FILED
San Francisco County Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **UBER TECHNOLOGIES, INC., a Delaware corporation; LYFT, INC., a Delaware corporation; and DOES 1-50, inclusive,** Defendants.	No. CGC-20-584402 **ORDER ON PEOPLE'S MOTION FOR PRELIMINARY INJUNCTION AND RELATED MOTIONS**

INTRODUCTION AND SUMMARY

On May 5, 2020, the Attorney General of California, joined by the City Attorneys of Los Angeles, San Diego, and San Francisco, filed this action on behalf of the People of the State California seeking injunctive relief, restitution, and penalties against Defendants Uber Technologies, Inc. (Uber) and Lyft, Inc. (Lyft). The complaint asserts that Uber and Lyft have misclassified their ride-hailing drivers as independent contractors rather than employees in violation of Assembly Bill No. 5 (2019-20 Reg. Sess.) (A.B. 5), which took effect on January 1, 2020. That statute is intended to ensure that all workers who meet its criteria receive the basic rights and protections guaranteed to employees under California law. The People's complaint states causes of action for violations of A.B. 5 and of the Unfair Competition Law, Bus. & Prof. Code § 17200 (UCL). On June 25, the People moved for a preliminary injunction enjoining Defendants from classifying their drivers as independent contractors, and from violating any provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission with regard to their drivers.

Defendants oppose the motion. They have also filed three additional motions: a motion to stay the litigation; a demurrer and motion to strike the complaint; and a motion to compel arbitration. Defendants' motions have in common an attempt to delay or avoid a determination whether, as the People allege, they are engaged in ongoing and widespread violations of A.B. 5, a state law that went into effect more than seven months ago, and that codified the California Supreme Court's April 2018 ruling in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. Defendants are not entitled to an indefinite postponement of their day of reckoning. Their threshold motions are groundless.

Defendants seek to stay the litigation until the Ninth Circuit rules on Uber's pending constitutional challenge to A.B. 5; until the November 2020 election, when the voters will consider Proposition 22, an initiative sponsored by Uber and Lyft that would exempt them from the requirements of A.B. 5; or until the final disposition of numerous lawsuits and arbitrations in which similar claims have been raised. None of Defendants' pleas for further delay is persuasive. The district court denied Uber's request for a preliminary injunction, finding that Uber had not shown a likelihood of success or even raised serious questions as to the validity of A.B. 5. That Uber and Lyft are attempting to persuade the voters to change that law, an effort that may or may not succeed, is no reason for this Court to refrain from deciding the issues currently before it. Finally, none of the pending lawsuits and arbitrations can displace the Legislature's express statutory grant of authority to the Attorney General and City Attorneys to seek injunctive relief to prevent the continued misclassification of employees as independent contractors, and none is likely in the near term to resolve the issues presented here in a broadly-applicable ruling. (See Part I, pp. 6-10, *infra.*)

Next, Uber demurs to the complaint on the grounds that the People have not properly joined it with Lyft in this action, but instead should have brought two different actions. That technical objection lacks merit, as the People's claims against Defendants are nearly identical and considerations of judicial economy and efficiency support their resolution in a single action. Uber, the largest of the ride-hailing companies in California, is not prejudiced one whit by its inclusion in this lawsuit with its smaller competitor. Its contention that the People have failed to allege any violations of the predicate laws (e.g., the Labor Code, Unemployment Insurance Code, and city ordinances) on which the second cause of action is based is also meritless. (See Part II, pp. 11-13, *infra.*)

Third, both Defendants move to compel arbitration of the People's claim for restitution, arguing that although the People are not a party to an arbitration agreement with them, they are acting on behalf of drivers who are bound by such agreements. Even if that novel argument were persuasive, there is no need for the Court to decide Defendants' motions to compel at this time. They are directed only to one type of relief sought by the People on one of its two causes of action, and therefore cannot affect the outcome of the People's motion for a preliminary injunction. (See Part III, pp. 13-14, *infra.*)

In the ordinary case, in deciding whether to issue a preliminary injunction, a court must weigh two interrelated factors: (1) the likelihood that the prevailing party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. However, where, as here, a governmental entity is seeking to enjoin the violation of a statute which specifically provides for injunctive relief, those requirements are relaxed. Because the Legislature has already determined by enacting the statute that any violation of it would be against the public interest, the moving party need only show a reasonable probability of prevailing, and a presumption arises that public harm will result if an injunction does not issue. Further, the court need not examine the relative actual harms to the parties unless the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction. And even then, a court may conclude that an injunction is proper. Defendants contend that this standard does not apply here because the People are seeking a mandatory rather than a prohibitory injunction. Even under the higher standard they contend applies, however, the Court concludes that the preliminary injunction sought by the People is warranted. (See Part IV(A), pp. 14-17, *infra.*)

First, the People have amply demonstrated a reasonable probability of prevailing on their claim that Defendants are misclassifying their drivers. Defendants' contrary arguments lack merit. Defendants argue first that A.B. 5 does not apply to them at all because they are not "hiring entities," or because they are exempt from that legislation. This argument flies in the face of Uber's conflicting claims in federal litigation and of Defendants' concerted effort to overturn the statute. Within days of its enactment, Uber filed suit in federal court asserting that A.B. 5 unconstitutionally "targets" its business, and, as discussed above, it has urged this Court to stay this litigation until its appeal in that case can be decided. And, of course, Defendants are major supporters of Proposition 22, a measure on the November 2020 ballot that would exempt their businesses from A.B. 5. Defendants make no attempt to explain away these glaring inconsistencies. Regardless, Defendants' contention that they are not hiring entities within the meaning of the statute cannot be squared with the undisputed reality that they hire and contract with drivers. (See Part IV(B)(2), pp. 19-21, *infra.*)

Whether Defendants' drivers should be classified as employees or independent contractors is governed by the so-called ABC test established by the Supreme Court's unanimous *Dynamex* decision, which A.B. 5 codified. Under that test, a person providing labor or services for remuneration "shall be considered an employee rather than an independent contractor" unless the hiring entity demonstrates that three conditions are satisfied: "(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. [and] (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (Lab. Code § 2750.3(a)(1); see Part IV(B)(1), pp. 18-19, *infra.*) Because Defendants cannot possibly satisfy the "B" prong of that test, the likelihood that the People will prevail on their claim that Defendants have misclassified their drivers is overwhelming; there is no need to address the other two prongs of the test.

It's this simple: Defendants' drivers do not perform work that is "outside the usual course" of their businesses. Defendants' insistence that their businesses are "multi-sided platforms" rather than transportation companies is flatly inconsistent with the statutory provisions that govern their businesses as transportation network companies, which are defined as companies that "engage in the transportation of persons by motor vehicle for compensation." It also flies in the face of economic reality and common sense. And it is irreconcilable with the Supreme Court's directive in *Dynamex* that California's employee classification standard should be interpreted and applied broadly to include all persons who can reasonably be viewed as working in the hiring entity's business. To state the obvious, drivers are central, not tangential, to Uber and Lyft's entire ride-hailing business. (See Part IV(B)(3), pp. 22-27, *infra.*)

Turning to the equities, the People have shown that substantial public harm will result if the Court declines to issue an injunction. The controlling legal standard creates a presumption of harm where, as here, a party is violating a statute that was enacted to protect the public. In the specific context involved here, both the Legislature and our Supreme Court have found that the misclassification of workers as "independent contractors" deprives them of the panoply of basic rights and protections to which employees are entitled under California law, including minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave. They have also found that depriving employees of those rights has ripple effects on law-abiding competing businesses, and on the public generally. (See Part IV(C), pp. 27-29, *infra.*)

