

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN

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

Plaintiffs,)

VS.)

UBER TECHNOLOGIES, INC.,)
Defendant.)

No. C 13-3826 EMC

San Francisco, California

Friday

January 30, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs: Lichten & Liss-Riordan, P.C.
100 Cambridge Street, 20th Floor
Boston, Massachusetts 02114
By: Shannon Liss-Riordan, Esquire
Adelaide H. Pagano, Esquire

For Defendants: Morgan, Lewis & Bockius LLP
One Market, Spear Street Tower
San Francisco, California 94105
By: Robert Jon Hendricks, Esquire
Sacha M. Steenhoek, Esquire
Caitlin V. May, Esquire

Reported By: Katherine Powell Sullivan, CSR #5812
Official Reporter - U.S. District Court

P R O C E E D I N G S

JANUARY 30, 2015

2:34 P.M.

THE CLERK: Calling Case C-13-3826, O'Connor versus Uber.

Counsel, please come to the podium and state your name for the record.

MR. HENDRICKS: Good afternoon, Your Honor. R.J. Hendricks with Morgan Lewis & Bockius on behalf of defendant.

THE COURT: Good afternoon, Mr. Hendricks.

MS. STEENHOEK: Sacha Steenhoek, also on behalf of defendant.

THE COURT: Good afternoon.

MR. HENDRICKS: And, for the record, Caitlin May is also at counsel table.

THE COURT: Good afternoon, Ms. May.

MS. LISS-RIORDAN: Good afternoon, Your Honor. For the plaintiffs, I'm Shannon Liss-Riordan. And with me is --

MS. PAGANO: -- Adelaide Pagano.

THE COURT: All right. Good afternoon, everyone.

Let me start off by making a couple of observations about the general framework of things as I see it.

Obviously, we're here on defendant's motion for summary judgment, so all facts, disputed issues of fact have to be resolved in favor of the nonmoving party. And all reasonable

1 inferences are to be drawn in favor of the nonmoving party.

2 So to the extent that there are conflicts in the evidence,
3 obviously I have to assume that the plaintiffs' facts are true
4 for purposes of this motion.

5 Second, there's this question about whether the
6 presumption of employee status applies where one is in the
7 service of another. And I know that that is an issue, in my
8 view, that that test is met here. And we can talk about that.

9 But the idea that Uber is simply a software platform
10 service provider and nothing else, I don't find that a very
11 persuasive argument. But I'll give you your chance to reargue
12 that.

13 But, assuming that that issue gets resolved, for purposes
14 of this motion, in favor of the plaintiff, then there is a
15 presumption that applies. And the burden of proof then lies
16 with the employer to prove otherwise.

17 And then, when we get to the substantive test, it is a
18 multifactor test -- I think everybody would concede that --
19 with degree of control being the primary factor. And although
20 that test has evolved over time arising out of the workers'
21 compensation context and migrating its way into the statutory
22 context, I think most courts -- nearly all the Courts now have
23 adopted pretty much a similar articulation of the test with
24 articulation of the 10, 11, 12, 13 factors, but all with a
25 primary emphasis on degree of control.

1 What I find that's interesting is, contrary to my, you
2 know, visceral reaction, which I had stated on the record that
3 I thought that plaintiff seemed to have a hard case to make, is
4 that when you look at the cases it's -- one conclusion you can
5 reach is that it's very rare to find any one factor
6 dispositive, either any indicia of control or any of the other
7 12 factors.

8 So, as one example, I would have thought in the old days
9 if you owned the truck, if you owned the shovel, if you owned
10 the backhoe, if you owned the broom and all the equipment,
11 that's a pretty good indicator of an independent contractor
12 status and non-employee status.

13 Well, I don't think that's the case. There are a number
14 of cases now, whether it's FedEx or some of these other
15 delivery cases where people provide the truck, the limousine,
16 the car, and that did not stand in the way of the Court
17 concluding employee versus independent contractor status.

18 Degree of supervision, you would have thought, sort of in
19 the old days, that, you know, if you left someone else to do
20 work in the way they want to and you only look at the results
21 with minimal or no field supervision, that's another pretty
22 good indicator. But the cases take a more subtle approach.

23 You look at the nature of the job. And there are certain
24 jobs that are inherently less susceptible to supervision,
25 particularly if you're out in a field, particularly if you're

1 driving a car or a truck. Many of the cases afford a
2 substantial amount of flexibility to the driver or to the
3 person in the field without losing employee status.

4 So simply to -- I mean, simple fact, seems to me, is that
5 it's never easy. It's not just one factor you can point to and
6 say, boom, that's it.

7 And the fourth observation I want to make is that -- both
8 of you are probably against me on this point, but is this a
9 question of law or fact?

10 The ultimate inference to be drawn, once you've
11 crystallized the facts and whether on summary judgment drawing
12 them in favor of the nonmoving party or at trial, once you've
13 resolved it as a finder of fact would resolve any conflicts
14 regarding, for instance, degree of control, terminability, et
15 cetera, et cetera, is the ultimate inference drawn whether one
16 is an employee or an independent contractor, is that a question
17 of law for the Courts or fact for the fact-finder of the jury?

18 And although there is some language in the *Borello* case, I
19 think it's now clear that it is a question -- the ultimate
20 question is a mixed question of law and fact. And the issue,
21 therefore, on summary judgment is whether a reasonable jury
22 could conclude -- could only conclude in one direction.

23 And there, I think, in the *Narayan* case, certainly the
24 Ninth Circuit made that very clear and, indeed, articulated --
25 borrowing from Judge Eastbrook, explained the rationale for

1 that.

2 There are more recent California Court of Appeal cases,
3 including *Arzate vs. Bridge Terminal Transportation* in 2011,
4 that have applied the reasonable trier of fact standard post
5 *Borello*, and a series of other cases that so hold, including, I
6 think, the *Mission* case that the defendants cite, saying it's a
7 mixed question of law and fact.

8 So that means the standard here, where we're not dealing
9 with cross motions for summary judgment -- I did preclude the
10 plaintiff from bringing a cross motion -- where we have a
11 single motion for summary judgment, I would have to find that,
12 viewing the facts in plaintiffs' favor, drawing all reasonable
13 subsidiary inferences in favor of the plaintiff, that no
14 reasonable jury could conclude that the drivers are employees.

15 That's a pretty tough standard to meet. I understand your
16 arguments and the overarching -- and we can talk about that.
17 But that's how I see things as a framing proposition. And
18 against the backdrop of finding that, there's in addition to
19 that a presumption of employment, of employee status here,
20 because I do think drivers are serving Uber.

21 So through that lens, I would then look at all the facts.
22 And we can line up the facts and talk about the facts. And, of
23 course, we can talk about the cases and how they've interpreted
24 them and which way they go.

25 And, frankly, you know, you could probably distinguish

1 just about every case on some level. But when you look at the
2 overall question that's before the Court, viewed through this
3 procedural framework, it seems to me a very tough argument at
4 this juncture to show that no reasonable jury could find that
5 drivers are employees when all the facts and conflicts are
6 drawn in favor of the plaintiff.

7 So before we get into the actual facts, I would like to
8 hear your comments if you think that I'm on the wrong track
9 with respect to the framing.

10 **MR. HENDRICKS:** Your Honor, I think that you have
11 generally framed the issues correctly. I do believe, as a
12 threshold question, there is the issue of whether they're
13 providing us a service.

