SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

QUINTERO,

Plaintiff,

vs.

APRIA HEALTHCARE LLC, et al.,

Defendants.

Case No.: 20STCV42367

COURT'S RULING ON MOTION FOR CLASS CERTIFICATION

Hon. Carolyn B. Kuhl
Department 12 – SSC

Court's Ruling: The Motion is granted. The court certifies the following class:

> All persons who were provided as drivers to Defendant by Spoke Logistics, LLC Fed Med Delivery, LLC, and Johnson Pickup & Delivery LLC, between November 1, 2016 and the date of class certification, and who were not paid as W-2 employees by Apria. The class does not include any Federal Express (FedEx) drivers.

Plaintiff's counsel is to forward a proposed Notice to the Class to Defense counsel in 10 days from the date of this Order. Defense counsel is to notify Plaintiff's counsel of any proposed changes to the Notice 7 days thereafter. Counsel are to meet and confer to try to resolve any differences in the form of Notice and, if unable to agree, are to post on CaseAnywhere a redline showing the parties' disagreements. The posting shall be made no later than 30 days from the date of this Order.

A further status conference is set for November 9, 2021 at 1:45 pm. Counsel shall file a joint status report 5 days prior to that date, outlining a plan for future proceedings in the case and proposing a trial date.

Factual and Procedural Background

Plaintiff moves for an order certifying this case as a class action. Plaintiff seeks to certify the following class:

> All individuals who worked for Defendants in California as drivers and are/were classified as independent contractors [or non-W-2 employees] during the four years period prior to the filing of the Complaint through the date of certification.

(Pl's Mot., at p. 10, brackets added by Plaintiff.) Plaintiff clarifies that the proposed class can also be defined as follows: "All persons who filled out Route Sheets for the Defendant [during the period from November 1, 2016 through the present], but were not paid as W-2 employees by Apria." (Pl's Mot., at p. 10, brackets added by Plaintiff.)

Plaintiff filed this class action on November 3, 2020, alleging Labor Code violations. Plaintiff filed the First Amended Complaint (FAC) on February 10, 2021, alleging the following causes of action: (1) Unpaid Overtime (Lab. Code, §§ 510, 1198); (2) Unpaid Minimum Wages (Lab. Code, §§ 1194,1197, 1197.1); (3) Wages Not Timely Paid Upon Termination (Lab. Code, §§ 201, 202, 203); (4) Unpaid Rest Break Premiums (Lab. Code, § 226.7); (5) Unpaid Meal Break Premiums (Lab. Code, § 226.7; (6) Non-Compliant Wage Statements (Lab. Code, § 226(a)); (7) Unpaid Business Expenses (Lab. Code, §§ 2800, 2802); (8) Violation of the UCL; and (9) Civil Penalties under PAGA.

As one aspect of its business, Defendant Apria Healthcare LLC (Defendant or Apria) provides its customers with home delivery of medical equipment and supplies, such as beds, oxygenators, and wheelchairs. Plaintiff alleges that Defendant misclassified its delivery drivers as independent contractors. Plaintiff contends that all of the alleged Labor Code violations stem from Defendant's misclassification of the putative class. In the FAC, Plaintiff defines the putative class as follows:

> All individuals who worked for Defendants in California as drivers and are/were classified as independent contractors at any time during the period of four years prior to the filing of the Complaint through the date of certification.

(FAC, ¶ 26, bolded in original.) Plaintiff claims that all putative class members were provided with "Route Sheets," which required that the drivers deliver and set up medical equipment and supplies for Defendant's customers in a scheduled order.

Defendant states as follows in its Opposition to the Motion for Class Certification:

> While Apria's Techs [i.e., official employees] are generally able to address all patient home equipment needs, Apria occasionally needs assistance during high volume times or when a branch has an unexpected loss of an Apria Techs. (Frailey ¶5) To address this work overflow, Apria contracted with Spoke Logistics, LLC ("Spoke"); Fed Med Delivery, LLC ("Fed Med"); and Johnson Pickup & Delivery LLC ("Johnson," collectively, "Courier Companies") to provide couriers.

(Def's Opp., at p. 6 [the court adopts Defendant's abbreviations herein].) Defendant asserts that it entered into Courier Services Agreements (CSA) with the three Courier Companies named above. Defendant asserts that, under the CSAs, no contractual relationship exists between Defendant and the couriers.