On the other side of the balance, Defendants do not show that they will suffer "grave or irreparable" harm from the issuance of an injunction. While they undoubtedly will incur costs in order to restructure their businesses, the costs are only those required in order for them to bring their businesses into compliance with California law. Moreover, these are costs that Defendants should have begun incurring more than two years ago, when the Supreme Court handed down its unanimous *Dynamex* decision. As another court has observed, "rather than comply with a clear legal obligation, companies like [Uber and] Lyft are thumbing their noses at the California Legislature, not to mention the public officials who have primary responsibility for enforcing A.B. 5." (*Rogers v. Lyft, Inc.* (N.D. Cal. Apr. 7, 2020), 2020 WL 1684151, at *2, *appeal filed* (Apr. 17, 2020), No. 20-15700.)] It is high time that they face up to their responsibilities to their workers and to the public. (See Part IV(D), pp. 29-32, *infra.*)

I. MOTIONS TO STAY

Both Defendants have filed motions to stay this action.[1] The motions ask the Court to stay the action, and therefore refrain from deciding the People's motion for a preliminary injunction, for essentially three reasons: (1) to await the outcome of an appeal pending before the Ninth Circuit, *Olson v. Becerra*, in which Uber raises constitutional challenges to A.B. 5; (2) to await the voters' decision regarding an initiative on the November 2020 ballot, Proposition 22, that would, if enacted, classify certain app-based drivers as independent contractors; and (3) to await the resolution of the issues posed here in other cases pending in state and federal courts, including pending Private Attorneys General Act (PAGA) actions in state court, as well as in thousands of individual arbitration proceedings. The Court is unpersuaded by any of these arguments either that a stay of the entire action is mandated or that it should exercise its discretion to stay the action or the hearing on the People's motion.

First, Defendants' argument that the Court should await the outcome of the Ninth Circuit appeal and/or other pending cases raising constitutional challenges to A.B. 5 is unconvincing. As Uber acknowledges, the district court in *Olson denied* its request for preliminary injunctive relief.

[1] Both Defendants seek to stay the action at least until the outcome of the November 2020 election is known.

(Mot. to Stay at 10, 13.) It did so in no uncertain terms, finding that "Plaintiffs have not shown either a likelihood of success on the merits or that serious questions exist as to any of their claims highlighted in this motion." (*Olson v. California* (C.D. Cal., Feb. 10, 2020), 2020 WL 905572, at *13, *appeal filed*, No. 20-55267 (Mar. 11, 2020).) State statutes come clothed with "a strong presumption of constitutionality" (*California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175, and trial courts should be " 'extremely cautious . . . to enjoin law enforcement officials from enforcing an ordinance obviously approved and adopted by duly elected representatives of the people.'" (*Cohen v. Board of Supervisors* (1986) 178 Cal.App.3d 447, 453.) The mere fact that a party may have filed litigation challenging a statute duly enacted by the Legislature does not disable the People from enforcing the law, nor does it relieve courts of their obligation to enforce the law as it currently exists. (Cf. *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999 [appellate court reviews injunction under the law in effect at the time the appellate court renders its opinion].) If the rule were otherwise, those dissatisfied with state laws would have every incentive to file litigation in order to force lengthy delays in their implementation while their challenges wend their way through the court system. As the People point out, Defendants have not cited a single California case where a court stayed an enforcement action pending resolution of a separate challenge to that law. (Cf. Code Civ. Proc. § 526(b)(4) [an injunction cannot be granted "[t]o prevent the execution of a public statute by officers of the law for the public benefit"].) [2] This Court will not duck its obligation to rule on a matter properly before it based on speculation that current law may be struck down or modified in the future.

Moreover, while Uber asserts that it "*will* raise in this case" the same constitutional issues that it raises in *Olson* (Mot. to Stay at 14 (emphasis added)), those issues are not currently before this Court.[3] In any event, a Ninth Circuit decision is at best many months away.[4] The Legislature

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[2] Of course, a court may enjoin the implementation of a statute if it determines that there are serious questions raised as to its validity on constitutional or other grounds. Despite extensive litigation since A.B. 5 was enacted in September 2019, however, Defendants do not point to any ruling striking it down or enjoining its implementation, with the exception of a single ruling that turned on a unique issue of federal preemption relating to aspects of the trucking industry. (*Cal. Trucking Assn. v. Becerra* (S.D. Cal. 2020) 433 F.Supp.3d 1154.)

[3] Uber asserts in opposition to the People's motion for a preliminary injunction that A.B. 5 (continued...)

and the California Supreme Court have determined that misclassification of workers has significant adverse effects on workers, businesses, and the public generally, effects that this Court is unwilling to ignore. This Court therefore declines to exercise its discretion to stay this action. (*Caifa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804 ["It is black letter law that, when a Federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action."].)

Second, Defendants' argument that the Court should stay the action because of the prospect that they will be "whipsawed" if this Court issues an injunction and the voters then enact Proposition 22, thereby undoing the Court's ruling, is singularly unpersuasive.[5] If, as the People contend, Defendants are currently violating state law, it is no answer to say that they should be given a pass to continue doing so to see if they can muster their considerable financial resources to persuade the voters to change the law in their favor. Moreover, as the People emphasize, even if the ballot initiative passes, it would not moot out the People's prayer for remedies for past violations.

Third, Defendants' claim that the People delayed unduly in bringing their motion is unconvincing. Labor Code section 2750.3, which expressly authorized the People to bring this action, did not become effective until January 1, 2020. In any event, delay is "merely one of many factors bearing on irreparable injury." (*Nutro Products, Inc. v. Cole Grain Co.* (1992) 3 Cal.App.4th 860, 866 [affirming preliminary injunction sought eight months after filing of

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(...continued)
is unconstitutional, but it offers no argument or authority in support of that conclusory assertion. (Uber Opp. to PI Mot. at 16-17.)

[4] That court's docket reflects that it is considering setting the case for oral argument in November or December 2020 or January 2021. There can be no assurance that the Ninth Circuit will issue its decision in "a few short months." (Uber Opp. to PI Mot. at 33.)

[5] Proposition 22, the Protect App-Based Drivers and Services Act, would provide that app-based rideshare and delivery drivers are independent contractors and not employees or agents with respect to their relationship with a network company if certain conditions are met. (*Qualified Statewide Ballot Measures*, Cal. Secretary of State, https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures).

action].) Moreover, the point cuts both ways, since it is Defendants' own lengthy delay in complying with controlling California law that prompted the People to file this motion in the first instance. Uber's contention that a further delay would cause the People no significant harm (Mot. to Stay at 15) is inconsistent with the controlling legal standard and with the People's showing that the misclassification of workers causes significant harms to workers, businesses, and the public generally. (See Part IV(C), pp. 27-29, *infra.*)

Fourth, the Court disagrees that a stay is required either by comity or by the doctrine of exclusive concurrent jurisdiction just because similar issues may have been raised in other actions brought by private parties now pending in federal and state courts. Here, the claims are asserted on behalf of the People of the State of California, under a statutory provision that explicitly confers standing on the Attorney General and the City Attorneys to prosecute an action for injunctive relief to prevent the continued misclassification of employees as independent contractors. (Lab. Code § 2750.3(j).) That provision evinces the Legislature's express intent that such actions proceed unhindered, and it reflects a strong countervailing policy that renders the usual rule of concurrent jurisdiction inapplicable. (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 769-770, 774 [concluding that the rule is "a judicial rule of priority or preference" that does not divest a court of jurisdiction, and "is not a defense to a request for a preliminary injunction"].)[6]

