor, Collective Action and the Uberization of the Economy: A Comparative Analysis Between France and the United States (Isaconf 2016).; J Walker Smith, *The Uber-All Economy of the Future*, 20 THE INDEPENDENT REVIEW (2016).

[7] A recent Bloomberg Law publication, for example, explained the potential impact of this lawsuit: "The action could compel the courts to clarify whether gig economy companies such as Uber, Lyft, GrubHub, Upwork, Fiverr

proposed settlement, on the other hand, has the potential to cement the poor working conditions of hundreds of thousands of workers.

14. In addition to the inadequate monetary terms of this settlement, the non-monetary terms of the settlement including the drivers' associations, deactivation panels, and potential tipping may perpetuate and even exacerbate deep economic and social inequalities for Uber drivers.

II. NON-MONETARY TERMS OF SETTLEMENT

15. The non-monetary terms of the settlement have adverse implications for the class and for Uber drivers outside of the class. The proposed drivers' association and deactivation panels, in particular, may do more harm than good for workers by undermining independent worker representation and by creating illusory mechanisms to address driver grievances. Further, Uber's recognition that workers may be tipped could, based on the experience of tipping in other industries, undercut the fight for wage security and worker dignity by distracting from the ultimate goal: secure wages. The potential introduction of a tipping culture, in lieu of secure and stable wages, thus may have a troubling impact on all Uber drivers.

A. Drivers' Associations

16. The proposed settlement creates Uber-funded and Uber-facilitated driver associations in California and Massachusetts to address driver grievances. While this proposal may have been well-intentioned, such associations – effectively "company unions" or "house unions" – would have detrimental long-term consequences for workers. Most saliently, the creation of such associations may deter Uber drivers from seeking to form an independent labor organization and may undermine existing efforts, like those being made by the Plaintiff Objectors, to organize drivers.

---

and Thumbtack can characterize their workers as independent contractors or traditional employees entitled to protections under federal labor laws." UBER & THE GIG ECONOMY: RECENT DEVELOPMENTS & KEY TAKEAWAYS, BLOOMBERG LAW, May 2016.

17. Notably, a company-sponsored and -facilitated worker association runs contrary to long-established national and international standards and laws on the right to organize, including Article 2 of the International Labor Organizations' Convention 98 and section 8(a)(2) of the National Labor Relations Act ("NLRA"). A long legal and political history of worker strife preceding the passage of the NLRA also cautions against the establishment of such driver associations. In the early decades of the twentieth century, such entities were created by employers to undermine the fight for better wages through independent worker organizing.[8]

18. Indeed, with the passage of the NLRA in 1935, Congress determined that for workers to be empowered to choose freely to engage in collective organizing and bargaining, employer-supported vehicles for bilateral dealings with workers needed to be *outlawed*. As a result, section 8(a)(2) of the NLRA expressly prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it." Further, section 2(5) of the NLRA extends the definition of "labor organization" to "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[9]

19. The "Drivers' Associations" in the proposed settlement may violate the letter of the NLRA (if, in separate NLRA litigation, Uber drivers are determined to be employees of the firm), and they would unquestionably violate its spirit. At the time of the NLRA's passage, workers were neither legally nor culturally bifurcated into "employees" and "independent contractors." In fact, as I show in my research, all workers, including taxi drivers, were ubiquitously referred to as "employees."[10] The independent contractor carve-out, borrowed from the doctrine of *respondeat superior* in tort law, was introduced into laws regulating safety-net

---

[8] As they did prior to the passage of the National Labor Relations Act. *See*, LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939 (Cambridge University Press. 2008). 171-175.

[9] 29 U.S.C. § 152(5).

[10] Veena Dubal, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. Forthcoming (2017). On File With Author and California Law Review.

benefits and worker protections in the years following World War II in response to creative lawyering and lobbying efforts to lower corporate costs and evade employer liability.[11] At its inception, the NLRA protected *all* workers from being subjected to a "company union."