> In responding to discovery, Defendant attested as follows:
> ... Defendant has no contractual or business relationship with Plaintiff or the alleged putative class members. Defendant did not hire, discipline, promote, demote, or terminate Plaintiff or any of the alleged putative class members. Defendant did/does not control Plaintiff's or the alleged putative class' hours or working conditions. Defendant did/does not determine Plaintiff's and the alleged putative class' rate of compensation and did/does not pay them for the work performed, ... Defendant also did/does not provide Plaintiff and the alleged putative class with its policies and procedures. Its policies and procedures only apply to employees, and couriers are not employees. Couriers are provided with a generic route sheet identifying the equipment to be delivered and the delivery location. While routes are organized in the most efficient manner, Couriers are free to deviate from the route, as long as they complete all of their deliveries, and thus their work varies day-to-day. Couriers also have complete control over when and for how long they take breaks. On the other hand, Defendant has a contractual relationship with Spoke ... , Fed Med, and [Johnson] ... to provide couriers on an as needed basis to deliver equipment. Under Defendant's Courier Services Agreement, these Courier Entities train and pay all couriers. ...

(Hefelfinger Decl. ISO Reply, Ex. 9, at p. 8.) Thus, because Defendant has admitted that it did not treat the couriers as its employees, the principal

legal and factual issue in this litigation is whether Defendant misclassified the couriers by not treating them as its employees.

Discussion

FedEx Employees

Plaintiff has clarified that the class does not include FedEx couriers who performed services for Defendant. Given Defendant's previous failure to mention the FedEx couriers in its discovery responses, Plaintiff could not have been expected to specifically exclude such drivers from the class. Thus, the class can be defined as specifically excluding all FedEx couriers.

Ascertainability

"[A] class [is] ascertainable when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).)

Here, after excluding all FedEx couriers, the class definition is written to include all persons offered as drivers by the Courier Companies to Defendant but who were not paid by Defendant as W-2 employees. The class is clearly defined in terms of objective characteristics.

Second, the evidence before the court demonstrates that identification of class members is possible. James Eric Frailey, who is Defendant's Vice President of Logistics and Inventory Management, testified as Defendant's PMQ witness that the identities of putative class members could be obtained by asking the third-party Courier Companies. (Pl's Comp. Evid., Ex. , at p. 21:20—22:9.) Plaintiff claims that he is now in receipt of all of the names and addresses of putative class members who worked for Defendant through the third-party Spoke, totaling 202 total putative class members related to Spoke. (Hefelfinger Decl. ISO Reply, ¶ 25.) Timothy Meyer, Scope's founding member and president, has confirmed after reviewing Spoke's records that Spoke has supplied approximately 202 drivers to Apria in California. (Meyer Decl., ¶ 21.) Chris Bovey, the managing member of Fed Med, has concluded that "Fed Med possesses the necessary database to provide the name, last known address, and contact information for each courier provided to Apria." (Bovey Decl., ¶ 9.) And Robert Johnson, the owner of Johnson, has stated in his signed declaration that Johnson "possesses the necessary database to provide the name, last known address, and contact information for each driver provided to Apria." (Johnson Decl., ¶ 10.)

Accordingly, the class is ascertainable.

Common Questions of Law and Fact—Misclassification

As noted above, because Defendant admits that it failed to treat the couriers as employees, the principal issue for determining liability is the question of whether the couriers are Defendant's employees under the ABC test of *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*). Plaintiff asserts his intention to rely on prong B of this test, which imposes a burden on Defendant of proving that the couriers performed work "that is outside the usual course of [Defendant's] business ... ." (*Id.* at p. 957.)

Plaintiff has demonstrated that the adjudication of this question can be made as to the entire class. Defendant's PMQ witness, Mr. Frailey, testified that Defendant's business "is to provide home delivery of ... medical equipment and supplies," such as "beds, oxygenators, wheelchairs, and a range of other home medical equipment." (Pl's Comp. Evid., Ex. 4, at 14:1-12.) Mr. Frailey further testified on behalf of Defendant that the putative class members "provide services to Apria by delivering medical products to customers," and that Defendant was aware that the putative class members "were driving and delivering home medical products to customers." (Pl's Comp. Evid., Ex. 4, at 29:8-21.) Referring to all couriers as a class of drivers, Mr. Frailey testified that (1) during the entire class period putative class members filled out Route Sheets and delivered home medical equipment or supplies to customers, and (2) their duties were comparable to what Defendant's "W2 employees/drivers" (i.e., technicians) were doing during the same period of time. (Pl's Comp. Evid., Ex. 4, at 55:3-25.) Relying on these statements by Defendant's own PMQ witness, Plaintiff intends to move for summary adjudication on behalf of the class, contending Defendant cannot prove that putative class members performed work outside the course of Defendant's business.