The parties, claims, and requested relief in the PAGA cases are all different from those in the People's enforcement action here. "An employee suing under PAGA 'does so as the proxy or agent of the state's labor law enforcement agencies.'" (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 81 (emphasis deleted).) Thus, an individual plaintiff in a PAGA action is asserting a representative claim on behalf of other aggrieved employees, standing in the shoes

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[6] The Legislature undoubtedly was aware when it enacted A.B. 5 of lawsuits that had been brought challenging Defendants' practice of classifying their drivers as independent contractors, and of judicial decisions in those cases, some of which are discussed below. (See, e.g., *Estate of McDill* (1975) 14 Cal.3d 831, 839 [the Legislature is deemed to be aware of judicial decisions already in existence and to have enacted a statute in light thereof].) In enacting section 2750.3(j), the Legislature plainly intended to authorize public authorities, notwithstanding that pending litigation, to bring actions such as this one.

of "the Labor Commissioner and other agencies." (*Id.*; accord, *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1241 ["the employee plaintiff represents the same legal right and interest as those agencies—namely, the recovery of civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency"].) The same is true of class actions. As the People point out, when a private plaintiff brings a UCL action as a class representative, "an action by the People lacks the fundamental attributes of a consumer class action filed by a private party." (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 18.) "An action filed by the People seeking injunctive relief and civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." (*Id.* at 17.)

Finally, the undeniable reality is that none of the various actions to which Defendants point—including what Uber contends are "thousands of individual arbitrations" and mediations (Mot. to Stay at 11 & fn. 1)—is likely any time soon, if ever, to resolve the issues presented here in a broadly applicable ruling. Because Defendants' arbitration agreements foreclose drivers from seeking and arbitrators from granting class-wide relief, the outcome of any of those arbitrations will affect only the individual driver involved, rather than deciding the misclassification issue as to all of Defendants' hundreds of thousands of drivers in California.

Fifth, Uber argues that Code of Civil Procedure section 1281.4 mandates a stay of this litigation because it has filed a motion to compel arbitration of the UCL claim in this action and because there are thousands of individual arbitrations that "involve the same drivers and the same claims as in this action." (Mot. to Stay at 20.) However, section 1281.4, by its terms, applies only if a court has ordered "arbitration of a controversy which is an issue involved" in the judicial action. (Code Civ. Proc. § 1281.4.) "Controversy" refers to "any question arising between parties to an [arbitration] agreement." (*Id.* § 1280(c).) The People are not a party to any arbitration agreement with Defendants, and are not the same as Defendants' drivers. The pending arbitrations involving individual drivers are entirely distinct from this law enforcement action by the Attorney General and three City Attorneys pursuant to an express grant of statutory authority under Labor Code section 2570.3.

II. DEMURRER AND MOTION TO STRIKE

Uber (but not Lyft) has filed a demurrer to the People's complaint. The demurrer is brought on two grounds: that Uber and Lyft may not properly be joined as defendants in the same action; and that the People have failed to plead the elements of the predicate statutory violations underlying the People's UCL claim. Uber's technical objections warrant little discussion.

Under California's permissive joinder statute, persons may be joined in one action as defendants if there is asserted against them:

> (1) Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or
>
> (2) A claim, right, or interest adverse to them in the property or controversy which is the subject of the action.

(Code Civ. Proc. § 379(a).) The right to relief arising out of the same transaction or series of transactions "is construed broadly. It is sufficient if there is any factual relationship between the claims joined." (Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2020) ¶ 2:221.) Further, Uber and Lyft share a common adverse interest in the controversy which is the subject of this action: their alleged misclassification of their drivers.

In any event, a demurrer for misjoinder lies only if the defendant can show from the face of the complaint that it would be prejudiced by the misjoinder. "[T]he defendant is entitled to a favorable ruling only when he can show some prejudice suffered or some interests affected by the misjoinder. . . . A proper defendant is seldom injured by the joinder of unnecessary or improper parties, and his demurrer ought to be overruled." (*Anaya v. Superior Court* (1984) 160 Cal.App.3d 228, 231, fn. 1.) "Demurrers on the ground of misjoinder lie only when the defect appears on the face of the complaint or matters judicially noticed." (*Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 198.) Uber's contention that it faces a "substantial likelihood of prejudice" if it is joined with Lyft because the two companies are "fundamentally different companies with different business models" (Dem. at 9) does not appear from the face of the complaint, which pervasively alleges exactly the opposite: that "[e]ach

Defendant" follows substantially identical business practices, and that the two companies are nearly indistinguishable in key aspects of their operation and relationship to their drivers. (E.g., Compl. ¶¶ 31-61, 64-68, 71-85.)[7] To the extent there are minor factual differences between the two Defendants that are material to the propriety of injunctive relief (the Court finds none), they can considered in connection with the People's motion for a preliminary injunction. If necessary, the Court retains authority to bifurcate or order separate trials later in the proceedings. (Code Civ. Proc. § 379.5; *Royal Surplus Lines Ins. Co., Inc.*, 100 Cal.App.4th at 205.) As the People correctly observe, their joinder of Defendants serves the very purpose of the joinder statutes: to further efficiency and judicial economy. (See *Petersen v. Bank of America* (2014) 232 Cal.App.4th 238, 249-250, 253 [joinder statutes should be liberally construed to promote efficiency and conserve judicial resources].)

Uber's further argument that the complaint does not state a claim under the UCL because it does not allege any violations of the predicate laws (e.g., the Labor Code, Unemployment Insurance Code, and city ordinances) on which the second cause of action is based lacks merit. The People's complaint is crystal clear that it premises its claim for relief not upon Uber's treatment of "a single driver" (Dem. at 13) or group of drivers. Rather, the complaint makes the overall claim that Defendants have misclassified all of their drivers as independent contractors rather than employees (Compl. ¶¶ 31-77) and that, as a result, Defendants have violated "requirements relating to minimum wages, overtime wages, business expenses, meal and rest periods, wage statements, paid sick leave and health benefits, and social insurance programs." (*Id.* ¶ 90.) The detailed supporting allegations are sufficient to allege the predicate violations upon which the People's UCL claim is based. (See *id.* ¶¶ 91-115, 121-123.) The People need not allege evidentiary facts at the pleading stage. (E.g., *Birke v. Oakwood Worldwide* (2009) 169

[7] Uber asserts that "[t]he face of the Complaint makes clear that Uber and Lyft" are distinct, but that assertion is unconvincing. Uber cites only three charging allegations from the 127-paragraph complaint to support its contention. Those paragraphs refer to both companies' ongoing experiments with various software features (¶ 57) and to their IPO prospectuses' discussion of the centrality of drivers to their business strategies (¶¶ 69-70). They do not remotely show that the two companies are so different that deciding the common factual and legal issues presented by the People's motion in a single action would deprive Uber of due process.

Cal.App.4th 1540, 1548 ["A plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact. [Citation.] The pleading is adequate so long as it apprises the defendant of the factual basis for the claim."].) In addition, the People's allegation that Defendants' misclassification of their drivers violates Labor Code section 2750.3 (Compl. ¶ 123) is itself sufficient to support the first cause of action. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."].)[8]

III. MOTIONS TO COMPEL ARBITRATION

Both Defendants have moved to compel arbitration of a portion of the People's UCL cause of action. In the alternative, Defendants seek an order striking that claim for restitution "to the extent it is subject to arbitration." (Lyft Mot. at 2, 15; Uber Mot. at 8.)[9] The motions are brought on the ground that although the People are not a party to any arbitration agreement with Defendants, the claim seeks restitution on behalf of individual drivers who are bound by arbitration agreements with Defendants to arbitrate those claims and should be deemed the real parties in interest as to that prayer. Defendants do not contest that by its UCL cause of action, the People also seek to recover injunctive relief and civil penalties, and that the People are entitled to pursue both of those forms of relief in this action. (See Lyft Mot. at 1.)