14 I do believe that -- that if they were found to be
15 providing a service, that we would go then, and only then, to
16 looking at whether they would be employees or independent
17 contractors. So I think there is some level of agreement
18 there.

19 **THE COURT:** Okay. And I know you argued in a footnote
20 to the contrary, sort of agreeing with the defendant that your
21 initial take was that this is a question -- the ultimate
22 question is one of law for the Court. I don't know if you're
23 still of that view.

24 **MS. LISS-RIORDAN:** Well, I am. And let me just speak
25 briefly to that before we get into the other matters.

1 I understand what you're saying and agree that the cases
2 are somewhat mixed. But I think the modern tendency has been,
3 in the most recent cases, that when there are not -- especially
4 when there are not material disputes regarding material facts,
5 courts have applied the law to the facts and made the
6 determination, as of course the Ninth Circuit did last year in
7 two cases, both the *Alexander* case and *Ruiz vs. Infinity* case.

8 It's also true for other FedEx cases, as I'm sure the
9 court is aware. The *Craig vs. FedEx* case in Kansas; the
10 *Slayman vs. FedEx* case in Oregon, on the Ninth Circuit.

11 The Nevada Supreme Court last year decided on facts that
12 could also be arguably mixed in the *Terry vs. Sapphire Adult*
13 *Entertainment* case found, as a matter of law, that the dancers
14 were employees.

15 A couple of the cases -- pertinent cases that said it was
16 a fact issue for trial, the *Narayan* case from the Ninth Circuit
17 2010, and Your Honor's case in *Harris*, it appeared from those
18 cases that there was only a motion filed, as here, by the
19 defendant for summary judgment and that the plaintiffs had not
20 cross moved.

21 Now, I understand that, for procedural reasons, you
22 decided you didn't want the plaintiffs to move for summary
23 judgment at this time. And, of course, because we're before a
24 class certification I would hope that you would consider
25 allowing us to move at a later stage, assuming this case goes

1 to a later stage.

2 But I think, in light of these recent cases, there is
3 reason to -- there is reason to believe that the Court could
4 decide this is a legal matter because it is a mixed question of
5 law and fact.

6 But if the underlying facts that are really important are
7 not so disputed, which I think may be well the case here, it's
8 the Court's role to apply the law to those facts. So that's --
9 that's what I have to say about that.

10 **THE COURT:** So is it your view that *Narayan* was wrong,
11 the Ninth Circuit decision in 2010 was wrong?

12 **MS. LISS-RIORDAN:** Well, I -- I don't know if in
13 *Narayan*, whether the plaintiffs had cross moved for summary
14 judgment. It looks from the decision like they hadn't --

15 **THE COURT:** Well, why does that make any difference?
16 Whether there's a cross motion or not, the standard applied to
17 each motion and cross motion is the same. Why should that
18 change it?

19 **MS. LISS-RIORDAN:** Well, I -- I believe because there
20 was simply a consideration of whether or not the defendant's
21 motion for summary judgment should have been granted, and the
22 Ninth Circuit, I believe, reversed that, that the Court didn't
23 have the opportunity to determine, as a matter of law, that a
24 plaintiff's motion should have been granted.

25 **THE COURT:** But it went into a detailed exposition as

1 to why these kinds of issues are properly one of -- so long as,
2 you know, a reasonable jury could so find. You could find that
3 a reasonable jury can't when the facts -- even drawn in favor
4 of the nonmoving party, that doesn't preclude summary judgment.

5 But just like many other mixed questions of law, mixed
6 questions such as whether under undisputed facts somebody is
7 negligent, whether there was excessive force under the Fourth
8 Amendment, there's all sorts of situations where it is
9 ultimately for the jury, even though there's not much dispute
10 as to the underlying subsidiary facts, because particularly as
11 *Narayan* points out, where you have a multifactor test, that is
12 almost peculiarly one appropriate for the jury.

13 **MS. LISS-RIORDAN:** Well, it's not clear because there
14 wasn't -- it does not appear there's a cross motion for summary
15 judgment by the plaintiffs. It might not have been argued in
16 that case that summary judgment should be entered for the
17 plaintiffs.

18 In the more recent *Alexander vs. FedEx* case, the Ninth
19 Circuit concluded that the factors pointed in different
20 directions, yet still the Court applied the law to those facts.

21 **THE COURT:** Well, the Ninth Circuit was conspicuously
22 silent on exactly what standard it was applying there, frankly.
23 It didn't adopt either standard. It didn't say this is a
24 question of law -- ultimate question of law for us to decide,
25 and that's why we're deciding, or whether it was really saying

1 no reasonable jury -- even though there are some facts going
2 the other way, when all is said and done, a reasonable jury
3 could go the other way. So it's a little ambiguous.

4 **MS. LISS-RIORDAN:** Right. And then again, last year
5 in the *Ruiz vs. Infinity* case, again the Ninth Circuit said as
6 a matter of law that plaintiffs were employees.

7 **THE COURT:** Well, let me just answer your question. I
8 don't want to get too far afield.

9 **MS. LISS-RIORDAN:** Sure.

10 **THE COURT:** But I also am interested, thinking ahead,
11 if this case does go to trial, for instance, if I don't grant
12 summary judgment in either direction, how do you handle this?

13 When you have disputed issues, subsidiary issues, and you
14 have lots of issues, you've got 13 factors, and many factors on
15 control, for instance -- and one of them we'll talk about is
16 whether or not somebody really could refuse, when they sign in,
17 whether they could refuse to take a ride without any
18 consequence or not, how terminable they were, how much
19 monitoring there really is of some of these suggestions, et
20 cetera, et cetera.

21 What do you do? Do you submit, under your scenario, 40
22 interrogatories, special interrogatories to a jury to decide
23 each micro fact, subsidiary fact, and then the Judge then takes
24 that all in and then does a Gestalt analysis? Is that how it
25 works?

1 **MS. LISS-RIORDAN:** I think it's worked different ways
2 in different courts. Either that type of specific jury form
3 versus just asking the jury the final ultimate question.

4 I mean, I will note that since we --

5 **THE COURT:** You can't -- under your scenario, if it's
6 the ultimate question before the Court, a question of law, I
7 wouldn't be able to just throw it to the jury like a negligence
8 case.

9 **MS. LISS-RIORDAN:** Well, that's correct. In other
10 words, I think if you think that there are material disputes of
11 fact regarding material factors here -- in other words, we
12 haven't or they haven't proven overwhelmingly that they win
13 based on some factors, even though other factors might be
14 disputed but they're not so important, then perhaps it would be
15 appropriate to have the jury decide each of those factors and
16 then send it back to the Court.

17 But one point I do want to make is remember we have UCL
18 claims here. And both of our statutory claims are brought
19 under the UCL, which, of course, would be tried to the bench
20 anyway. So that is something to think about, that it may
21 possibly be --

22 **THE COURT:** If you have a mixture of jury and judge
23 questions, my recollection from first year of civil procedure,
24 the *Dairy Queen* or *Beacon Cedar* case, the Seventh Amendment
25 prevails and you have to let the jury decide all the factual

1 questions before the Court can issue equity decisions, et
2 cetera, et cetera.

3 So that doesn't help the fact that there's a UCL claim,
4 which is normally a question for the Court. It would still
5 have to await resolution of underlying facts by the jury.

6 **MS. LISS-RIORDAN:** But, Your Honor, I think once you
7 hear -- once you let me make my very first argument, I think
8 you might even be convinced that this first argument is
9 dispositive, period. But I'll wait until you're ready to hear
10 that argument.

