UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 19-10956-DMG (RAOx)** Date February 10, 2020

Title ***Lydia Olson, et al. v. State of California, et al.*** Page 1 of 24

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS - ORDER RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [14]

On January 8, 2020, Plaintiffs Lydia Olson, Miguel Perez, Postmates Inc. ("Postmates"), and Uber Technologies, Inc. ("Uber")[1] filed a Motion for Preliminary Injunction requesting that the Court enjoin the enforcement against Plaintiffs, pending final judgment, of any provision of California Assembly Bill 5 2019 ("AB 5"), a recently enacted law pertaining to the classification of employees and independent contractors. [Doc. # 14.] The Motion has been fully briefed, and the Court held a hearing on February 7, 2020. [Doc. ## 21, 23.][2] For the reasons stated below, the Court **DENIES** Plaintiffs' Motion.

I.
FACTUAL AND PROCEDURAL BACKGROUND[3]

California courts have long grappled with the challenges of defining the line between an employee and an independent contractor. Two years ago, in its unanimous decision in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018), the California Supreme Court described

[1] The Court refers to Olson and Perez collectively as the "Individual Plaintiffs" and Uber and Postmates collectively as the "Company Plaintiffs."

[2] On February 4, 2019, individuals described as "California On-Demand Contractors" Keisha Broussard, Daniel Rutka, Raymond Frazier, and Lamar Wilder filed a brief as *amici curiae* in support of Plaintiff's Motion for Preliminary Injunction. [Doc. # 27.] The next day, the Chamber of Commerce of the United States of America, Engine Advocacy, and TechNet also filed a brief as *amici curiae* in support of Plaintiff's Motion. [Doc. # 44.]

[3] The following facts are based on judicially noticeable documents and the sworn declarations Plaintiffs submitted in support of their Motion, not on the unverified allegations in Plaintiffs' Complaint. *See, e.g., K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) ("A verified complaint or supporting affidavits may afford the basis for a preliminary injunction[.]"); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2949 (3d ed. 2019) ("Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction.").

the distinction between an independent contractor and employee—and the importance of that distinction—in this way:

> Under both California and federal law, 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.

Id. at 912–13 (footnote omitted). The California Supreme Court noted that "[t]he basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare." *Id.* at 952. It therefore adopted a "very broad definition of the workers who fall within the reach of the wage orders."[4] *Id.*

That broad definition is known as the "ABC" test, a standard used in numerous jurisdictions in different contexts to determine a worker's classification. *Id.* at 916. Under the ABC test, a worker is considered an employee unless the hiring entity establishes that the worker (a) is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (b) "performs work that is outside the usual course of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 916–17. *Dynamex* applied the ABC test to all employers and workers covered by California Industrial Wage Commission ("IWC") wage orders. *Id.* at 964.

[4] "In California, wage orders are constitutionally-authorized, quasi-legislative regulations that have the force of law." *Id.* at 914.

On September 18, 2019, Defendant the State of California enacted AB 5, which codifies *Dynamex*'s holding and adopts the ABC test for all provisions of the California Labor Code, the Unemployment Insurance Code, and IWC wage orders, with numerous exemptions. *See* A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019); Cal. Lab. Code § 2750.3. For such statutory exemptions, AB 5 provides that the multifactor test of independent contractor status established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989), remains in effect. *See* Cal. Lab. Code § 2750.3(b)–(h). The listed occupations, industries, or types of work relationships are subject to additional criteria in order to be exempted from application of the ABC test and include, among others: licensed professionals such as doctors and lawyers, commercial fishermen, contractors and subcontractors in the construction industry, business-to-business service providers, travel agents, graphic designers, freelance writers, aestheticians, and business entities providing referred services as home cleaners, dog walkers, or tutors. *See id.* Under AB 5, certain city attorneys may bring injunctive actions, and reclassified employers may be subject to pre-existing Labor and Unemployment Insurance Code provisions penalizing some violations as misdemeanors. *See id.* § 2750.3(j); A.B. 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019).

On December 30, 2019, Plaintiffs filed the instant lawsuit alleging that AB 5 violates the U.S. and California Constitutions and seeking declaratory, injunctive, and other relief from the State and Defendant Xavier Becerra, in his capacity as Attorney General of California. [Doc. # 1.] Postmates and Uber are both headquartered in San Francisco, California, and are commonly referred to as "on-demand economy," "network economy," "platform," or "gig economy" companies that use technology to respond to a customer's immediate or specific need. *See* Compl. at ¶ 3; Andres Decl. at ¶ 3 [Doc. # 17]; Rosenthal Decl. at ¶ 5 [Doc. # 18]; McCrary Decl. at ¶ 14 n.1 [Doc. # 19].

Postmates provides and maintains an online marketplace and mobile platform (the "Postmates App") that connects local merchants, consumers, and drivers[5] to facilitate the purchase, fulfillment, and—when applicable—delivery of goods from merchants (oftentimes restaurants) to consumers. Andres Decl. at ¶4. When consumers place orders of goods for delivery through the Postmates App, nearby drivers receive a notification and can choose whether to pick up and complete the requested delivery. *Id.* at ¶¶ 4–5. According to Postmates, more than 300,000 drivers in California currently make deliveries through the Postmates App, and "the vast majority" of those drivers "provide delivery services only intermittently and for

[5] Postmates' Director of Trust and Safety and Insurance Operations describes drivers as "independent contractor couriers." *See, e.g.*, Andres Decl. at ¶ 2. The Court has not been asked to decide whether Postmates' couriers are independent contractors or employees under AB 5, *Dynamex*, *Borello*, or any other law, and opts to describe the couriers as "drivers."

short periods of time." *Id.* at ¶ 6. For drivers, there are no set schedules or requirements for minimum hours or deliveries. *Id.* at ¶ 7. Drivers use their own vehicles and determine their own appearance and routes, and they may do other work for other employers. *Id.* at ¶¶ 9–11. Drivers who wish to make deliveries through the Postmates App must sign the "Fleet Agreement," which currently explains, *inter alia*, that the driver is "an independent provider of delivery services" and that Postmates and the driver do not have an employer-employee relationship. *Id.* at ¶¶ 12–15.