As Lyft acknowledges, the issue presented by Defendants' motions presents an open question: "whether someone who is not a party to an arbitration agreement may bring a representative action pursuant to Business and Professions Code section 17204 for restitution on behalf of injured consumers who are parties to the arbitration agreement." (*Cruz v. Pacificare Health Systems, Inc.* (2003) 30 Cal.4th 303, 320, fn. 7.) None of the California cases cited by

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[8] Uber's perfunctory fallback motion to strike adds nothing of substance to its demurrer. Motions to strike are disfavored, and their use should be "cautious and sparing." (*PH II, Inc.*, 33 Cal.App.4th at 1683.)

[9] Both Defendants acknowledge that some of their drivers have opted out of arbitration, although they assert without further detail that the "vast majority" have not done so. (Lyft Mot. at 3, fn. 6; Shah Decl. ¶ 23; Uber Mot. at 10; Rosenthal Decl. ¶ 15 ["the majority of Drivers" did not opt out]; cf. Uber Mot. at 13 [asserting that "many" drivers opted out].) However, without knowing which drivers entered into the arbitration agreements, the Court cannot very well compel arbitration of the claims brought on their behalf, as opposed to claims brought on behalf of drivers who opted out. On that ground alone, the motions to compel fall short.

Defendants addressed the issue presented here: whether a governmental law enforcement agency with express standing to enforce the UCL may seek restitution on behalf of individual victims of unfair competition. The parties' briefing on the motions raises a number of complex and contested issues, including the applicability of the transportation worker exemption from the FAA (9 U.S.C. § 1), FAA preemption, and the applicability of the U.S. Supreme Court's holding in *E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279 that an arbitration agreement between an employer and an employee does not bar the EEOC from pursuing victim-specific judicial relief, such as reinstatement and back pay, in an enforcement action alleging that the employer violated federal law. There is no need for the Court to decide those issues at this time, since Defendants' motions are directed only to one type of relief sought by the People on one of its two causes of action, and cannot affect the outcome of the People's motion for a preliminary injunction. Accordingly, the Court defers any ruling on these motions.[10]

IV. MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

Where, as here, a governmental entity seeks to enjoin an alleged violation of a statute which specifically provides for injunctive relief, the traditional two-factor test for injunctive relief—the likelihood that the plaintiff will prevail on the merits, and the balance of interim harms—does not apply. Instead, "[w]here a governmental entity seeking to enjoin the alleged violation of an ordinance [or statute] which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.) In other words, "[o]nce a governmental entity establishes that it will probably succeed at trial, a presumption should arise that public harm will result if an injunction does not issue." (*Id.*) Our Supreme Court explained the reasoning underlying this

[10] In light of the partial nature of the motions to compel—which seek arbitration of only one of three types of relief sought in one of the People's two causes of action—Uber's contention that the Court may not grant Plaintiff's motion for a preliminary injunction without first deciding them (Opp. at 9, 16) is mistaken. Lyft informs the Court in its motion to compel abitration that it is "amenable to the Court hearing it at a later date." (Lyft Not. of Mot. at 2.)

presumption: "Where a legislative body has enacted a statutory provision proscribing a certain activity, it has already determined that such activity is contrary to the public interest. Further, where the legislative body has specifically authorized injunctive relief against the violation of such a law, it has already determined (1) that significant public harm will result from the proscribed activity, and (2) that injunctive relief may be the most appropriate way to protect against that harm." (*Id.* at 70.)[11]

On the other side of the balance, only "[i]f the defendant shows that it would suffer *grave or irreparable harm* from the issuance of the preliminary injunction" must "the court . . . then examine the relative actual harms to the parties." (*Id.* (emphasis added).) And even if a defendant makes such a showing, a trial court may conclude that an injunction is proper after considering "both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief." (*Id.*) "For example, if it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unlikely to prevail in a balancing of the probable harms. On the other hand, the harm which the defendant might suffer if an injunction were issued may so outweigh that which the plaintiff might suffer in the absence of an injunction that the injunction should be denied even though the plaintiff appears likely to prevail on the merits." (*Id.* at 72-73; see also, e.g., *Water Replenishment Dist. of Southern Calif. v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1464 [because defendant city did not establish it would suffer grave or irreparable harm from issuance of the preliminary injunction, trial court need not examine the relative actual harm to the parties]; *People ex rel. Brown v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571 [same].)

Defendants argue that this standard does not apply where the government is seeking a mandatory preliminary injunction rather than a prohibitory injunction, and that instead a higher standard should apply: that a "mandatory injunction . . . is not permitted except in extreme cases,

[11] Federal courts take a similar view. (See *Olson*, 2020 WL 905572, at *15 ["The Court agrees that '[t]he public interest may be declared in the form of a statute' and is not served by the preliminary injunction Plaintiffs seek"].)

where the right thereto is clearly established, and it appears that irreparable injury will flow from its refusal." (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295.) However, the Court rejects Defendants' premise. An injunction that restrains a defendant's continued violation of state law is prohibitory in nature; any aspects of such an injunction that "require defendants to engage in affirmative conduct are merely incidental to the injunction's objective to prohibit defendants from further violating California's . . . laws." (*People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 342 [collecting authorities].)

In any event, Defendants cite no case in which a court declined to apply the *IT Corp.* standard merely because the government was seeking a mandatory rather than a prohibitory injunction. The law is to the contrary. (See *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1157, 1162 [affirming preliminary injunction abating a medical marijuana business as a nuisance, presuming the existence of public harm because it was not authorized by city ordinance]; *City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 299 [affirming mandatory preliminary injunction requiring defendants to remove billboard that was erected without a permit in violation of city ordinance, applying the *IT Corp.* standard].) Nor does the distinction make any sense: if the Legislature has enacted a statute that specifically authorizes injunctive relief for its violation, why should a court be more reluctant to issue an injunction against a defendant that has entirely refused to comply with the statute, as opposed to a defendant that has partially complied but is engaging in some new prohibited practice? Regardless, the issue is academic, since the Court finds that injunctive relief is warranted under either standard. (See *People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630 [affirming mandatory preliminary injunction requiring defendants, an immigration lawyer and law firm, to provide notice to clients that another lawyer who had resigned from the firm was not authorized to practice law].)[12]

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[12] Defendants also point to this Court's refusal to issue a mandatory injunction seeking reclassification of Lyft's drivers in *Rogers v. Lyft, Inc.* (S.F. Super. Ct. April 30, 2020) 2020 WL 2532527, *appeal filed,* A160182 (May 21, 2020). However, *Rogers* presented a very different situation: it was brought by three individual drivers, all of whom were parties to arbitration agreements with Lyft; the factual basis for the application for emergency injunctive relief was "sparse" (*id.* at *6, fn. 5 & *8); it sought provisional relief pending arbitration, which is subject to (continued...)