In its Opposition brief, Defendant contends there are potential individualized issues based on certain distinctions between couriers and Apria's technicians. Defendant's evidence to support this argument comes in the form of a declaration by Mr. Frailey. In his declaration, Mr. Frailey states that couriers and technicians received different training and performed some different tasks. (See Frailey Decl., ¶¶ 12-22.) But this proof asserts a distinction between technicians as a group and couriers as a group, and the asserted distinction is one that is common to the putative class as a whole. For example, when Mr. Frailey makes statements such as "Apria Technicians complete a training program that is not provided to couriers as they do not

complete the same tasks as technicians" (Frailey Decl., ¶ 12), he is placing all couriers into a single category.

In his declaration, Mr. Frailey also makes certain statements to suggest that there are differences among the couriers with respect to training and performed tasks. Mr. Frailey states that "[t]here are significant variations amongst the couriers including: whether they go into patient houses to setup equipment, the type of equipment they are setting up, whether they receive add-ons during the day, and whether they conduct environmental assessments. Some couriers should *never* enter patient's homes, including FedEx and Fed Med couriers and some of the Spoke and Johnson couriers." (Frailey Decl., ¶ 22, emphasis in original.) However, Defendant has failed to show how these asserted differences in tasks and training among the couriers would substantially affect the analysis under prong B of the ABC test, which focuses on whether tasks performed by the putative class were work performed outside the usual course of Defendant's business.

Common Questions of Law and Fact—Labor Code Violations and Damages

The California Supreme Court has "long ago recognized that [the fact that] each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action. [Citation.] Predominance is a comparative concept, and the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate. [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed. [Citations.]

"Nor is it a bar to certification that individual class members may ultimately need to itemize their damages. We have recognized that the need for individualized proof of damages is not per se an obstacle to class treatment [citation] and that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper [citation]." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334–335 (*Sav-On*), internal citations and quotation marks omitted.)

Because Defendant did not treat the couriers as its employees, its alleged violations of the Labor Code would largely be demonstrated by a showing that Defendant misclassified the couriers. This conclusion is clearest with respect to the Sixth Cause of Action for Non-Compliant Wage Statements. Mr. Frailey testified that Defendant intentionally chose not to issue check stubs or wage deduction statements to the couriers. (Pl's Comp.

Evid., Ex. 4, at 32:21—34:11.) If the couriers are found to be Defendant's employees, then Plaintiff can argue, based on common facts, that Defendant's failure to issue wage statements to the couriers is in violation of Labor Code section 226.

Nor will adjudication of the First and Second Causes of Action for wages raise a preponderance of individualized issues. Defendant admits that it did not pay couriers, but that couriers were instead compensated by the three Courier Companies. (See, e.g., Def's Opp., at p. 17.) Because couriers drove different routes, and because the Courier Companies offered "different compensation structures," Defendant argues that calculating whether minimum wages and/or overtime were properly paid will require an individualized analysis of each courier's schedule and recorded pay. (Def's Opp., at p. 17.) Of course, the same could be said about the vast majority wage-and-hour class actions: in order to calculate the particular wages owed, the trier of fact must determine the hours worked and pay received for each of the class members. For example, not every class members will have worked overtime. But such an individualized calculation at the damages stage of litigation does not prevent class certification. (*Sav-On*, *supra*, 34 Cal.4th at p. 334 ["even if some individualized proof of such facts ultimately is required to parse class members' claims, that such will predominate in the action does not necessarily follow"].)

Here, Plaintiff states he will rely on the Route Sheets, which show the number of hours worked and the mileage driven, to calculate wages owed. Mr. Frailey has already testified on behalf of Defendants that "[a]nyone who did a route to visit a patient's home should have a route sheet." (Pl's Comp. Evid., Ex. 4, at 26:7-8.) Mr. Frailey also testified that couriers were directed to write the mileage for each route, as well as that courier's start and end time, including total hours. (Pl's Comp. Evid., Ex. 4, at 44:16—45:14.) Each courier was also instructed to sign each Route Sheet in the section titled "Employee Signature." (Pl's Comp. Evid., Ex. 4, at 45:15-22.) The Route Sheet also identifies the courier; one of Plaintiff's Route Sheets offered in evidence prints the name of the "EMPLOYEE" as "Quintero, Al – 1422S5." (Pl's Comp. Evid., Ex. 3.) All of the Route Sheets exemplars provided by Defendant include the printed name of the particular individual couriers to which they refer. (Paz Decl., Exs. B, C; Emerson Decl., B, C, D.)