Uber provides at least two "digital marketplaces" to connect individual consumers with those willing to service them—the UberEats mobile platform (the "UberEats App") and the Uber rideshare mobile platform (the "Uber Rides App"). Rosenthal Decl. at ¶¶ 6–8. The UberEats App, like Postmates, connects local merchants, consumers, and drivers to facilitate customers' food orders for delivery. *Id.* at ¶ 8. The Uber Rides App has different interfaces for customers seeking a ride ("riders") and for drivers seeking riders. *Id.* at ¶¶ 7, 12–15. According to Uber, more than 395,000 drivers in California have used Uber platforms to provide services in the year beginning October 1, 2018. *Id.* at ¶ 9. Drivers can choose when and where they drive and accept or reject requests as they see fit. *Id.* at ¶¶ 14–15, 18–19. To use the driver version of the Uber Rides app, drivers must agree to Uber's Technology Services Agreement (the "Rasier Services Agreement"), which provides, *inter alia*, that Uber is "a technology services provider that does not provide transportation services" and that the drivers operate as independent contractors, not employees. *Id.* at ¶¶ 20–29. UberEats drivers must also agree to a Technology Services Agreement (the "Portier Services Agreement") with similar provisions. *Id.* at ¶¶ 30–39.

Plaintiff Lydia Olson is a driver for Uber, and Plaintiff Miguel Perez is a driver for Postmates and, occasionally, Uber Rides and UberEats. Olson Decl. at ¶ 5 [Doc. # 15]; Perez Decl. at ¶¶ 2, 4–5 [Doc. # 16]. Olson owns a consulting business and at times takes care of her husband, who suffers from multiple sclerosis. Olson Decl. at ¶¶ 2–3. She attests that she intentionally chooses to work as an independent contractor for the flexibility and autonomy, as well as to help stabilize her fluctuating income. *Id.* at ¶¶ 4–5, 8–12. Similarly, Perez attests that he chose on-demand work to avoid driving a truck during the graveyard shift, to take on more family responsibilities, and to increase his income. Perez Decl. ¶¶ 3–8, 18. Neither Individual Plaintiff wants to be an employee of Uber or Postmates, and both express concerns about the grave impact of AB 5 on their lives. *Id.* at ¶¶ 19–20; Olson Decl. at ¶¶ 10, 12.

AB 5 went into effect on January 1, 2020. On January 8, 2020, Plaintiffs filed the instant Motion requesting that this Court enjoin Defendants from enforcing AB 5 against Company Plaintiffs.

II.
JUDICIAL NOTICE

Both sides seek judicial notice of various documents. Federal Rule of Evidence 201 permits a court to take judicial notice of facts not subject to reasonable dispute and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 824 n.3 (9th Cir. 2011) (citing Fed. R. Evid. 201(b)). Defendants seek judicial notice of:

(1) The Order Denying Temporary Restraining Order in *American Society of Journalists and Authors, Inc. v. Becerra*, No. CV 19-10645-PSG (C.D. Cal. Jan. 3, 2020);
(2) The October 29, 2019 initiative submitted to the California Attorney General's Office entitled "the Protect App-Based Drivers and Services Act." [Doc. # 21.]

Plaintiffs seek judicial notice of:

(1) Plaintiffs' Motion for Provisional Relief in *Regents of University of California v. U.S. Department Homeland Security*, No. CV 17-05211-WHA (N.D. Cal. Jan. 9, 2018);
(2) Brief of State Amicus Curiae in *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017);
(3) Order Granting Temporary Restraining Order, *California Trucking Association v. Becerra*, No. CV 18-02458-BEN (BLMx) (S.D. Cal. Dec. 31, 2019);
(4) Order Granting Preliminary Injunction, *California Trucking Association v. Becerra*, No. CV 18-02458-BEN (BLMx) (S.D. Cal. Jan. 16, 2020);
(5) Docket Report, *First Franklin Financial Corp. v. Franklin First Financial, Ltd.*, 356 F. Supp. 2d 1048, CV No. 04-02842-WHA (N.D. Cal. 2005);
(6) Tweet by @LorenaSGonzalez, Twitter (Jan. 20, 2020, 11:55 p.m.), https://twitter.com/LorenaSGonzalez/status/1219528872351322114;
(7) Tweet by @LorenaSGonzalez, Twitter (Jan. 20, 2020, 11:35 p.m.), https://twitter.com/LorenaSGonzalez/status/1219523961517527040. [Doc. # 24.]

Courts "may take judicial notice of 'matters of public record.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted). Documents on file in federal or state courts are considered undisputed matters of public record. *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Courts take notice of the existence of such filings, not the truth of the facts recited therein. *Lee*, 250 F.3d at 689–90.

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