Here, both A.B. 5 and the UCL specifically provide for injunctive relief. The motion is brought under Labor Code § 2750.3(j), which expressly authorizes the Attorney General and city attorneys to bring "an action for injunctive relief to prevent the continued misclassification of employees as independent contractors," and the Business and Professions Code, which likewise "provides broad authority for an injunction." (*People ex rel. Brown v. Black Hawk Tobacco, Inc.*, 197 Cal.App.4th at 1568.)[13] As discussed below, the People have easily shown a reasonable probability that they will prevail on the merits. Further, Defendants have not shown that they would suffer such grave or irreparable harm if an injunction were to issue requiring them to comply with California law that would outweigh the harms to their drivers, other businesses, and the public generally if the Court were to deny the People's motion. Accordingly, the People's motion for a preliminary injunction must be granted.

B. The People Are Likely To Prevail On The Merits Of Their Claim That Defendants Are Violating A.B. 5.

The People have shown a reasonable probability (indeed, an overwhelming likelihood) of prevailing on the merits of their claim that Defendants are violating A.B. by misclassifying their drivers as independent contractors. In order to assess that claim, it is necessary first to examine A.B. 5 itself and the Supreme Court's *Dynamex* decision, which it was intended to codify.

(...continued)
additional statutory requirements (*id.* at *7); and it sought reclassification of Lyft's drivers only for the narrow purpose of qualifying them for a single benefit, paid sick leave under state law, where they were already eligible for greater benefits under federal law. This action, in contrast, is brought by the People pursuant to an express statutory authorization to seek injunctive relief to prevent the continued misclassification of employees; the People's motion is based on an extensive factual record; the claims on which is based are not subject to mandatory arbitration; and it seeks broad-based relief.

[13] Bus. & Prof. Code section 17203 authorizes a court to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition" within the meaning of the UCL and to "make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . , or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Section 17204 specifically authorizes the Attorney General and certain city attorneys, among other public officials, to prosecute actions for relief under the UCL upon their own complaint or upon the complaint of a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

1. A.B. 5 and the California Supreme Court's *Dynamex* Decision

The Legislature enacted A.B. 5, and it was signed into law by the Governor, in September 2019, and it became effective on January 1, 2020. (Stats. 2019, ch. 296, codified at Lab. Code §§ 2750.3, 3351, and Unemp. Ins. Code §§ 606.5 and 621.) The Legislature declared its intent to "codify the decision of the California Supreme Court in Dynamex and [to] clarify the decision's application in state law." (*Id.* § 1(d).) That decision established the ABC test for determining when a person shall be considered an employee rather than an independent contractor. Under that test, for purposes of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied":

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Lab. Code § 2750.3(a)(1).) Thus, unless the hiring entity can demonstrate that all three of the conditions or "prongs" are satisfied, the person shall be considered an employee. (*Id.*)[14]

Dynamex involved a complaint by two delivery drivers, suing on their own behalf and on behalf of a class of similarly situated drivers, against Dynamex, a nationwide package and document delivery company, alleging that it had misclassified its delivery drivers as independent contractors rather than employees. After the trial court certified a class action, finding that the common issues relating to the proper classification of the drivers as employees or as independent

[14] Subdivision (b) expressly exempts a number of different occupations from the ABC test. (§ 2750.3(b)(1)-(7).) Subdivision (c) also exempts a variety of contracts for professional services, while subdivisions (d) through (h) exempt a number of other relationships and industries. None refers, directly or indirectly, to drivers who work for transportation network companies such as Defendants.

contractors predominated over potential individual issues, Dynamex unsuccessfully sought to decertify the class, and then filed a writ proceeding in the Court of Appeal regarding the proper definitions of "employ" and "employer" for purposes of the wage orders. The Supreme Court granted review to decide that issue.

After an extensive review of California and out-of-state judicial decisions regarding the employee or independent contractor distinction, the Court held that "the wage order's suffer or permit to work definition must be interpreted broadly to treat as 'employees,' and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*." (4 Cal.5th at 916 (emphasis original).) In particular, the Court held that "in determining whether . . . a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors." (*Id.*) On the facts disclosed by the record, the Court went on to hold, the trial court's class certification order was correct as a matter of law under this ABC test, and the Court of Appeal's judgment therefore was affirmed. (*Id.* at 917.)

2. A.B. 5 Applies To Defendants' Transportation Network Companies

Defendants contend first that A.B. 5 does not apply to them at all, either because they are not "hiring entities" within the meaning of the legislation or because their businesses fall within one or more of the statutory exemptions. That contention is impossible to square with Defendants' own litigation positions, and lacks merit in any event.

First, in the same breath as Defendants argue that they are not subject to A.B. 5, they urge the Court to stay this litigation until the Ninth Circuit can decide the constitutionality of that legislation, insisting that a decision in their favor will moot this case. But if A.B. 5 does not even apply to Defendants, why would the Court need to stay this litigation until its validity has been determined? Indeed, the inconsistency goes even deeper. One week after A.B. 5 went into effect on January 1, 2020, Uber, Postmates, and two individual drivers filed the *Olson* action, seeking a preliminary injunction enjoining the enforcement of A.B. 5 against those companies and their drivers. (*Olson*, 2020 WL 905572, at *3.) Uber argued in that case that "AB 5 targets gig economy companies and workers and treats them differently from similarly situated groups." (*Id.* at *5.) Indeed, pointing to "the bill sponsor's alleged refusal to consider an exemption for gig economy companies," Uber and its co-plaintiffs argued "that AB 5's supporters 'did their best to limit the scope of the law *only* to the [transportation] network companies.'" (*Id.* at *8.) The district court agreed with plaintiffs' assertion that "the record contains some evidence that AB 5 targeted Company Plaintiffs and other gig economy companies, and that some lawmakers' complaints specifically complained about Uber." (*Id.* at *9 (footnote omitted); see also *id.* at *11 [quoting references in plaintiffs' complaint and motion "to 'forced reclassification' as if Uber's and Postmates' drivers necessarily transform into employees under AB 5"].)[15] Yet here, Uber contends that the same legislation it asserts in federal court "targeted" its business does not, in fact, apply to it at all. It is difficult for the Court to take seriously such contradictory positions.

Second, Defendants' position that A.B. 5 does not apply to them lacks merit as a matter of statutory interpretation and logic. Defendants assert that they are not "hiring entities" within the meaning of A.B. 5 because their drivers do not provide services to them and Defendants do not pay remuneration to drivers for their services. Nonsense.

Contrary to Defendants' argument, A.B. 5 does not establish any "threshold requirement" to show that the putative employer is a hiring entity that must be met before applying the ABC test. The ABC test focuses on the individual worker, not on the employer: "a person providing labor or services for remuneration is considered an employee rather than an independent contractor unless the hiring entity demonstrates that the following conditions are satisfied." (Lab. Code § 2750.3(a)(1).) It is readily apparent that the legislation's use of the undefined term "hiring entity" was intended to avoid using the term "employer," and is synonymous with the more cumbersome phrase "the person to whom service is rendered" that was commonly used under the *Borello* test that predated the enactment of A.B. 5. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531, quoting *Borello*, 48 Cal.3d at 350 [under *Borello*,

[15] At the same time, Uber and Postmates "insist[ed] that their drivers qualify as independent contractors even under the ABC test." (*Id.* at *10; see also *id.* at *11 (same).)

"the principal test of an employment relationship [was] whether *the person to whom service is rendered* ha[d] the right to control the manner and means of accomplishing the result desired" (emphasis added)]; see also Lab. Code § 3357 ["Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."].) As discussed above, A.B. 5 was intended to *broaden* the definition of an employee. Defendants offer no reason to believe that the Legislature intended to negate or undermine that objective by at the same time narrowing the category of businesses responsible for hiring workers. Moreover, contrary to Defendants' misreading, nothing in the plain statutory language requires that the "remuneration" be paid *directly* by the "hiring entity," only that the individual must be "providing labor or services for remuneration." Uber and Lyft's hundreds of thousands of drivers plainly are not providing their labor for free.