Defendant suggests that the Route Sheets may not offer an accurate record of the exact number of hours worked by each courier, and that "Defendant will need to examine each courier's route to test the credibility as to whether gaps were attributed to hours actually worked or times when the courier was engaged in personal activities to which he is not entitled to compensation." (Def's Opp., at p. 17.) However, Defendant fails to present

evidence showing that any putative class members other than Plaintiff may have engaged in personal activities during the recorded driving hours listed on the Route Sheets. Mere speculation that couriers engaged in personal activities while driving their routes does not justify denial of certification. Moreover, should Plaintiff succeed in proving the couriers are Defendant's employees, the inaccuracy of Defendant's own employment records should not simply inure to the benefit of Defendant. (See, e.g., *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1536, fn. 11, disapproved of on other grounds by *Noel*, *supra*, 7 Cal.5th 955 ["[t]o the extent [relevant time] data are not readily accessible, that absence is attributable to the inadequacy of [the employer's] own records and cannot be relied upon to resist the attempt of its employees to address inequities in [the employer's] compensation system"].) Where an employer fails to keep accurate records of its employees' working hours, the employer may bear the burden of proving the precise amount of work performed; if the employer fails to meet its burden the court may award damages, even if the resulting damages are only approximate. (*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 134–135 disapproved of on other grounds by *Noel*, *supra*.)

Defendant argues that proper reliance on the Route Sheets is hampered by the fact that only 60 to 70 percent of all Route Sheets are "available." (Frailey Decl., ¶ 26.) The meaning of the word "available" is in need of some clarification here. Mr. Frailey states in his declaration that, "[o]nce completed, the route sheets are collected and stored in thousands of boxes off site in different storage facilities." (Frailey Decl., ¶ 26.) Mr. Frailey refers to no policy, practice, or record of Defendant destroying or losing physical copies of the Route Sheets. Mr. Frailey testified that hard copies of the Route Sheets were maintained "the majority of the time," that it would be "a little bit of speculation" to state, but that he believed they were maintained 60 to 70 percent of the time," if not a little higher." (Pl's Comp. Evid., Ex. 4, at 25:6-9.) But by "available" or "maintained," Mr. Frailey appears to mean that only 60 to 70 percent of the Route Sheets were scanned and saved digitally. Mr. Frailey himself admits that Defendant has yet to review the thousands of boxes containing the Route Sheets, claiming that it would require an unreasonable expenditure of time to do so: "It will take hundreds of hours to identify and produce the courier route sheets as Apria will have to pull all route sheets, sort the route sheets by courier and Apria technician, redact HIPAA information, and photocopy the route sheets." (Frailey Decl., ¶ 26.) Clearly, in light of a lack of any policy for the destruction of Route Sheets, and because Mr. Frailey has not carried out a review of the Route Sheets to compare the total number of physical Route Sheets with the number of total Route Sheets filled out by technicians and couriers, the court cannot credit Mr. Failey to be saying that 30 to 40 percent of all Route Sheets have been destroyed or lost. There mere fact

that a significant portion of Route Sheets may not have been saved digitally does not prevent Plaintiff from relying on the Route Sheets in this case to prove the putative class's claims. And again, Defendant's alleged failure to adequately keep and maintain employee records (assuming the couriers should legally be characterized as employees) would not foreclose the class from proving their damages more approximately.

As for the Third Cause of Action for failure to timely pay wages, the class can be certified as to this claim for the same reasons expressed above as to the First and Second Causes of Action for wages. Defendant claims that the couriers *agreed* to be independent contractors. But the Labor Code specifically states that the right to receive timely payment of wages under Labor Code section 201 can in no way "be contravened or set aside by a private agreement." (Lab. Code, § 219, subd. (a).) In any event, Defendant's argument of waiver appears to apply to all couriers as a class, and thus would be a proper issue for class-wide adjudication.

The same analysis above applies to the Fourth and Fifth Causes of Action for unpaid meal and rest break premiums. In opposing the instant Motion, Defendant claims that it *did* have meal and rest break policies. However, Mr. Frailey states in his declaration that the meal and rest break policy applied to Defendant's *employees*. (Frailey Decl., ¶ 31.) Mr. Frailey testified that policies regarding Defendant's employees were not supplied to couriers. (Pl's Comp. Evid., Ex. 4, at 100:20-23.) Defendant has admitted in written discovery that "Defendant also did/does not provide Plaintiff and the alleged putative class with its policies and procedures. Its policies and procedures only apply to employees, and couriers are not employees." (Hefelfinger Decl. ISO Reply, Ex. 9, at p. 8.)