11 **THE COURT:** All right.

12 **MR. HENDRICKS:** And we come back and say that, again,
13 there is a threshold question here that we believe disposes of
14 the further inquiry into whether they're employees or
15 independent contractors.

16 **THE COURT:** Why don't we go ahead and address that
17 since that's your threshold question.

18 **MR. HENDRICKS:** Your Honor, I don't think there's any
19 dispute that the law requires that sort of showing, that, as a
20 factual matter, that the individuals claiming to be employees
21 must first demonstrate that they provided service. Okay?

22 We see that under the *Narayan* case and other cases that
23 articulate the standard. Even in *Borello* you hear language
24 about that when you look at control you're looking at it that
25 they were under the control of the person they were providing

1 service to. That becomes a very important component.

2 **THE COURT:** And does that question here turn on
3 whether one characterizes Uber as a software provider as
4 opposed to a transportation provider?

5 **MR. HENDRICKS:** No.

6 **THE COURT:** No?

7 **MR. HENDRICKS:** No.

8 **THE COURT:** So if I conclude that, like the PUC did,
9 that Uber is in the business of providing transportation, you
10 don't think that drives that first question?

11 **MR. HENDRICKS:** I do not. I think it can be a factor.
12 And that is to say, because we are a software company that
13 develops an app, I think that strengthens the fact that they're
14 not in this instance providing a service to us.

15 But more importantly is the nature of the obligation and
16 what's actually taking place. You have to step back and look
17 at this not as elements and a punch list. You have to step
18 back and take a look at what is the actual relationship.

19 The cases that you are probably relying on are
20 particularly dispatch cases where people are delivering goods,
21 transportation cases where you have FedEx or JHK, where the
22 entity that is being viewed as the employer has already entered
23 into some sort of contractual relationship where they are
24 obligated to deliver a product. Okay? A package.

25 You know, I go to the FedEx station, I give you my ten

1 bucks and say deliver it by tomorrow. Okay? That is a
2 different kind of situation than what we have here.

3 Under our agreements with the transportation providers, as
4 well as with riders, Uber never assumes that obligation. No
5 rider can come to Uber and say, you know something, the app was
6 down, you owe me. You know, that driver didn't show up, you
7 owe me.

8 We never obligate ourselves to be a transportation
9 provider. The agreements, which are the first step in the
10 analysis here, don't create that sort of obligation on the part
11 of Uber. Uber disclaims it as to passengers. It disclaims it
12 as to the plaintiffs in this particular case.

13 **THE COURT:** So could Uber operate and be an ongoing
14 company with revenue if it weren't providing -- essentially,
15 responding and providing and connecting people who ride rides?

16 **MR. HENDRICKS:** Our product is intellectual property.
17 We get licensed in a variety of different ways. We assume
18 different revenue models relative to that. You see
19 applications all the --

20 **THE COURT:** Well, if all you were doing was selling an
21 app, you could sell an app and sell it at the app store.

22 **MR. HENDRICKS:** And we download it from the app store.
23 Nothing precludes us -- the manner --

24 **THE COURT:** But Uber does a little more than that,
25 doesn't it?

1 **MR. HENDRICKS:** The manner in which we are compensated
2 for the intellectual property does not change the inquiry as to
3 whether or not these individuals are providing a service to us.
4 That is not the proper inquiry.

5 Secondly --

6 **THE COURT:** Well, no, the inquiry is how do you make
7 your money? Do you make your money by selling an app at the
8 app store? Or do you make your money from people buying a
9 service, i.e. getting a ride?

10 **MR. HENDRICKS:** No, no, no. We make our money from
11 licensing software. That's what we do. And giving them the
12 right to use it. And we happen to have a compensation model
13 that, when they use it successfully, we get compensated.

14 Look, *Martinez vs. Combs*, the Supreme Court, when
15 analyzing a suffer and permit standard, made very clear -- and
16 this is the thing I want to make clear here -- there is a
17 difference between benefiting from something, benefiting from a
18 transaction, and someone actually being in service to provide a
19 service or providing a service to that individual.

20 The fact that we benefit from these individuals using our
21 apps simply makes them a customer. That is our view of it.
22 That's what the evidence supports.

23 Take a look at Mr. Manahan's testimony. Mr. Manahan
24 testified that he pays us a service fee for using the app.
25 That is our connection. We promote. We market. That's

1 correct. We assist with the transaction in some respects in
2 terms of processing the payment.

3 But, fundamentally, the commercial relationship between
4 these drivers and transportation providers and Uber is one
5 where they are our customer, where we license to them our
6 software, and we receive a fee for doing that.

7 That is not them --

8 **THE COURT:** The fact that you screen drivers, select
9 them, the fact that you, Uber, sets the fare, not the drivers,
10 the fact that the company could not operate and exist as a
11 company and make money without drivers, you think that does not
12 establish, among other things, that these drivers serve Uber?

13 **MR. HENDRICKS:** First to which, where -- we are in
14 summary judgment. I know that --

15 **THE COURT:** And, therefore, all the inferences are to
16 be drawn in favor of the drivers even on the subsidiary
17 question.

18 **MR. HENDRICKS:** Inferences as to evidence in fact.
19 Where is the evidence -- this is their burden to show that they
20 provide service to us. Counsel, in her motion, said, oh, God,
21 of course, that's the case.

22 Where is the evidence of that? Where is the declaration
23 of that? Where is the fact of that upon which is drawn --

24 **THE COURT:** The three things that I just mentioned are
25 undisputed, correct? Uber does select -- there's some

1 screening process. I hope you do. There's some screening,
2 correct?

3 **MR. HENDRICKS:** Sure, sure, sure, sure.

4 **THE COURT:** Right.

5 **MR. HENDRICKS:** Sure. That's right.

6 **THE COURT:** And you have certain requirements of
7 drivers. May be minimal, but you have some requirements.

8 **MR. HENDRICKS:** We make decisions about who we give
9 access to our software, that's correct.

10 **THE COURT:** So it's not like Craigslist, where anybody
11 can get on and sell whatever they want. Well, even there,
12 there are some restrictions.

13 You exercise some quality control. And there is some
14 feedback and some right to terminate people who don't follow
15 the rules in respect to their driving performance and their
16 performance as drivers. That's undisputed, right?

17 You do have a 5-star rating situation. You may not sit
18 somebody, as in the FedEx situation, and drive around four
19 times a year with somebody, but you do solicit feedback and you
20 rate drivers and you warn drivers if they fall below a certain
21 standard or if they do certain things while they're driving
22 that they're not supposed to do.

23 **MR. HENDRICKS:** The ultimate standard -- there is a
24 standard that's provided for quality. That's the standard.

25 And the cases say that that does not create an employment

1 relationship.

2 **THE COURT:** I'm not talking about relationship right
3 now. I'm talking about whether they're in the service.

4 **MR. HENDRICKS:** Okay.

5 **THE COURT:** And whether your business -- your client's
6 business is merely providing a software platform or providing a
7 transportation service.

8 So if they're only providing software, why would they be
9 concerned with who's buying it, whether they're qualified, how
10 they're doing on the job? And why would they have control over
11 the pricing, and whether to implement surge pricing or not, et
12 cetera, et cetera.

13 Why are they setting the rates by which drivers are
14 getting compensated? Why do they have a right to terminate
15 drivers under certain circumstances?