20. Drafters of the NLRA, principally Senator Robert F. Wagner, offered two explanations for the absolute embargo on company unions. The first was an "employer coercion rationale," meaning that the prohibition outlawed efforts by companies to undermine independent union organizing.[12] Prior to the passage of the NLRA, employer representation associations were part of an arsenal of tactics to undermine worker organizing that also included "the use of spies, professional strikebreakers, and mass discharges of union supporters."[13] As submitted in the Congressional testimony of Edwin Smith, a National Recovery Act ("NRA") Board Member, company unions, in cases that had come before the NRA, engaged in tactics to "forestall the labor union organization, . . . [including] discharge of labor union workers and other intimidation against the union workers; speeches by employers denouncing labor unions and praising the company union or workers council, . . . [and] the utilization of company lawyers to draw up a constitution for use in the plans."[14] The NRA staff created a report on company-union cases that came before the Board and submitted it into testimony during the debates preceding the passage of the NRLA, with the intent to discourage the future legality of such entities.[15]

21. The second reason cited for why the NLRA's prohibition on company unions was the consensus that employers must be removed from the process in order to preserve the ability of workers to make choices out of free will.[16] Senator Wagner, who referred to company unions as "sham[s]," "masquerades," or "pretend union[s]," argued that company-supported systems

---

[11] *Id. See also* JEAN-CHRISTIAN VINEL, THE EMPLOYEE: A POLITICAL HISTORY (University of Pennsylvania Press. 2013).
[12] Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125(1994).
[13] *See* IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY, 9-14 (University of California Press 1950).
[14] 1 LEGIS. HISTORY OF THE NAT'L LABOR RELATIONS ACT, 1935 at 1546 (1949).
[15] *Id.*
[16] *See* Estreicher, N.Y.U. L. REV. (1994).

could not secure democratic consent and cooperation.[17] As law professor Mark Barenberg points out, Harvard labor economist and adviser to Senator Wagner Professor Sumner Slichter wrote in 1929 that modern personnel methods, including company unions, were "one of the most ambitious social experiments of the age, because they aimed, among things . . . to prevent him [the worker] from becoming class conscious and from organizing trade unions."[18]

22. The creation of drivers' associations as part of this wage and hour settlement perversely introduces and legitimates a company tool or technique used historically to undermine independent worker organization and representation and to thwart the free will of workers. Plaintiff Objectors, all active worker organizers and advocates, have formed the SFBADA with the intent of organizing and eventually establishing collective bargaining rights for fellow fulltime Uber drivers. The creation of company-sponsored drivers' associations through this proposed settlement, in addition to being potentially illegal, would subvert and weaken these efforts.

B. Deactivation Policy and Panels

23. Plaintiffs' counsel claims that the non-monetary terms of the settlement provide "significant protection to workers that they do not currently have," but the proposed standard for deactivation does not depart significantly from the status quo and is largely illusory. Under the terms of the settlement, Uber has agreed to only terminate drivers for "sufficient cause." However, Uber unilaterally determines what constitutes "sufficient cause." Included among these causes in the now-published driver deactivation policy are overly broad grounds such as "quality" and "safety."[19]

---

[17] Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARVARD L. REV 1379, 1456 (1993).

[18] *Id.* In sharp contrast, Leslie Vickers, representing an employer association maintained that company unions were good because the interests of companies and labor were "identical." *Id.*

[19] Driver Deactivation Policy – US ONLY, *available at* https://www.uber.com/legal/other/driver-deactivation-us-english/.

24. Of 81 drivers surveyed in my on-going research on San Francisco Bay Area Uber drivers, 24 (or roughly 30 percent) have been deactivated. These drivers reported that they were deactivated for reasons ranging from high cancellation rates, low ratings, accidents, and incorrect or outdated information. Had this "new" sufficient cause policy been in effect earlier, ALL of these drivers would likely still have been deactivated. In effect, the new policy is not a significant departure from the previous one. Drivers will continue to be subject to capricious and unpredictable termination of their ability to work and earn money.

25. The settlement terms related to the negotiated driver appeals scheme are also inherently flawed. Per these terms, drivers deactivated for certain specified reasons can appeal to a Driver Appeal Panel, which will include Uber drivers. No details on the terms or rules of these panels are provided in the proposed settlement. How will these panels be constituted? By whom? How will adjudicators be compensated? How long will an appeal take? Who will decide whether or not a challenge has enough merit to be reviewed by the panel? Who will guarantee the independent judgment of the panel which is presumably constituted and sponsored by Uber? If this settlement is approved, the answers to these questions will be determined by Uber, who, without oversight, has little incentive to formulate anything more equitable or sophisticated than a kangaroo court.