Defendant nonetheless offers declarations with its Opposition, attempting to show that certain couriers may have had information about Defendant's employee policies. For example, in a declaration filed to oppose certification, Defendant's employee states as follows:

> Couriers at the Redding Branch are aware of Apria's meal and rest period policy and California's laws governing meal and rest periods. Couriers have access to the technicians' break room where Apria's meal and rest period policy is prominently posted on the wall. Additionally, the courier's meal and rest breaks were and still are recorded as route stops on both his paper route sheet and his MobileCast route sheet. Furthermore, I reviewed California's meal and rest period laws and Apria's meal and rest period policy during the courier's initial training.

(Emerson Decl., ¶ 20.) However, such a declaration does not contradict Defendant's discovery responses and Mr. Frailey's statement that couriers were not subject to the employee policies. In any event, Plaintiff has offered evidence on a classwide basis that the couriers were not subject to Apria's meal and rest break policies.

As Defendant's employee mentioned in his declaration, meal and rest breaks sometimes were recorded on the Route Sheets. (Emerson Decl., ¶ 20; see also Def's Opp., at p. 19.) Defendant points to several types of evidence (Route Sheets, text messages from drivers) that show that some couriers did in fact at some point take rest and meal breaks while performing services for Defendant. But Defendant has not offered evidence to show that any one putative class member consistently took meal and rest breaks that complied with the requirements of the Labor Code. Whether and when a certain putative class member took a meal or rest break is a matter for the calculation of damages; that damages calculations are individualized does not justify denial of certification. (See *Sav-On*, *supra*, 34 Cal.4th at p. 334.) And, in the event Defendant failed to record meal and rest breaks for a putative class member, "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74, internal citation and quotation marks omitted.)

The class may also be certified with respect to the remaining Seventh Cause of Action for unpaid business expenses. "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties ... ." (Lab. Code, § 2802, subd. (a).) Without offering specific evidence, Defendant claims that a determination of whether expenditures were necessary will raise individualized issues. However, Plaintiff offers evidence that Defendant did not reimburse the couriers for use of their personal vehicles. Insofar as some drivers under some circumstances received reimbursement from a Courier Company for mileage (for example, Spoke provided mileage when a courier drove over 600 miles in one week), such reimbursement would be an offset in an individual damage calculation. Again, these individualized issues would arise as to the calculation of damages and do not prevent certification of the class.

Lastly, the Eighth and Ninth Causes of Action are derivative of the factual claims underpinning the First through Seventh Causes of action, and therefore may also be certified for class adjudication.

Typicality and Adequacy of Representation

"In order to be deemed an adequate class representative, the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class. This is part of the community of interest requirement. [Citation.] Where there is a conflict that goes to the very subject matter of the litigation, it will defeat a party's claim of class representative status. [Citation.] Thus, a finding of adequate representation will not be appropriate if the proposed class representative's interests are antagonistic to the remainder of the class. [Citation.] The adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. [Citation.] A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. ... To assure adequate representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class." (*J. P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212, internal citations quotation marks, brackets and ellipses omitted.)

As a courier for Defendant, Plaintiff's claims are typical of those of the putative class members. Defendant's contention that Plaintiff fails to meet the typicality requirement is based on the claim that Plaintiff wanted to be classified as an independent contractor. Plaintiff stated at deposition that he "want[ed] to be an independent contractor instead of being a regular driver." (Bernard Decl., Ex. 2, at 41:8-9.) Plaintiff is not a lawyer, so it is unclear what he may have meant by the terms "regular driver" and "independent contractor." Moreover, as noted above, Plaintiff cannot waive his right to the employee protections of the Labor Code. Whether Plaintiff may have wanted to be an "independent contractor" is thus of limited relevance to this action. What is more, Defendant has already raised the argument that couriers generally agreed to be independent contractors; consequently, the significance of Plaintiff's alleged agreement to be an independent contractor, if any, would apply more generally to the other putative class members.

As for adequacy of representation, both Plaintiff and Plaintiff's counsel will adequately represent the putative class. Plaintiff has stated his intention to "strive to look out for the class' best interests." (Quintero Decl., ¶ 12.) Plaintiff also states that he "understand[s] and accept[s] the duties imposed upon class representatives, and [that he] agree[s] to discharge those duties to the best of [his] ability." (Quintero Decl., ¶ 7.) For its part, Plaintiff's counsel has demonstrated significant experience litigating class actions. (See Palay Decl., ¶¶ 2-5; Hefelfinger Decl., ¶¶ 2-9.)