16 **MR. HENDRICKS:** So let's --

17 **THE COURT:** It sounds like a little more than just
18 selling something on the app store.

19 **MR. HENDRICKS:** But, Your Honor, that's a far --
20 that's a far leap. The implicit notion within your suggestion
21 is, if those are true, that must mean they're providing a
22 service.

23 And I'm telling you, even if all those things were true --
24 and I will walk through them and explain why they don't
25 establish any sort of service relationship, but even if they

1 were true, they don't mean that we are now receiving a service
2 within the meaning of the law.

3 And let's walk through this for a moment. I am a
4 concierge. I work at a hotel. I have hotel guests that come
5 up to me all the time and say, you know something, I really
6 would like a referral for a dog -- I brought my dog in, do you
7 have a dog walker?

8 And because of what I do, I have connections with people.
9 I have dog walkers. I have restaurants. I have drivers. You
10 know, a lot of drivers stay at hotels.

11 And I sit back and say, you know something, I can pick
12 between a lot of different folks. If you give me ten bucks,
13 the next time someone asks for a referral, I'll refer you.

14 And if you give me that ten bucks, Your Honor, and I refer
15 you to a hotel guest, I'm not your employer. You are not
16 providing a service to me.

17 The service you are providing is still to that hotel
18 guest, getting them from point A to point Z. And all I've
19 done --

20 **THE COURT:** So Uber is nothing more than a concierge
21 working for tips?

22 **MR. HENDRICKS:** Uber is nothing more than providing
23 opportunities and lead generation services, which these
24 plaintiffs have certified in their contracts with us.

25 **THE COURT:** What about the price setting? What about

1 the fact that Uber sets the price? That's a little different
2 than a concierge asking for a tip.

3 **MR. HENDRICKS:** I could give you different examples.

4 **THE COURT:** Well, what about that example? I'd like
5 you to address that. Isn't there a difference there?

6 **MR. HENDRICKS:** Let's assume that I say that. Let's
7 assume I come to you and say, hey, you know something, I get a
8 lot of people -- this is a good business, wait a second, I have
9 someone who's paying me to refer them to someone else, and I
10 think there's a market out there that if folks were to price
11 their services at this bucket, a lot of people would do it.
12 And I get a lot of money by connecting people.

13 It still does not mean that I am providing transportation
14 services. What I'm doing is a referral service, a lead
15 generation service. And my business is creating opportunities.

16 Not one of these drivers, not one of these plaintiffs are
17 obligated to take any of these leads. When that person comes
18 to me and asks for the reference, I'm not obligated to give
19 them one. And even if I tell them, hey, go with
20 Ms. Liss-Riordan, they're not obligated to do it.

21 So it's not as though I'm providing the service or have
22 accepted a duty to provide the service or that my business is
23 doing that. I don't own a fleet of vehicles. Okay? The
24 *Yellow Cab* --

25 **THE COURT:** So the logo about being everybody's

1 private driver really doesn't -- that has no bearing on this
2 question, how Uber presents itself to the public?

3 **MR. HENDRICKS:** I think it has no legal bearing to the
4 question, particularly in light of the fact that people are
5 entering into specific agreements that set forth that
6 relationship.

7 Those sort of communications are marketing. It is
8 designed to generate interest in the application. We can do
9 that without becoming a transportation provider.

10 Let me give you another example.

11 **THE COURT:** What happens if somebody's credit card
12 bounces? Uber collects, right, and remits a portion to the
13 driver. What if that credit card bounces?

14 **MR. HENDRICKS:** We don't have an obligation to ensure
15 that -- if it doesn't get paid, it doesn't get paid.

16 **THE COURT:** So the driver doesn't get paid?

17 **MR. HENDRICKS:** We're not the insurer, the guarantor.

18 **THE COURT:** So it is done on a per-transaction basis
19 of payment? So if something fails --

20 **MR. HENDRICKS:** If the card's not good, the card's not
21 good.

22 **THE COURT:** Who bears the risk, is what I'm asking?

23 **MR. HENDRICKS:** The driver would bear the risk of
24 that. We may -- so, for example, through contract, we've
25 agreed under certain circumstances to charge the passenger for

1 a cancellation fee, but that's a fee that goes to the driver.
2 Okay?

3 **THE COURT:** And who collects that?

4 **MR. HENDRICKS:** It's passed through, but it's for the
5 driver or the transportation --

6 **THE COURT:** The actual collection is done by Uber.

7 **MR. HENDRICKS:** Per agreement, yeah. They've asked us
8 to do that. That's another service that we're providing to
9 them.

10 **THE COURT:** A little more than a concierge would
11 normally do.

12 **MR. HENDRICKS:** But still, where's the direction of
13 activity? Yeah, Uber is doing that. We're doing it as a
14 service. It's a part of why we get our fee. We get a
15 commission.

16 What's that commission for? It's giving you the access to
17 the intellectual property. It's giving you access to the
18 credit card processing to some extent. It's giving you access
19 for dealing with issues that may come up.

20 And that's just like what happened in *Rabanal*. In
21 *Rabanal*, the Court of Appeal in that case made that same sort
22 of conclusion. It's the exact same conclusion that happened in
23 Massachusetts, where the Court said, gee, all they're doing is
24 providing service. And --

25 **THE COURT:** So let me ask you --

1 **MR. HENDRICKS:** One more point, Your Honor --

2 **THE COURT:** -- you think the *Yellow Cab* case --

3 **MR. HENDRICKS:** One more point, Your Honor, if I
4 could. One more point. One more point.

5 If you take a look at the insurance cases, the *Arnold*
6 case, for example, that's a case where you have an insurance
7 provider, right, entering into an independent contractor
8 relationship with a marketer, an agent of sorts.

9 And the fact that they may be related in some fashion,
10 complementary in some fashion, doesn't suddenly convert them
11 into an employee. In this instance, the mere fact that this
12 application, the particular usage --

13 **THE COURT:** You're conflating. I'm not at the
14 employee. I'm at the threshold question, a simple threshold
15 question of whether there's enough semblance of a service being
16 provided as to trigger the presumption.

17 **MR. HENDRICKS:** And this is my --

18 **THE COURT:** The ultimate for these cases that you cite
19 the ultimate question, that's not the question I'm asking.

20 **MR. HENDRICKS:** But --

21 **THE COURT:** That's not the question we're discussing.

22 **MR. HENDRICKS:** Understood, but I'm making an analogy.
23 And the analogy is this: The mere fact that we may be
24 tangentially related, we make the point that we are a
25 application company, a software company.

1 The Court said, Well, I see that you're --

2 **THE COURT:** The PUC is wrong by categorizing you as a
3 transportation company?

4 **MR. HENDRICKS:** Well, first of which, it doesn't
5 categorize Uber in that sense. I believe that it was making
6 reference to, sort of, Raiser or other software operators.

7 And, moreover, the PUC does not say by virtue of that
8 status we are employers. It doesn't go to that connection
9 either. Okay?

10 The point is that -- is that the mere fact that we may be
11 tangentially related in some fashion, at least this
12 manifestation, doesn't mean that they are providing a service
13 to us. You have to go beyond that.

14 And, again, there is no evidence to that fact. The
15 evidence from Manahan is he pays us for use of the intellectual
16 property and the other services that we provide. The
17 passengers pay them. It's their fare.

18 We take a cut of that fare for our services. They're not
19 obligated to take any particular ride. We don't control when
20 they do those sorts of things.