26. Over the last 60 years, nonunion employers have increasingly adopted disciplinary hearings and workplace grievance procedures like the proposed Driver Appeal Panel. Scholars and researchers of labor relations submit that such procedures have been enacted not to benefit the worker, but to forestall litigation and "to avoid unionization by providing workers with a mechanism for resolving complaints."[20] Data suggests that such procedures are nonetheless ineffective and underused, even when they contain considerable procedural formality.[21] Perhaps most importantly, in the specific instance of peer-reviewed

---

[20] A.J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 ADVANCES IN INDUSTRIAL & LABOR RELATIONS 69, 70 (2004).

[21] Peter Feuille and Denise Re. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 JOURNAL OF MANAGEMENT 27 (1995).

termination review procedures (the type of procedures provided by the proposed settlement) available data suggests that the vast majority of decisions uphold the decision of management.[22] Indeed, "[t]he cases where employees were successful in appealing to peer review panels often involved failures of management to follow the exact procedural details of their own rules... rather than the content of the complainant's conduct."[23] Thus, the proposed Driver Appeal Panel is likely to be underutilized and ineffective, even if it is successful in producing the appearance of fairness and equity while disguising continuing abuses by Uber.

27. Finally, comparative analysis of drivers terminated in another segment of the transportation-chauffeur industry highlights that these Driver Panels have little to no potential to positively impact the job security of drivers. In my previous research, I found that analogous driver appeal panels had been utilized in the Black Car industry in New York City. These peer-reviewed appeals mechanisms were highly criticized by terminated workers and worker advocates who claimed that the panelists were not wholly independent because they came from within the industry and with their own biases. The same would be true in an Uber-constituted adjudicatory panel where driver-members' decisions could not be made independently of company interests.

C. Tips and Tipping

28. Since announcing the proposed settlement (which suggests that Uber will clarify that workers *can* be tipped), Uber has been very clear to riders: tipping, though permitted, is not "expected or required." In a post published by its policy team, Uber writes, "[I]t's important to note that last week's settlement has not changed our approach in any way. In it, we simply agreed to 'clarify [our] messaging regarding tipping . . . and that tipping is neither expected nor required."[24] Because Uber is actively discouraging its riders from changing their habits with

---

[22] *Id.* at 17.
[23] *Id.*
[24] *See* Uber Under the Hood, *Our Approach to Tipping*, April 28, 2016, *available at* https://medium.com/@UberPubPolicy/our-approach-to-tipping-aa0074c0fddc#.ovclo8ftp

regard to tipping, any benefit from this portion of the proposed settlement is limited. As I told the *Wall Street Journal*, "There has to be consumer recognition that tips can now be a part of this culture."[25] Without a shift in consumer culture, Uber drivers will not gain significantly from this portion of the settlement. In fact, given Uber's position, drivers who solicit tips risk receiving a low-rating from riders, and low-ratings, in turn, could lead to deactivation under the "sufficient cause" policy.

29. More importantly, however, allowing or facilitating "tips" is not an appropriate or fair exchange for a secure living wage. In industries where tipping has become the norm, the federal minimum wage for tipped workers is $2.13 an hour.[26] In Massachusetts it is $3 an hour. In California, where Uber has some of its lowest fares, drivers have been working without even a minimum wage floor, a vulnerability that this settlement exacerbates. If a tipping ethos were produced amongst Uber consumers *without* the guarantee of secure and stable wages, it could exacerbate a culture of hierarchy, undercut worker dignity, and undermine the fight for secure, stable, and equitable wages. A far better outcome would be to mandate that Uber pay its workers secure and stable wages, and leave tipping to the discretion of riders.

30. Uber drivers in my research report rampant workplace abuse that may be intensified by a culture of tipping that is not also supported by fair and secure wages, especially when the threat of low-ratings leading to deactivation is ever present. Some drivers report that riders have told them to "just shut up" and to "go back to your f*cking country." One Uber driver in my interview of him summarized his experiences eloquently, "People basically treat you like you don't have a soul. They treat you like you're less than them . . . Like some of them even get irritated when you're talking to them. When I see them look at each other and they're like – they'll like look at each other and then look up and roll their eyes, like they really don't

---

[25] *See* Rachel Silverman and Lauren Weber, Uber Reaches a Tipping Point with Its Drivers, WALL STREET JOURNAL, Apr. 24, 2016, *available at* http://www.wsj.com/articles/uber-reaches-a-tipping-point-with-its-drivers-1461490205.