In opposition to certification, Defendant raises several reasons why it believes Plaintiff would not adequately represent the class. The first is that Plaintiff "lacks fundamental knowledge to represent his proposed class." (Def's Opp., at p. 21, bolded, underlined, and capitalized in original.) This argument is based on the fact that, because Plaintiff only provided his services through Spoke, he lacks knowledge as to the operations of the other two Courier Companies. Defendant cites to no authority requiring a class representative to have knowledge of all aspects of a defendant company's operations. More importantly, for reasons expressed above, the claims in this action can be litigated on a class-wide basis; that is, Defendant has failed to demonstrate significant differences among the class members depending on the particular Courier Company through which they provided services. To the extent the particular operations of Fed Med or Johnson become relevant in this action (for example, with respect to individualized damage calculations), then the parties will be able to offer evidence and testimony as to those Courier Companies without having to rely solely on the testimony of Plaintiff.

Defendant next argues that Plaintiff, by pursuing this action, is acting contrary to the interests of the putative class members who agreed to submit their claims to arbitration. This argument is based on the claim by Spoke's president that all but three of the drivers it offered to perform services for Defendant agreed to an arbitration provision, which was part of Spoke's "Broker-Carrier and Transportation Services Agreements." (Meyer Decl., ¶ 21.) The arbitration agreement was not made between Defendant and couriers. Spoke's president himself states that "Apria is not and never was a party to Spoke's Broker-Carrier or Transportation Services Agreements with its independent contractors." (Meyer Decl., ¶ 22.) And Defendant has admitted in discovery responses that "Defendant has no contractual or business relationship with Plaintiff or the alleged putative class members." (Hefelfinger Decl. ISO Reply, Ex. 9, at p. 8.) Defendant has thus failed to show that putative class members agreed to submit the claims brought against Defendant here to arbitration.

Lastly, Defendant argues that Plaintiff has "credibility issues" that disqualify him as a class representative. (Def's Opp., at p. 23.) In making this argument, Defendant cites to two cases: the first, an unpublished opinion by the Second District Court of Appeal; the second, a trial court order from the Superior Court of Santa Clara County. The court admonishes Defendant not to cite unpublished opinions of this State's appellate courts. (Cal. Rules of Court, rule 8.1115, subd. (a).) In the trial court opinion cited by Defendant, the trial court stated as follows:

> Trivial attacks on credibility should not defeat a class representative's adequacy. (See *CE Design Ltd. v. King Architectural Metals, Inc.* (7th Cir. 2011) 637 F.3d 721, 728.) "For an assault on the class representative's credibility to succeed, the party mounting the assault must demonstrate that there exists admissible evidence so severely undermining plaintiffs credibility that a fact finder might reasonably focus on plaintiffs credibility, to the detriment of the absent class members' claims." (*Ibid.*)

(*Guang Tian v. MA Labs., Inc.*, 2014 Cal. Super. LEXIS 100, *28-29.)

In its Opposition, Defendant has offered trivial attacks on Defendant's credibility. Defendant has not established that Plaintiff has lied under oath. Defendant claims that "Plaintiff testified that Apria invoiced Spoke for his services so that he would be paid, not him." (Def's Opp., at p. 23.) Plaintiff testified that he never "[went] into a Spoke website to identify days that [he] worked," and that he never "sen[t] an invoice saying [he] worked these days or these hours," because he "just worked for Apria." (Bernard Decl., Ex. 2, at 190:25—191:11.) Defendant argues that Plaintiff's testimony is impeached by the following statements by Scope's president:

> Spoke pays its independent contractors, including Plaintiff, based upon invoices that the contractors submit to Spoke. Up until around June 5, 2020, Spoke requested that the independent contractors submit information through Spoke's website that generated invoices, including identifying all hours worked, days worked, and mileage driven per day.

(Meyer Decl., ¶ 18.) Because Plaintiff intends to establish an employee relationship under prong B of the ABC test, whether Plaintiff sent invoices to Spoke is not relevant to Plaintiff's theory of the litigation. Moreover, Defendant has at most made a trivial attack on Plaintiff's credibility, given that Plaintiff may have simply been confused as to the questioning. For example, it has been established that couriers submitted Route Sheets *to Apria* listing the days and hours worked; Plaintiff may have confused the meaning of "invoice" with the Route Sheets. Lastly, the Meyer Declaration refers to invoices generally, but does not offer a single instance in which Plaintiff submitted an invoice to Spoke through its website; the declaration therefore does not serve to directly contradict the statements made by Plaintiff.

Defendant also argues that Plaintiff has credibility issues with respect to his meal and rest break claims. Defendant cites to deposition testimony by Plaintiff in which Plaintiff claimed that he saw certain policies that applied to couriers, but that he was not told by Defendant to take lunch breaks:

> They never told me about it. All the time it was, like, rush, you know. Special waiting for this, and special waiting for that, and so on. They never call me and say, you know, time to take your break or take your lunch. Stop. 20 minutes for your lunch. Never ever hear that.