21 So the suggestion somehow, as you go through this list of
22 items and say, well, that must mean they're providing you a
23 service, no, it doesn't.

24 It means that we have an intellectual property. It is the
25 application. We market that. Guess what, we market it to

1 customers as well, to the rider side of things.

2 **THE COURT:** All right. Let me ask you to respond.

3 **MS. LISS-RIORDAN:** Uhm, certainly. There are a lot of
4 ways to respond, but let me just start out by saying --

5 **THE COURT:** Give me your best argument, because I want
6 to move on, frankly.

7 **MS. LISS-RIORDAN:** Okay. I'll try to jump the gun
8 quickly. Uber holds itself out to the public as a car service.
9 We've cited Exhibit 3, "everyone's private driver." Uber
10 refers to "our chauffeur." It refers to what Uber drivers do.

11 A number of courts have said that the way companies hold
12 themselves out to the public shows what their business is.
13 This does merge into the factor regarding what the nature of
14 the business is. But in *Estrada* the Court said, "Without the
15 drivers, there would be no company."

16 In the *Yellow Cab* case -- it's interesting that in the
17 *Yellow Cab* case they were found to be employees and provide
18 service to the cab company when there the payments that were
19 made were for what the company said was renting the cab. So
20 unlike Uber, it wasn't getting a revenue off of each ride.

21 Of course, in the *Yellow Cab* case, just as Mr. Hendricks
22 is arguing, there was no obligation by the company to provide
23 any ride for any particular customer. If a customer needed a
24 cab and there was a cab available, they would get the ride.
25 They weren't obligated to give them the ride.

1 The Courts have pretty uniformly rejected defendant's
2 attempts to deny the obvious and try to recharacterize what
3 they are.

4 In the FedEx cases, FedEx tried to make the same argument,
5 that it wasn't a package delivery company; that it was a
6 logistics network that simply connected people and businesses
7 who wanted to send packages with independent businesses who
8 wanted to deliver them.

9 And the Courts now, in a number of states, including in
10 the *Alexander* case, have rejected that. In the Massachusetts
11 case, the Court noted that that was an interesting metaphysical
12 argument, but it's clear from the way they hold themselves out
13 that they are a delivery company. That's what customers would
14 believe.

15 The *Kubinec vs. Top Cab* case, the defendants cite from
16 Massachusetts -- first of all, it's a lower court case. And an
17 appeals court case has since said that cab drivers there are
18 likely to be able to prove they are employees and that they
19 provide services for the company, not the other way around.

20 **THE COURT:** Which -- in that case?

21 **MS. LISS-RIORDAN:** The *Kubinec vs. Top Cab* case is a
22 trial court -- a recent trial court decision from
23 Massachusetts --

24 **THE COURT:** Yeah, I'm familiar. You said there was a
25 subsequent Court of Appeal in Massachusetts?

1 **MS. LISS-RIORDAN:** Yes, that we cited. It's *Sebago*
2 *vs. Tutunjian*.

3 **THE COURT:** All right. Well, to tell you the truth,
4 with all due respect to the Superior Court of Massachusetts
5 interpreting Massachusetts law, which appears somewhat distinct
6 from California law, I don't think that case is particularly
7 persuasive, particularly since in that case the company
8 received a set amount no matter what, and it was not dependent
9 on whether rides were given. Nor do they set cab fares in that
10 case.

11 But, in any event, let's move on to -- I think the more
12 interesting question here is whether or not the facts, and if
13 disputed, at least those facts drawn in favor of the plaintiffs
14 are sufficient to establish at least a jury question.

15 And so I'd like your comments on the following. I mean,
16 seems like one of the main arguments here is that drivers are
17 not obligated -- I mean, they are so free and so free from
18 control that the only obligation is to work once every -- is it
19 180 days or something? If you're Uber Black, it's one every 30
20 days or something like that?

21 **MR. HENDRICKS:** If you're peer-to-peer Raiser, one
22 trip every 180 days. If it's Uber Black, it will be one trip
23 per every 30 days.

24 **THE COURT:** Right. And that -- therefore, that
25 certainly doesn't look like your typical employment

1 relationship when somebody can decide, "I'm not going to work
2 at all except once every half year, and I'll show up when I
3 want."

4 Now, once they're on duty, whether they have to take a
5 call or a ride or not, that's the second question I want to
6 address. But the first question is, this sure doesn't look
7 like a typical employment relationship.

8 **MS. LISS-RIORDAN:** Well --

9 **THE COURT:** Can you think of any other analogy, any
10 other situation where courts have said, yeah, that's an
11 employment relationship?

12 **MS. LISS-RIORDAN:** Yes, I absolutely can. *Borello*.

13 The California Supreme Court held that the farm workers
14 were employees despite the fact that they could work whenever
15 they wanted, as much or as little as they wanted. And rather
16 than providing direct supervision in the field to them, the
17 company operated -- the farm operated by putting incentives
18 into place that would simply encourage the farmers to do the
19 work.

20 *Borello* is really quite right on point.

21 Other cases as well, more recent cases, the *Air Couriers*
22 case, the Court of Appeals noted that the drivers could work
23 when they wanted, however long they wanted; their schedules
24 were flexible; they could choose --

25 **THE COURT:** But, in fact, didn't they work pretty much

1 on a regular basis? Isn't that what some of the evidence
2 showed?

3 **MS. LISS-RIORDAN:** Well, the evidence was that they
4 generally did. And a lot of the Uber drivers drove on a
5 regular basis, but they were free to work when and however much
6 or little as they wanted.

7 They were also free to work for other companies. There
8 was no prohibition on that. They were not required to accept
9 every job that was offered. And there were no repercussions if
10 they didn't accept a job. They were paid by the job. They
11 didn't have formal training. They didn't have uniforms, et
12 cetera.

13 But in *Borello*, the California Supreme Court, if you read
14 that decision, is really so much akin to this case. I mean,
15 it's interesting, as I was going back and rereading the
16 cases -- it's funny, *Borello* sort of stands for -- is commonly
17 considered to stand for the proposition that control is the
18 ultimate issue.

19 But, really, what the Court was getting at in *Borello* is
20 that control is not everything. We're going to look at all
21 these secondary indicia. In *Borello*, there was very little
22 control. There was -- there was one employee who was generally
23 seeing how the farmers were doing their work.

24 But the farmers were on their own to decide how to do
25 their work, when to do their work, whether to do the work at

1 all or not. So on that issue I don't think there's anything
2 unusual about this situation.

3 I don't think there's anything unusual about a company
4 claiming that its workers aren't employees simply because they
5 can work as much or as little as they choose. So that's that
6 point.

7 **THE COURT:** All right. Let me get your response to
8 that, Mr. Hendricks. What about *Borello*?

9 **MR. HENDRICKS:** Several points, first of which, the
10 actual product that was being grown on the land belonged to
11 *Borello*. And so these individuals, when performing their
12 harvesting functions, were servicing *Borello*'s interests. They
13 were performing work for *Borello*. That is the first point that
14 distinguishes this from this case.

15 In this case, Uber is under no obligation to provide any
16 transportation services to any rider. And the riders are free
17 to have the discretion, and have the discretion by contract,
18 whether to accept or not accept.

19 So when they accept or not accept, they are doing it for
20 their benefit. And not only their benefit, but they're doing
21 it at their own discretion, not ours.

22 **THE COURT:** Well, but that discretion point is the
23 very point that was just made.