In any event, Defendants *are* hiring entities. The Public Utilities Code explicitly recognizes that Uber and Lyft are hiring entities, since it provides that a transportation network company "shall not contract with, employ, or retain a driver" who has been convicted of certain criminal offenses. (Pub. Util. Code § 5445.2(a)(2), (3).) Under any conceivable reading of that language, those activities—contracting with, employing, or retaining drivers—constitute "hiring." Defendants do not contest the People's showing that they set drivers' qualification standards, solicit applications, conduct background checks and in-person interviews with applicants, engage certain applicants as drivers while rejecting others, and enter into standard form contracts with drivers. Defendants' insistence that they are not "hiring entities" blinks economic reality, and is inconsistent with the Supreme Court's direction in *Dynamex* that California's employee classification standard should be "interpreted and applied broadly to include within the covered employee category *all* individuals who can reasonably be viewed as working '*in the [hiring entity's] business*.'" (5 Cal.4th at 953.)[16]

[16] Uber's half-hearted argument, joined by Lyft, that its transportation network business is exempt from A.B. 5 as a "bona fide business-to-business contracting relationship" (Lab. Code § 2750.3(e)) or "the relationship between a referral agency and a service provider" (*id.* § 2570.3(g)) is risible. Under the familiar maxim of statutory construction *expressio unius est exclusio alterius*, had the Legislature meant to exempt Defendants' well-known ride-hailing businesses, it would have done so explicitly. (See *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, (continued...)

3. Drivers Do Not Perform Work That Is Outside The Usual Course of Defendants' Businesses.

As noted above, under the ABC test, Defendants' drivers are presumptively employees, and Defendants bear the burden to show otherwise. In order to determine whether Defendants can met their burden, the Court need only decide that Defendants cannot satisfy *one* of the three prongs of the ABC test. (See *Dynamex*, 4 Cal.5th at 963 [because "a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an empoloyee for purposes of the wage order, a court is free to consider the separate parts of the ABC standard in whatever order it chooses."].) Here, this Court need only address the "B" prong in order to find that the People have shown, at the very least, a reasonable probability of prevailing on their claim.

The "B" prong of the test asks whether "[t]he person performs work that is outside the usual course of the hiring entity's business." (Lab. Code § 2750.3(a)(1)(B).) As a matter of logic, in order to answer that question, one has to identify in the first instance the nature of the entity's "usual business operation." Let's do that: Defendants are regulated by the California Public Utilities Commission as transportation network companies (TNCs). (Pub. Util. Code §§ 5430-5450.) Article 7, which applies to TNCs, was added to Chapter 8 of the Public Utilities Code, "Charter-Party Carriers of Passengers," effective January 1, 2015. Sections 5360 and 5360.5 define charter-party carriers as "every person engaged in the transportation of persons by motor vehicle for compensation" on a prearranged basis. Section 5431 defines a TNC as a specialized type of charter-party carrier: "an organization . . . . operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle." (*Id.* § 5431(c).) In enacting these provisions, the Legislature expressly found that the California Public Utilities Commission (CPUC), which is responsible for regulating TNCs under these provisions, "has

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(...continued)
1230 ["if exemptions are specified in a statute, [a court] may not imply additional exemptions unless there is a clear legislative intent to the contrary."].) In any event, none of the requirements of either statutory exemption is met here. (See People's Reply at 23-24.)

initiated regulation of transportation network companies as a new category of charter-party carriers." (*Id.* § 5440(a).)[17] These California statutes governing Defendants' businesses, not what may be said by Defendants' experts or "in the economic literature and under the securities laws," (Lyft Opp. at 31), are dispositive as to the nature of those businesses: they are "engaged in the transportation of persons by motor vehicle for compensation."

Despite these controlling statutory provisions, Defendants stoutly deny the reality that they are in the business of transporting passengers for compensation. Instead, they assert that they are merely "multi-sided platforms" that operate as "matchmakers" to facilitate transactions between drivers and passengers. Uber goes even farther, asserting that the platform itself—the smartphone app—*is* Uber's business, and that its "*actual* employees" work in engineering, product development, marketing, and operations "in order to improve the properties of the app." (Uber Opp. at 25.) Uber contends that "[t]he work performed by drivers—transporting riders—is thus outside the ordinary course of Uber's business because it is not comparable to the work performed by Uber's employees." (*Id.*)

Uber's argument is a classic example of circular reasoning: because it regards itself as a technology company and considers only tech workers to be its "employees," anybody else is outside the ordinary course of its business, and therefore is not an employee. Were this reasoning to be accepted, the rapidly expanding majority of industries that rely heavily on technology could with impunity deprive legions of workers of the basic protections afforded to employees by state labor and employment laws.

This is not the first time that Defendants have made this argument. In a pre-*Dynamex* case, exactly as here, Uber asserted that the presumption of employment did not apply to its drivers because they do not provide a service to it. "The central premise of this argument is Uber's contention that it is not a 'transportation company,' but instead is a pure 'technology company'

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[17] Under the statutory scheme, TNCs are required to maintain specified insurance coverage and to disclose that coverage and limits of liability to participating drivers (*id.* §§ 5432, 5433); to cooperate with claims coverage investigations into accidents involving participating drivers (*id.* § 5435); to maintain the privacy of TNC passengers' personally identifiable information (*id.* § 5437); and to conduct criminal background checks of participating drivers (*id.* § 5445.2).

that merely generates 'leads' for its transportation providers through its software. Using this semantic framing, Uber argues that [drivers] are simply its customers who buy dispatches that may or may not result in actual rides. . . . . Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers." (*O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2015) 82 F.Supp.3d 1133, 1141.) Judge Edward Chen of the U.S. District Court for the Northern District of California found this argument "fatally flawed in numerous respects." (*Id.*) First, it focuses too narrowly on the technology Uber developed, which "is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides." (*Id.*) Focusing on "the substance of what the firm actually does . . . , it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one." (*Id.*) "Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business without its drivers." (*Id.* at 1142 (footnote omitted).) Thus, "it strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business; it strains credulity even further to argue that Uber drivers do not provide Uber a valuable service." (Id. at 1144.) "Uber's drivers provide an 'indispensable service' to Uber, and the firm 'could not more survive without them' than it could without a working smartphone app." (*Id.*) Grounding its holding in logic, common sense, and prior California case law, the court held as a matter of law that "Uber's drivers render service to Uber, and thus are Uber's presumptive employees." (*Id.* at 1145.)