(Bernard Decl., Ex. 2, at 128:4-9.) Plaintiff clarified that the "policies" he had seen were the "rules according to drivers, you know, that not to argue with customers, not to pick up money. lift weight, bending on the knees, and rules like that." (Bernard Decl., Ex. 2, at 128:11-14.) Plaintiff testified that he did not take his "meal and rest breaks." (Bernard Decl., Ex. 2, at 134:4-8.) Plaintiff further claimed that he did not "take a 30-minute break while ... working at the Santa Fe Springs, Oxnard, or Van Nuys facility." (Bernard Decl., Ex. 2, at 134:10-14.) However, Plaintiff clarified that he ate food in his van. (Bernard Decl., Ex. 2, at 134:16-25.) Plaintiff testified that he did not recall sending a text message in which he communicated he could not do an "add-on" because he was in the middle of lunch. (Bernard Decl., Ex. 2, at 181:7-12.) Plaintiff also testified that he never said "to Apria [that he] couldn't do something because ... [he was] taking a rest break." (Bernard Decl., Ex. 2, at 181:13-16.)

That Plaintiff was not provided with Defendant's meal and rest break policies is confirmed by Defendant's own written discovery answers, in which Defendant stated that "Defendant also did/does not provide Plaintiff and the alleged putative class with its policies and procedures." (Hefelfinger Decl. ISO Reply, Ex. 9, at p. 8.) Plaintiff's credibility has not been challenged on this point. Nor has Defendant introduced evidence to directly contradict Plaintiff's claims that he was not specifically told to take breaks by Defendant. Moreover, Plaintiff is not a lawyer, and thus may not understand what it means to take a legally-compliant meal or rest break. Indeed, Plaintiff's lawyer objected to the question of whether Plaintiff took "meal and rest breaks" as calling for a legal conclusion. (Bernard Decl., Ex. 2, at 134:7.) Plaintiff's clarification that he did eat in his car preserved his credibility on this point.

As for the text messages, Defendant at most has mustered only trivial attacks on Plaintiff's credibility. In claiming that Plaintiff *did* message a dispatcher several times that he took his 15-minute rest break and 30-minute meal break, Defendant points to a 10-page spreadsheet which Mr. Frailey claims is a copy of "Plaintiff Alvaro Quintero's MobileCast messaging data." (Frailey Decl., ¶ 33, Ex. G.) Without directing the court to any portion of the ten-page document, Mr. Frailey states that the document shows "that Plaintiff messaged a dispatcher 8 times that he took his 15-minute rest break and 30-minute meal break, and on 2 other occasions that he took a break." (Frailey Decl., ¶ 34.) The messaging data provided

appears to include all messages exchanged between Plaintiff and dispatchers between September 2019 and June 2020. (Frailey Decl., Ex. G.) A review of the messaging data shows that there are five instances in which Plaintiff referred vaguely to taking "lunch" or "a break." (Frailey Decl., Ex. G, at 000550—000552, 000556.) It is unclear whether the term "lunch" or "break" refers to a Labor Code-compliant meal and rest breaks, and thus these five text messages do not serve to substantially undermine Plaintiff's credibility.

Perhaps more importantly, Defendant has failed to show that it was Plaintiff's normal practice to take 15-minute rest breaks or 30-minute meal breaks. The messaging data offers well over 100 days worth of messages between Plaintiff and dispatchers, which took place over a nine-month period. But Plaintiff stated that he took a "15 break" on only 8 of these days. And Plaintiff texted that he took a "30 lunch" or "lunch 30" on only four of these days. Evidence that Plaintiff may have taken four 30-minute lunch breaks over a nine-month period does not serve to so severely undermine his credibility such that a fact finder might reasonably focus on Plaintiff's credibility to the detriment of the class members' claims. At most, this evidence, if found to be reliable, would serve to lower Plaintiff's individual recovery when damages are calculated.

Trial Plan

Class action plaintiffs must assure the court that a trial of their class claims is manageable. Ordinarily this is done by submission of a trial plan. Plaintiff has not submitted a trial plan with his Motion. However, in briefing and at oral argument Plaintiff has explained how he will proceed on a class-wide basis. Plaintiff states he will move for summary adjudication on the issue of whether Plaintiff and the putative class members are Defendant's employees under the ABC test from *Dynamex*. As explained above, if a determination of that issue is made in Plaintiff's favor, either in a ruling on the Plaintiff's motion or at a bifurcated trial, then the bulk of the remaining litigation will center on damage calculations for the individual class members, whom Defendant has admitted it did not treat as its employees. Plaintiff has made a plausible case that those calculations can be made by relying on the Route Sheets. However, Plaintiff also references the potential use of damages experts, and the admissibility of that evidence will need to be determined before beginning a damages phase. Nevertheless, the court will certify the Plaintiff's claims for class treatment at this time, subject to reconsideration should Plaintiff's proposal for proof of class members' individual damages claims prove unmanageable.