24 **MR. HENDRICKS:** But the difference --

25 **THE COURT:** The discretion whether to work or not.

1 Sure, the crops may belong to *Borello*, but no agricultural
2 worker was obliged.

3 **MR. HENDRICKS:** But, Your Honor, at some point the
4 crop had to be harvested, and that's the key. It had to be
5 harvested. Here, there is never any particular obligation on
6 any driver or any transportation provider to do anything, quite
7 frankly. And that's a fundamental qualitative difference in
8 the level of control.

9 The reality of it is that, because you know that they're
10 going to have to harvest it at some point, there is some level
11 of control implicit within that relationship that doesn't exist
12 in this particular fact.

13 Uber -- individuals using the Uber application ultimately
14 really don't have to use it. It's completely left up to them.
15 There's not this necessary point in connection with the
16 harvest, which was *Borello's* product, that they have to service
17 in some sort of way.

18 Here there is no particular thing that the Uber drivers
19 have to do for Uber. And that's not the nature of the
20 relationship.

21 There's further control, Your Honor. The fact -- if you
22 go back to the contracts -- and again, you know, if you look at
23 *Ayala*, it says look at the right of control, look at the
24 contract. That's going to be the initial dispositive factor.

25 In our contracts we, in fact, disclaim any obligation to

1 provide ultimate service. There's no duty on the part of the
2 drivers or the transportation providers relative to Uber to
3 take any particular rides or trips. We don't set their
4 schedules.

5 We don't -- in terms of pricing, let's talk about pricing
6 for the moment. If we had control over drivers in that
7 respect, if we really set their wages in that sense, we
8 wouldn't need to have surge pricing.

9 We would simply say, you know something, we want you out
10 on the road at this point in time, and if you're not we're
11 going to deactivate you. We don't have that right under the
12 agreement. We've never communicated that fact.

13 All of the evidence indicates that everything we do is to
14 incentivize because we don't, in fact, have the ability to
15 control Uber drivers.

16 There's a marketplace out there regarding pricing. The
17 Court tried to suggest that we set, in essence, the wages here.
18 We have some influence in terms of the rates. There's a
19 formula that parties agree to when using the application, that
20 they're going to agree to these rates.

21 There's language in the partner agreement that
22 specifically identifies that the rider can attempt to negotiate
23 a lower rate and the driver can agree to a lower rate. There's
24 a mechanism for fare adjustment in the application.

25 But understand what you have in terms of pricing. Okay?

1 You have a dynamic marketplace taking place. Because we lack
2 the control to say when they're going to use the Uber app,
3 okay --

4 **THE COURT:** When who's going to use the Uber app? The
5 drivers?

6 **MR. HENDRICKS:** Both. Either the rider or the driver,
7 okay? They're really setting the pricing here. If there's
8 high demand and low supply, the prices go up. And the
9 driver --

10 **THE COURT:** They don't have to go up. You're
11 maximizing profits. There's no law that requires -- just
12 because demand rises -- of course, every producer is subject to
13 the laws of supply and demand. Nobody sets it unilaterally
14 unless you're a total monopolist and you're selling air or
15 water, so --

16 **MR. HENDRICKS:** No, the point is this, Your Honor --

17 **THE COURT:** -- let's be real. You're acting as if
18 Uber is some passive entity.

19 **MR. HENDRICKS:** I'm not acting like that at all.

20 **THE COURT:** You're maximizing profit. New Year's Eve,
21 they're going to jack it up and charge triple surcharge rates.

22 **MR. HENDRICKS:** And, Your Honor --

23 **THE COURT:** They don't have to.

24 **MR. HENDRICKS:** Your Honor, if a driver feels at any
25 given time that the rates that are being charged are too low or

1 too high, they can make the choice when to enter the
2 marketplace, the price where they feel their services are at.

3 If a rider feels that the surge pricing is too high, they
4 can decide --

5 **THE COURT:** That's right, it takes two to tango. But
6 you're an active party. Uber is an active party.

7 **MR. HENDRICKS:** I'm not suggesting that we're not an
8 active party. What I'm suggesting is, is that the driver and
9 the transportation provider has the ultimate discretion as to
10 when they utilize the service.

11 They're the ones that are making the determination as to
12 the value of their services and what they're willing to receive
13 as compensation for providing those services. Not us.

14 It's a different situation --

15 **THE COURT:** Well, let's go back to where we got here.
16 I asked you a simple question. I'm trying to isolate the
17 factors.

18 One of the factors -- one of the key things you have
19 repeated thematically in your papers is that drivers can work
20 anytime they want; they're not obligated to do anything;
21 there's not a regular time to work. And that is true. That is
22 one indicia.

23 The more regularized it is -- and that is one difference,
24 for instance, between this and the *Alexander* case, where it's
25 clear you had to show up at 8 o'clock, to the center, pick up

1 the -- you know, if you didn't do it, you're going to miss out
2 on that day's work. And you had to come back and return the
3 tracker and all that sort of stuff. It seemed more regularized
4 because there were hours, you had to get it done within a
5 certain amount of time.

6 Of course, here people can check in and check out as much
7 or little as they want. But the come-back to that is that
8 there are cases that say, well, that is true in, at least
9 theoretically, in *Borello* and *Air Couriers*, that people could
10 volunteer to work anytime they wanted.

11 And the simple point is, again, it's not dispositive. The
12 mere fact that the putative employee can, sort of, choose his
13 or her hours, days of work, frequency, does not necessarily end
14 the debate.

15 **MS. LISS-RIORDAN:** Your Honor --

16 **MR. HENDRICKS:** I think --

17 **THE COURT:** That's all -- you know --

18 **MR. HENDRICKS:** The problem, Your Honor, is I feel as
19 though the Court is going through isolated aspects of cases and
20 not looking at the cases from the factual posture that they
21 arise. Okay?

22 *Air Courier* is a different case from the Uber posture. So
23 whatever weight they've given particular factors must be
24 considered in the context of that case. *Air Couriers* was a
25 workers' compensation case. This is not. So the presumption

1 that's occurring in that case does not occur here.

2 **THE COURT:** Well, what do you mean by that? If I were
3 to find that drivers, contrary to your argument, do serve Uber,
4 that presumption applies.

5 I understand that *Borello* and other cases talk about
6 applying the employee versus independent contractor status in
7 the context of the statutory purpose and sometimes in the
8 liberality of that purpose in terms of protecting workers or
9 ensuring workers' compensation, et cetera, et cetera. But here
10 we have a Labor Code that's just as solicitous of workers, I
11 think, as any of these other provisions.

12 And I have not seen any case that suggests that the
13 *Borello* test and the derivative from that is going to be
14 applied significantly differently in this context compared to
15 workers' comp or unemployment insurance or anything else. I
16 have not seen a case that suggests a totally different
17 analysis.

18 **MR. HENDRICKS:** Well, but, again, understand the
19 posture of this particular case.

20 This case was a case where there had been an underlying
21 administrative proceeding where the Court of Appeal -- and I
22 think you have to be cautious in cases that are being done not
23 in the context of summary judgment, but cases that are being
24 done on the substantial evidence standard, because there the
25 appellate review is to find substantial evidence and even

1 inflate further the inferences that go a certain way.

2 And in the particular case here, unlike in the case with
3 Uber, the Court found that there were not, for example,
4 contracts with these particular drivers indicating independent
5 contractor status, contrary to the representations.