A number of other courts have reached exactly the same conclusion. (See, e.g., *Cunningham v. Lyft, Inc.* (D.Mass. May 22, 2020) 2020 WL 2616302, at *10 ["despite Lyft's careful self-labeling, the realities of Lyft's business—where riders pay Lyft for rides—encompasses the transportation of riders. The 'realities' of Lyft's business are no more merely 'connecting' riders and drivers than a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics. Instead, focusing on the reality of what the business offers its customers, the business of a grocery stores is selling groceries, the business of a car repair shop is repairing cars, and Lyft's business—from which it derives its revenue—is transporting riders."]; *Namisnak v. Uber*

Technologies, Inc. (N.D. Cal. Mar. 12, 2020) --- F.Supp.3d ----, 2020 WL 1283484, at *4 ["Uber's claim that it is 'not a transportation company' strains credulity, given the company *advertises itself* as a 'transportation system.'"]; *Crawford v. Uber Technologies, Inc.* (N.D. Cal. Mar. 1, 2018) 2018 WL 1116725, at *4 [rejecting Uber's argument that it is not "primarily engaged in the business of transporting people," but instead is a "a technology company that is engaged in the business of facilitating networking between drivers and riders."]; *Cotter*, 60 F.Supp.3d at 1078 ["the argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one."].)[18]

The Supreme Court's *Dynamex* decision, which the Legislature codified in A.B. 5, significantly illuminates the purpose and meaning of this prong of the test. In discussing that factor, the Court stated that "one principal objective of the suffer or permit to work standard is to bring within the 'employee' category *all* individuals who can reasonably be viewed as working '*in the [hiring entity's] business*' [citation], that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. [Citations.] Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business." (5 Cal.4th at 959.) The Court provided several illustrative examples:

> Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the

[18] Indeed, even before the California Supreme Court's *Dynamex* decision and the enactment of A.B. 5, a number of courts had held that the question whether Uber and Lyft drivers were employees, at a minimum, raised disputed issues of fact that precluded finding as a matter of law that their drivers were independent contractors. (See, e.g., *Cotter*, 60 F.Supp.3d at 1078-1081 [genuine issues of fact existed as to whether Lyft retained right to control drivers, and thus whether they were employees or independent contractors]; *Doe v. Uber Techs., Inc.* (N.D. Cal. 2016) 184 F.Supp.3d 774, 783 [holding at motion to dismiss stage that plaintiff drivers "alleged sufficient facts that an employment relationship may plausibly exist"]; *O'Connor*, 82 F.Supp.3d at 1138 [finding a triable issue of fact as to whether Uber drivers are employees].) Even then, a court could have found a reasonable probability that Defendants were violating California law.

> services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. [Citation.] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [citations], or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes [citation], the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees.

(*Id.* at 959-960.) In *Dynamex*, the Court found there was a sufficient commonality of interest with respect to prong B to permit plaintiff delivery drivers' claim of misclassification to be resolved on a class basis. (4 Cal.5th at 965.) The Court explained that the defendant's "entire business is that of a delivery service. Unlike other types of businesses in which the delivery of a product may or may not be viewed as within the usual course of the hiring company's business, here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the ordinary course of its business is clearly amenable to determination on a class basis." (*Id.* (footnote omitted).)

Defendants' position cannot survive even cursory examination. Far from "merely incidental" to Defendants' transportation network businesses, drivers' work—the work of transporting customers for compensation—is "an integral part" of those businesses. (See *id.* at 961, fn. 29; see also *Cotter*, 60 F.Supp.3d at 1069 ["[Drivers'] work is central, not tangential, to Lyft's business."].) Defendants' entire business is that of transporting passengers for compensation. Unlike an independent plumber or electrician who may visit a retail store on one occasion to perform a single, limited task such as repairing a leak or installing a new electrical line, Defendant's drivers are part of their usual, everyday business operations, and their work falls squarely within the ordinary course of that business.[19] In short, under any reasonable understanding of the English language, an Uber or Lyft driver can only be viewed "as working in the hiring entity's business." (Accord, *Rogers v. Lyft, Inc.*, 2020 WL 1684151, at *2 ["Lyft

[19] Uber places considerable emphasis on recent changes to its model, including a modification that allows drivers to have input into fare-settting. While those changes to Uber's algorithm and practices may have some bearing on the other prongs of the ABC test, none alters the analysis as to whether drivers' work is outside the ordinary course of Uber's business.

drivers provide services that are squarely within the usual course of the company's business, and Lyft's argument to the contrary is frivolous."].[20]

C. Substantial Public Harm Will Result If An Injunction Does Not Issue.

As discussed above, the controlling legal standard gives rise to a presumption that public harm will result if an injunction does not issue where, as here, a public agency seeking to enjoin the alleged violation of a statute which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits. But the Court need not rely solely on that bare presumption. Both the California Supreme Court and the Legislature have clearly delineated the harms—to drivers, to businesses, and to the public generally—that result from employers' misclassification of their employees.

In *Dynamex*, the Supreme Court explained that "the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally":

> On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.

(4 Cal.5th at 912-913; see also *Cotter*, 60 F.Supp.3d at 1069 ["The answer is of great consequence for the drivers, because the California Legislature has conferred many protections on employees, while independent contractors receive virtually none."].) The Court went on to observe that "[a]lthough in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated

[20] Defendants' assertion that drivers (and also, presumably, passengers) are "outside the usual course of [their] business[es]" would come as startling news, the Court is convinced, to any layperson. It is equally unpersuasive to this Court.

as employees may be improperly classified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled." (*Id.* at 913 (footnote omitted).)

When it enacted A.B. 5, the Legislature with the Supreme Court's recognition that misclassification of workers results in "harm to misclassified workers who lose significant workplace protections," "unfairness to employers who must compete with companies that misclassify," and "the loss to the state of needed revenue from companies that use misclassification to avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability insurance." (A.B. 5, Stats. 2019, ch. 296, § 1(b).) It found that "[t]he misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise of income inequality." (*Id.* § 1(c).) In a broad summary of its intent, the Legislature declared:

> It is also the intent of the Legislature in enacting this act to ensure workers who are currently exploited by being misclassified as independent contractors instead of recognized as employees have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave. By codifying the California Supreme Court's landmark, unanimous Dynamex decision, this act restores these important protections to potentially several million workers who have been denied these basic workplace rights that all employees are entitled to under the law.

(*Id.* § 1(e).)

It bears emphasis that these harms are not mere abstractions; they represent real harms to real working people. The People's motion is supported by numerous declarations of individual drivers who testify that although they work grueling hours for Defendants for their livelihoods and to support their families, they receive no payment for overtime, rest or meal breaks, restroom breaks, or time spent waiting for fares, driving to pick up passengers, or "deadheading" on a return trip; they are not reimbursed for business expenses, such as the costs of vehicle inspection, automobile rent or maintenance, insurance, gasoline, or cleaning their vehicles, or cell phone use; they do not receive health insurance or sick leave, and therefore receive no pay if they are sick and have to take a day off; they do not receive paid family leave to take care of a sick child or spouse; and they may not qualify for or receive state unemployment benefits. That these drivers may temporarily qualify for emergency federal benefits during the pandemic does not fundamentally alter the precariousness of their financial existence, which is directly attributable to Defendants' refusal to classify and treat them as employees entitled to protection under California law. The harms that would result if an injunction does not issue are substantial indeed.

D. The Asserted Harm To Defendants Is Not Grave Or Irreparable, And In Any Event Does Not Outweigh the Harm To Drivers, Businesses, and The General Public In The Absence of An Injunction.

Defendants have not shown that the harm to them from issuance of an injunction requiring them to comply with California law would be "grave or irreparable." Even if they could, they have not shown that any harm to them would outweigh the harm to drivers, competing businesses, and the general public in the absence of an injunction.

Defendants assert that if they are required to comply with A.B. 5 and to to reclassify their drivers as employees, they would suffer significant harms. In particular, they assert that an injunction will cause two categories of harm: (1) the costs and other harms associated with the restructuring of Defendants' businesses in California; and (2) the harms to Defendants' drivers, including the risk that some drivers may unable to continue earning income if Defendants do not offer them continued work as employees, and the risk that their reclassification as employees may jeopardize their eligibility for emergency federal benefits available to them as self-employed workers during the COVID-19 pandemic. The Court does not question that the requested injunction may have adverse effects, although they are difficult reliably to predict and quantify.

However, it cannot find that they would outweigh the harms to workers, businesses, and the public discussed above.