[26] This minimum wage holds true as long as the workers' tips make up the difference between that amount and the federal minimum hourly wage. *See* U.S. Dept. of Labor, MINIMUM WAGES FOR TIPPED EMPLOYEES, *available at* https://www.dol.gov/whd/state/tipped.htm

want to talk to you, you know? And it sucks because I'm trying to be nice." On top of the abuse, drivers engage in emotional labor when interacting with their riders, interpreting social cues on whether or not the riders want to engage, and responding appropriately to sometimes inappropriate and unsettling behavior.[27]

31. Introducing a culture of tipping without the benefit of secure wages may produce an added element of hierarchy and expectation of emotional labor. More specifically, tipping drivers who do not have any guarantee of a minimum wage may, as it has in other service industries, encourage the tolerance of on-the-job abuse.[28] Workers forced to live on tips are often compelled to endure inappropriate and degrading behavior in order to make a living.

III. MONETARY TERMS OF PROPOSED SETTLEMENT

32. The vast majority of Uber drivers and putative class members who I have encountered in my research know of this case and have been eagerly awaiting its outcome at trial. These drivers, like Plaintiff Objectors, are generally less concerned about the immediate potential for one-time monetary compensation as a result of the settlement and more concerned with the adjudication of their employment identities for wage purposes. The non-monetary terms of the settlement, nonetheless, are inadequate and Plaintiffs' counsel's representation otherwise is deceptive in at least two important ways.

33. First, Plaintiffs' counsel's comparison between Barbara Berwick's award and the settlement award for fulltime drivers in this proposed settlement is erroneous. Plaintiffs' counsel argues in her Declaration that class members who drove fulltime will get remuneration comparable to the amount received by Barbara Berwick, who was declared an employee of Uber

---

[27] A rich and compelling story about affective and emotional labor was first introduced by sociologist Arlie Hochschild. *See* ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING (Univ of California Press 2003). Since then there has been extensive of research on this topic. For a survey of the literature, see Amy S Wharton, *The Sociology of EmotionalLlabor*, ANNUAL REVIEW OF SOCIOLOGY (2009).

[28] *See* SARU JAYARAMAN, BEHIND THE KITCHEN DOOR (Cornell University Press 2013).

by the California Labor Commissioner.[29] However, contrary to Plaintiffs' counsel's representation, Ms. Berwick drove about 40 hours a week for 8 weeks, not for "several months." Ms. Berwick was awarded around $4000 in expenses. If Plaintiffs' counsel won this case at trial, class members who drove fulltime (or longer) over the course of two years would be entitled to tens of thousands more dollars than they would receive under this settlement.

34. Second, Plaintiffs' counsel's comparison to the settlement in *Alexander v. FedEx Ground Package Sys., Inc.*, No. 3:05-cv-00038-EMC (N.D. Cal.) in justifying the proposed settlement is misleading, at best. In arguing that the monetary relief is valuable and meaningful, Plaintiffs' counsel maintains that the settlement in *Alexander v. FedEx*, a major misclassification case, was approximately 42% of the plaintiff's total potential recovery, while, "*depending on how one measures it*, the recovery obtained through this settlement is up to 29% of the damages Plaintiffs might have obtained if they had won at trial . . . ."[30] (my emphasis). This comparison is distorted. In *Alexander v. FedEx*, plaintiffs' counsel calculated maximum potential recovery assuming that Plaintiffs could prevail on *every single* aspect of their damage claims including but not limited to vehicle expenses, expenses incurred for all of plaintiffs' contract routes, and the *full* measure in civil penalties sought under PAGA and the Labor Code § 203.[31] In contrast, Plaintiffs' counsel in this case was much more conservative in calculating potential recovery. Notably, Plaintiffs' counsel did not include the full measure of civil penalties sought under PAGA nor did she calculate penalties to pay wages when due, unlawful deductions, or failure to pay minimum wage, among other things. Thus, the stylized comparison of recovery in this proposed settlement to the recovery in the *Alexander v. FedEx* settlement serves Plaintiffs' counsel's interests by making this settlement look within the ballpark of reasonable. But the comparison is clearly flawed and deceptive.