6 In our case, there are contracts. Where there are
7 contracts indicating independent contractor status and the
8 record supports that inference, courts have also said the
9 Courts should not easily disrupt those relationships.

10 In our instance, I --

11 **THE COURT:** Well, the Courts have also said that the
12 labels applied to other parties and even the parties'
13 expectation, for instance, is only one of some 12 factors in
14 the secondary list, not even in the primary list.

15 **MR. HENDRICKS:** Sure, sure.

16 **THE COURT:** So it is a factor. But it seems to be
17 pretty low on the hierarchy of factors.

18 **MR. HENDRICKS:** Well, since we're on that point, I'd
19 like to raise that point that you just raised to respond to
20 another issue. And that is, you talked about Uber's marketing.
21 You know, again, I think the Court has to look at, actually,
22 the relationship between the parties and not necessarily
23 characterizations of that.

24 And, you know, to the extent the parties' characterization
25 of their relationship in a contract as being independent

1 contractor status, Uber providing lead generation is not
2 controlling, I don't know how Uber's statement in internal
3 marketing materials, and for which foundation has not fully
4 been laid as to when they were distributed, and those sorts of
5 things, somehow should be controlling here. I think that would
6 be unfair to say Uber's statements matter, but yet the
7 statements of the drivers and the contracts they signed with us
8 don't matter in some sort of fashion.

9 **THE COURT:** Oh, I didn't say none of that matters. I
10 think all of that matters. The question is, at the end of the
11 analysis, when you look at it all and you have to draw all the
12 inferences, again, in favor of the nonopposing party, do you
13 find yourself in a situation where no reasonable jury could
14 find otherwise?

15 **MR. HENDRICKS:** But the further inference here is --
16 again -- and it's important that you keep in mind the
17 distinctions as you analyze these cases. This is another
18 delivery case. Okay?

19 It's another delivery case where the company at issue has
20 already committed to a customer: We're going to get your
21 package. We're in the business here. We're going to get your
22 package. And then I go to someone and say: Hey, I have to
23 deliver this package, I'm obligated to deliver this package.
24 Will you do it for me?

25 In that situation, going back to our service argument,

1 there is a clear line of service. In this case, that was one
2 of the considerations.

3 **THE COURT:** Well, I don't know how dispositive that
4 is. In the *Yellow Cab* situation, *Yellow Cab* didn't have to
5 respond when somebody calls a cab.

6 **MR. HENDRICKS:** The difference in *Yellow Cab* is they
7 had a fleet of taxis. They had a fleet of vehicles. The
8 central instrumentality of transportation is the vehicle.

9 Take a look at Mr. Colopy's testimony --

10 **THE COURT:** Well, the vehicle is no good if you don't
11 have a driver.

12 **MR. HENDRICKS:** Take a look at Mr. --

13 **THE COURT:** That's pretty central. Unless you have
14 driverless cars, I guess, maybe in the future.

15 **MR. HENDRICKS:** Or if you don't have a rider. Or if
16 you don't have a rider. We treat riders and drivers in
17 similar --

18 **THE COURT:** The fact that they own the cars is one
19 factor. They supplied one of the equipment. It's one of the
20 12 secondary factors. I acknowledge that.

21 **MR. HENDRICKS:** It's not simply that they supplied the
22 vehicles. It is evidence of the nature of their business.

23 When I have a fleet of vehicles and I have a dispatch
24 operation and I have you paint your cars a certain way and I
25 have a --

1 **THE COURT:** That's a different point. Your point --
2 you were trying to make the point that you can only have an
3 employment relationship where the alleged employer has a
4 contractual obligation to do something, like deliver packages.
5 That's what you've been saying.

6 That's how you distinguish *Air Courier*. In a way, that's
7 how you distinguish *Borello*. And I'm saying, well, maybe
8 that's a factor. But, like I said in the beginning, it's not a
9 dispositive factor because we have other models where the
10 employment relationship has been found where there is no
11 preexisting exterior obligation.

12 **MR. HENDRICKS:** I've not seen that case. I've not --
13 I've not seen that case.

14 **THE COURT:** Well, *Yellow Cab* is a case where they're
15 not obligated in advance to give anybody a ride.

16 **MR. HENDRICKS:** But the difference -- again, you have
17 to look at the facts. What *Borello* tells us is it's very
18 dangerous to simply take one aspect of a case and then apply it
19 to a different --

20 **THE COURT:** That's why I'm discussing one fact at a
21 time. And I'm saying the fact that you want to emphasize --
22 you've emphasized several times now that these cases, like the
23 *Courier* cases, are different because there's a preexisting
24 obligation to perform package delivery, and that's why there
25 was an employment relationship.

1 Number one, I don't see that as a factor. That's not been
2 articulated in any one of the *Borello* progeny cases, the fact
3 of whether who owns the land, who owns the crop. But, in any
4 event, that factor is not dispositive, as evidenced by the
5 *Yellow Cab* kind of situation.

6 **MR. HENDRICKS:** The weight --

7 **THE COURT:** Maybe it's a factor, but it's not a
8 dispositive factor.

9 **MR. HENDRICKS:** The question is not necessarily
10 dispositive, because no factor is. The question is what weight
11 do you give the factors. And that changes depending upon the
12 factual context of the case.

13 And my point simply is, is that in a case where we have no
14 obligation to provide any transportation service to a rider,
15 and a driver has no obligation to provide any transportation
16 service, the factor of that sort of control and the fact that
17 we're not obligated to do that is significant in analyzing are
18 they integral to our business? It's significant in analyzing
19 whether they're providing a service to us. Okay? That's the
20 issue.

21 And so in the context of *Yellow Cab*, where they have a
22 fleet of vehicles that if they are not used they lose money off
23 of that proposition, we are not dealing with that situation
24 here. Okay?

25 They have instrumentalities that have to be used. They

1 have capital that they're trying to use. We are not dealing
2 with where we generate our revenue based upon making sure these
3 cars are being utilized in performing a service that we also
4 give dispatch service to, we have marketing logos on the
5 vehicles, and have a medallion and other sorts of aspects in
6 that regard.

7 What we say is we create opportunity. Okay? People can
8 take it or leave it. And in our situation, for example --

9 **THE COURT:** Well, you're also invested, besides, in
10 software development costs, which I'm sure are not
11 insubstantial itself. And you also provide the iPhone or the
12 phone.

13 **MR. HENDRICKS:** And you know something, that's so
14 fungible in terms of the phone, because at present, you know,
15 there are people that can utilize the app using their own
16 phone.

17 The providing of the phone was not a function of providing
18 equipment. It was a function of that's how the intellectual
19 property was transmitted. That was the best way, at the time,
20 to protect the property.

21 **THE COURT:** Well, at least under the facts here, the
22 phone is part of the deal.

23 **MR. HENDRICKS:** What's that?

24 **THE COURT:** There's evidence that the phone is part of
25 the deal.

1 **MR. HENDRICKS:** And they pay us a fee for it. It's
2 not like we're giving them the phone.

3 **THE COURT:** Well, still you're providing the phone.

4 **MR. HENDRICKS:** But we're not giving it to them.

5 **THE COURT:** You have an investment. You have
6 property. What good is the phone and app? And the app has,
7 I'm sure, a fairly high developmental cost figure, sunk cost.
8 I'm sure it's no small thing.

9 So the idea, well, we're nothing more than a broker
10 that -- we're introducing a rider, and we have nothing invested
11 in this thing is a bit of misnomer. You may not own the cars,
12 but you own the property, including intellectual property.