As Defendants acknowledged at the hearing, the "sliding scale" approach to preliminary injunctions applies here. (See *Butt v. State of California* (1992) 4 Cal.4th 668, 678 ["The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction."].) For the reasons discussed above, the People's showing on the merits is very strong, and Defendants' is exceedingly weak. That being so, even if the harm to Defendants were "grave or irreparable," the Court believes that an injunction would be warranted. (See *IT Corp.*, 35 Cal.3d at 72 [even if a defendant makes such a showing, a trial court may conclude that an injunction is proper after considering "both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief."].)[21]

The Court is under no illusion that implementation of its injunction will be costless or easy. There can be no question that in order for Defendants to comply with A.B. 5, they will have to change the nature of their business practices in significant ways, such as by hiring human resources staff to hire and manage their driver workforces. (See *Olson*, 2020 WL 905572, at *14 ["If the ABC test is found to require the reclassification of their drivers, Uber and Postmates would also suffer significant harms associated with restructuring their businesses."].) But that argument, at root, is fundamentally one about the financial costs of compliance. Defendants' contention that the costs of complying with existing law are properly considered irreparable is questionable. (Cf. *People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 882 [finding that defendants cannot claim harm from any restrictions in activities found to constitute a public nuisance].) But even if they are, those are costs that Defendants reasonably should have

[21] Defendants correctly stress that the People are seeking a preliminary injunction, not a permanent injunction. However, even a preliminary injunction that alters the status quo does not necessarily constitute an impermissible permanent injunction, since "it rests solely on the facts presented to the trial court at the time of its issuance" and a full trial is still required to adjudicate the ultimate rights in controversy. (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1186 [affirming preliminary injunction that altered the status quo in extreme case where the right to relief was clearly established].)

anticipated bearing at least since April 2018, when *Dynamex* was decided, and certainly since September 2019, when A.B. 5 was enacted and signed into law.[22] As one district court has observed, "A.B. 5 contains no exception for wealthy corporations that disagree with the Legislature's policy judgment and would rather not spend money to effectuate that judgment." (*Rogers v. Lyft, Inc.*, 2020 WL at *2, fn. 1.)

The Court does not take lightly Defendants' showing that a preliminary injunction may also have an adverse effect on some of their drivers, many of whom desire the flexibility to continue working as they have in the past, and may have commitments that make it difficult if not impossible for them to become full-time or part-time employees.[23] As Defendants argued at the hearing, those concerns are magnified by the sweeping scope of the injunction sought by the People, and by the Court's uncertainty as to how precisely Defendants will go about complying with it. But if the injunction the People seek will have far-reaching effects, they have only been exacerbated by Defendants' prolonged and brazen refusal to comply with California law. Defendants may not evade legislative mandates merely because their businesses are so large that they affect the lives of many thousands of people.

Moreover, concerns about the effects of the Court's injunction on drivers are substantially mitigated by at least two factors. First, as Defendants themselves emphasize, the vast majority of their drivers work on a casual or sporadic basis, for only a small number of hours per week, and thus the effects on those drivers of a reorganization of Defendants' businesses are likely to be correspondingly minor. (See, e.g., Lyft Opp. to PI Mot. at 12; Tucker Decl. ¶ 76.) Second, the

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[22] In its August 4, 2020 order, one of the questions the Court asked Defendants to address at the hearing was: "What measures, if any, have Defendants taken to prepare to comply with A.B. 5 (should it be held to apply to them) since it became effective on January 1, 2020? With the Supreme Court's April 2018 *Dynamex* decision?" Defendants conspicuously failed to respond.

[23] The Court gives no weight to Defendants' surveys regarding how many of their drivers wish to become employees or remain self-employed. A.B. 5 may be unpopular among some of Defendants' drivers, but a lawsuit is not a popularity contest. Nor, as Defendants and some *amici curiae* argue, is it this Court's role to decide whether A.B. 5's effects on drivers will outweigh its benefits. "Policy judgments underlying a statute are left to the Legislature; the judiciary does not pass on the wisdom of legislation." (*Vergara v. State of California* (2016) 246 Cal.App.4th 619, 643.)

ongoing effects of the pandemic have drastically reduced the demand for Defendants' services, and even those drivers who are able to find work may elect not to do so to avoid exposing themselves to the coronavirus. (See Uber Opp. to PI Mot. at 30 [referring to "an unprecedented fall in demand for rides due to the pandemic"].) Now, when Defendants' ridership is at an all-time low, may be the best time (or the least worst time) for Defendants to change their business practices to conform to California law without causing widespread adverse effects on their drivers.

In short, as the federal district court concluded in *Olson*,

> Considering the potential impact to the State's ability to ensure proper calculation of low income workers' wages and benefits, protect compliant businesses from unfair competition, and collect tax revenue from employers to administer public benefit programs, the State's interest in applying AB 5 to [Defendants] and potentially hundreds of thousands of California workers outweighs [Defendants'] fear of being made to abide by the law.

(*Olson*, 2020 WL 905572, at *16.) Although Defendants "have shown some measure of likelihood of irreparable harm, the balance of equities and the public interest weigh in favor of permitting the State to enforce this legislation." (*Id.*)

CONCLUSION AND ORDERS

For these reasons, Defendants' motions to stay this action are denied; Lyft's demurrer is overruled and its motion to strike the People's complaint is denied; and the Court defers any ruling on Defendants' motions to compel arbitration to a later hearing date to be set upon further order of the Court.

The People's motion for a preliminary injunction is GRANTED, as follows:

1. During the pendency of this action, Defendants Uber Technologies, Inc. and Lyft, Inc. are hereby enjoined and restrained from classifying their Drivers as independent contractors in violation of Labor Code section 2570.3.

2. Defendants are further enjoined and restrained from violating any provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission with regard to their Drivers.

3. "Drivers" refers to the following two categories of individuals:

First Category: All individuals who drive for Uber as ride-hailing drivers in the State of Caliornia at any time during the pendency of this action, and who (1) signed up to drive as a ride-hailing driver directly with Uber or with an Uber subsidiary under their individual name or with a fictional/corporate name and (2) are paid by Uber or an Uber subsidiary directly under their individual name or a fictional/corporate name for their services as ride-hailing drivers.

Second Category: All individuals who drive for Lyft as ride-hailing drivers in the State of Caliornia at any time during the pendency of this action, and who (1) signed up to drive as a ride-hailing driver directly with Lyft or with a Lyft subsidiary under their individual name or with a fictional/corporate name and (2) are paid by Lyft or a Lyft subsidiary directly under their individual name or a fictional/corporate name for their services as ride-hailing drivers.

This injunction is stayed for a period of 10 days.[24] It shall remain in effect through and including the trial of this matter or upon further order of this Court.

IT IS SO ORDERED.

Dated: August 10, 2020

HON. ETHAN P. SCHULMAN
JUDGE OF THE SUPERIOR COURT

[24] At the close of the hearing, Defendants requested that the Court temporarily stay any injunction pending appellate review. The Court believes that a brief stay is appropriate under the circumstances. (See Code Civ. Proc. § 918.) Because the People are the moving party, no undertaking is required. (Code Civ. Proc. § 529(b)(3).)

CGC-20-584402 PEOPLE OF THE STATE OF CALIFORNIA VS. UBER TECHNOLOGIES, INC., A DELAWARE CORPORATION ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on August 10, 2020 I served the foregoing **Order on People's motion for preliminary injunction and related motions** on each counsel of record or party appearing in propria persona by causing a copy thereof to be served electronically by email sent to the email addresses indicated below:

Date: August 10, 2020

By: M.GOODMAN

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