Defendant's Objections to Evidence Submitted with Plaintiff's Reply

Citing to *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522 (*Jay*), Defendant objects to three pieces of evidence offered with Plaintiff's Reply: (1) the Declaration of Brian D. Hefelfinger in support of Plaintiff's Reply and Exhibits 8 and 10; (2) the Declaration of Alejandro P. Gutierrez in support of Plaintiff's Reply Brief and Exhibit 13; and (3) the Declaration of Robert Johnson in support of Plaintiff's Reply Brief.

The holding in *Jay* was not that a party is barred from introducing any new evidence with its reply brief; instead, the court in *Jay* offered a more nuanced analysis of when a trial court may decide not to review such evidence:

> The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions, which is not surprising, given that it is a common evidentiary motion. The inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case[,] and if permitted, the other party should be given the opportunity to respond. [Citations.] ...
>
> This rule is based on the same solid logic applied in the appellate courts, specifically, that points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. [Citations.]

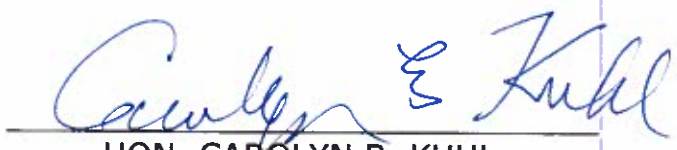
(*Id.* at pp. 1537-1538, internal citations, quotation marks, brackets, and ellipses omitted.) The court in *Jay* explained that this general rule was meant to prevent a party from "address[ing] the substantive issues in the first instance," but that a party is not barred from "fill[ing] gaps in the evidence" created by the opposition papers. (*Id.* at p. 1538; see also *RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 432 [evidence offered with reply brief could be admitted where new evidence did not contradict earlier claims, but instead "offered texture to rebut" claims made by opposing party].)

It is important to note that the trial court has "discretion whether to accept new evidence with the reply papers." (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308.) In *Jay*, the court held that, even though the defendants waited until the filing of their reply briefs "to bring forth *any* evidence at all" in support of their motions, "the trial court [still] had discretion to admit the reply declarations." (*Jay*, supra, 218 Cal.App.4th at p. 1538, emphasis in original.)

The only pieces of Reply evidence that are both relied upon here by the court and objected to by Defendant consist of paragraph 25 of the Hefelfinger Declaration in support of the Reply and paragraph 10 of the Johnson Declaration in support of the Reply. The court exercises its discretion to admit this evidence. In paragraph 25 of his declaration, Mr. Hefelfinger offers an update on Plaintiff's efforts to gather the names and addresses of putative class members from the third-party Courier Companies. Similarly, in the Johnson Declaration, the owner of Johnson merely clarifies that Johnson is able to provide the name and contact information of all drivers it provided to Defendant. This evidence does not raise any new issue for the court; instead, the evidence serves to rebut Defendant's argument that Plaintiff could not show that he could recover class information from the Courier Companies. The Hefelfinger Declaration responds directly to Defendant's argument raised in the Opposition that Plaintiff would be unable to "obtain information from couriers who worked for subcontractors of Spoke." (See Def's Opp., at p. 14.) Moreover, the new evidence merely serves to corroborate statements made by Defendant's own PMQ witness that identifying class information could be obtained from the Courier Companies. (Pl's Comp. Evid., Ex. , at p. 21:20—22:9.) In light of the testimony by Defendant's PMQ witness, Plaintiff might be forgiven for thinking that Defendant would not argue in opposition to the Motion that Plaintiff would be unable to obtain identifying information from the Courier Companies. Importantly, as Plaintiff notes, Defendant failed to respond to Plaintiff's interrogatories asking for Defendant's contentions as to why the requirements for class certification were not met; thus, Plaintiff had a limited ability to anticipate the factual basis for Defendant's opposition to class certification.

Furthermore, the evidence does not appear to have been available at the time the Motion was filed. The record before the court suggests that, at the time of the Motion's filing, Plaintiff was not yet in possession the names and addresses of all 202 of the Spoke drivers. Offering an update of Plaintiff's discovery efforts to better inform the court of the class's ascertainability is not analogous to purposefully withholding evidence in order to gain some advantage in the litigation.

Dated: Sept. 14, 2021



HON. CAROLYN B. KUHL
JUDGE OF THE SUPERIOR COURT