---

[29] Decl. of Shannon Liss-Riordan in Support of Plaintiffs' to Objections to Class Action Settlement, ECF No. 613 ("Pls.' Dec.") at 3-4

[30] Plaintiffs' Responses to Objections to Class Action Settlement, ECF No. 611 ("Pls.' Resps.") at 18 (emphasis added).

[31] *Alexander*, N.D. Cal. Case No. 3:05-cv-38, ECF No. 149, at 8.

35. Uber drivers want long-term wage security, not short-term dressing on their wounds. As one driver told me in an interview, "Right now, we are worse off than Walmart workers. At least they know how much they will make each hour." Despite this strong sentiment and the dire need for wage security among the class, this proposed settlement creates a presumption of independent contractor status for wage purposes.

IV. CONCLUSION: WEIGHING RISKS

36. While the risks to the Plaintiffs' case at the 9th Circuit and before a jury are not insignificant, the long, historical view is that class members are better served by taking this case to trial.

37. Plaintiffs' counsel gives too much weight, in her analysis of the risk associated with litigating this case, to Uber's arbitration clause. Notably, the certified class includes many drivers who never signed the arbitration award. Even if the 9th Circuit overturned this Court's order invalidating the arbitration agreement, a valuable and viable challenge to Uber's business model could be mounted at trial. Such a successful challenge would greatly benefit all members of the class because it would provide them with prospective stable income.

38. In formulating her decision to settle this case, Plaintiffs' counsel also stresses the risk of losing at trial. However, Uber drivers, particularly those in my research who have been actively working to build worker unity and worker power in the industry, have relied upon Plaintiffs' counsel's representation that she would take this case to trial. In media interviews, Plaintiffs' counsel has made statements leading these class members to believe that she would aggressively represent their long-term interests and not settle. For example, in widely circulated story in 2015 (which is available on her website), Plaintiffs' counsel was reported to have said, "I can't predict yet my defining moment . . . . *Of course, I haven't given my closing argument in the*

Uber case yet, either."[32] (emphasis added.) She added, "The most recent [September 1, 2015] ruling effectively means every other company who does this is going to a jury. They're not going to get off the hook."[33]

39. When strategizing and building their movement, Plaintiff Objectors and other drivers have relied upon these representations and depended on this case to settle the question of their work identities for wage purposes, one way or the other. Plaintiffs' counsel maintains that the issue can still be litigated, despite this settlement, but class members, the vast majority of whom are low-income workers, have already lost three years of time waiting on a decision in this case. The settlement, if approved, will undermine the growing movement of Uber drivers, including Plaintiff Objectors, working towards better conditions and simultaneously sanctify a business model that creates and perpetuates inequality.[34]

40. By leaving this issue undecided, Plaintiffs' counsel and Uber with their proposed settlement create a presumption of independent contractor status for wage purposes, leaving workers in a sandpit from which there is no clear route to rise. Alongside the creation of a company union and inadequate, illusory on-the-job protections, this settlement may leave drivers worse off than before, with an underwhelming, one-time cash payout, instead of the right to work hard and eventually bargain for secure wages.

---

[32] Susan J. Wells, '*Sledgehammer Shannon: The Attorney Taking on Uber and Others in the Sharing Economy.* BIZWOMEN, Sept. 15, 2015, available at http://www.bizjournals.com/austin/bizwomen/news/profiles-strategies/2015/09/sledgehammer-shannon-the-attorney-taking-on-uber.html?page=5.

[33] *Id.*

[34] From a social movements perspective, even a loss at trial may be a boon for workers. A robust scholarship in the sociology of law engages the possibility of "winning by losing." As eminent legal scholar Douglas NeJaime has noted in his work, litigation losses may nonetheless produce winners: "Litigation loss may, counterintuitively, produce winners. When savvy advocates lose in court, they may nonetheless configure the loss in ways that result in productive social movement effects and lead to more effective reform strategies." *See*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. (2011). Here, losing at trial could create a political opportunity for organized workers and their advocates to mobilize and push for protections in legislative venues.

41. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on May 27, 2016.

Signature: _____

Veena Dubal, SBN 249268
Associate Professor of Law
University of California, Hastings College of the Law
200 McAllister Street
San Francisco, California 94102
(415) 565-4860