13 **MR. HENDRICKS:** But the fact that we have something
14 invested does not mean, therefore, that -- my difficulty is the
15 inference. And I'm trying to determine -- to be responsive how
16 the Court goes from the fact that you have an investment or may
17 benefit from a transaction means that, therefore, they're
18 providing a service to you.

19 I'll give you another example. I'm a recruiter. Okay? I
20 work with companies who pay me a fee to successfully recruit
21 candidates for them. I go out in the marketplace and I
22 cultivate candidates. I spend money on advertising. I spend
23 money on promoting the company that I'm trying to get them
24 placed for. I talk them up. Okay?

25 And when I get those candidates -- right? -- I even talk

1 to them. When you going on the interview, make sure you talk
2 to this person this way. They like this. You know, I think
3 this is what they're looking for. You know, you shouldn't wear
4 that suit. Maybe you should dress this way. No, they're a
5 casual company. This is how you should respond to them. I
6 give all sorts of feedback and suggestions in all of those
7 things. Okay?

8 And I only get paid if they get hired. But if they get
9 hired, the fact that they were looking for work, the fact that
10 they actually got work, you know, the fact that they continue
11 to work doesn't mean that I'm their employer.

12 And, in fact, my recruiting contract often will say if
13 they quit within six months, I don't get my fee. So all of my
14 energies and efforts in marketing my operation and marketing
15 them and giving them information and giving them suggestions
16 for the purpose of recruitment, which is my distinct
17 undertaking -- okay?-- giving them an opportunity does not mean
18 that now they're my employee, even though I benefit if they get
19 the job and perform the services.

20 **THE COURT:** Well, one could easily come back and say
21 one of the factors -- the subsidiary factors is whether one is
22 in a specialized industry, a specialized skill exercised in an
23 industry. Recruitment, as we all know, is not something people
24 do just right off the streets. It is very specialized. You
25 have to have a certain amount of talent and skill to be a

1 recruiter. And it is an industry unto itself.

2 **MR. HENDRICKS:** Okay.

3 **THE COURT:** A little more specialized skill, I think,
4 than driving a car.

5 **MR. HENDRICKS:** I disagree. And let me explain why.

6 Again, you're looking at the shipping cases where people
7 are driving packages.

8 Here people are driving people. The very ratings that
9 they're talking about and the variations in the ratings --
10 okay? -- the very fact that people are expected to give
11 excellent service so the customer is happy, the rider is happy,
12 and the fact that some people can't do that, this is not
13 necessarily a simple thing to do.

14 In any human undertaking, when you're interacting with
15 people versus packages, it takes some level of skill. There's
16 no evidence here --

17 **THE COURT:** Which is exactly why I assume Uber has a
18 very extensive list of dos and don'ts and suggestions and
19 feedback to assure that that quality is maintained.

20 **MR. HENDRICKS:** But in your example of the recruiter,
21 where you say it takes skill, Uber is the recruiter. Uber is
22 the one that's connecting the two. Uber is the one that's
23 benefiting from its intellectual property, its skill, its
24 efforts in being able to understand what one market wants --
25 okay? -- and provide them with folks that might be able to

1 satisfy them.

2 The ultimate decision-making process of whether they work
3 and whether that transaction takes place, that's between the
4 recruiter -- between the employer, right, the person wanting
5 the recruitment, and the -- the potential employer and the
6 applicant. That's their relationship even though I'm very
7 much, as the recruiter, involved in it.

8 Uber is the recruiter in that example.

9 **THE COURT:** Let me ask you, Ms. Liss-Riordan, what's
10 wrong, if anything, with the recruiter analogy?

11 **MS. LISS-RIORDAN:** Well, recruiters typically don't
12 have, then, an ongoing supervisory relationship with the people
13 they recruit into a position. I think that's the main
14 distinction there.

15 If I could just go back to a little bit of what has just
16 been said, very briefly.

17 **MR. HENDRICKS:** Your Honor --

18 **THE COURT:** No, let her finish.

19 **MR. HENDRICKS:** Okay.

20 **MS. LISS-RIORDAN:** I still never heard from defense
21 counsel any real distinction in *Borello*. In *Borello*, the farm
22 wasn't obligated to provide the pickles to Vlastic. It just
23 sold as many pickles as it was able to.

24 **THE COURT:** His distinction is that the pickles
25 belonged to *Borello*. They had to be harvested and somehow

1 that, therefore, is a factor in -- some indicia of an
2 employment relationship as opposed to an independent
3 contractor.

4 It's lost on me because one could hire independent
5 contractors to pick the pickle just as much as an employee. I
6 don't know why it makes any difference who owns the crop.

7 **MR. HENDRICKS:** Because it goes --

8 **MS. LISS-RIORDAN:** If I could speak --

9 **THE COURT:** Let her continue.

10 **MR. HENDRICKS:** Okay.

11 **MS. LISS-RIORDAN:** Yes, thank you.

12 Okay. So in *Borello*, my point is just going to the factor
13 that there is no -- what he's arguing is there's no obligation
14 for Uber to provide a service to a passenger, there's no
15 obligation for the pickles to actually get harvested and be
16 sold to Vlastic. They were sold when and if they grew and when
17 and if they met Vlastic specifications.

18 In addition to the *Air Couriers* case and the *Borello* case,
19 on this issue that we're talking about regarding workers being
20 able to work as much or as little as possible, I just also
21 wanted to highlight the *JKH* case, where there were route
22 drivers and there were special drivers. And the appeals court
23 noted that the special drivers simply call in each day to
24 inform the dispatcher whether they want to work that day. They
25 can work whenever they want. They don't have to work.

1 The Court also said, this is on 569:

2 "The drivers are free to decline to perform a
3 particular delivery when contacted by the dispatcher even
4 if the driver has indicated his or her availability for
5 the day. The special drivers are not required to work
6 either at all or on any particular schedule."

7 Later, on page 1052, the Court notes that all drivers set
8 their own schedules and choose their own driving routes. Their
9 work is not supervised. It has only a vague idea of where its
10 working drivers are during the business day. They don't have
11 to report to the office.

12 So, anyway, you asked for cases, so I have *Borello*, *Air*
13 *Couriers*, *JKH*, working as much or as little as you want. It
14 does not mean that you're not an employee.

15 **THE COURT:** Let me ask you this, Ms. Liss-Riordan.
16 Let me take it one step deeper, and that is: What is your
17 contention as to when a driver is in the employ of Uber?

18 Is it somebody who does it occasionally? Is it at all
19 times, or when they decide to drive and turn on the app and
20 make themselves available?

21 At what point -- in other words, one could also say, in
22 response to the irregularity question and the occasionalness
23 question, that that does not mean necessarily that somebody who
24 only works occasionally or somewhat rarely, that doesn't
25 necessarily preclude them from being an employee when they do

1 go to work.

2 So whether it's a day laborer being picked up and being
3 told exactly how to handle a particular task when they're
4 brought to the site, or whether it's a reserve officer or
5 reserve firefighter who only works once every six months, but
6 once he or she reports, arguably, is in the employ.

7 So is it a fair construct to say that in a way it doesn't
8 necessarily matter how often they work, when they work; the
9 question is: When they're at work, that's when the employment
10 relationship kicks in and the Labor Code kicks in. Is that
11 your construct?

12 **MS. LISS-RIORDAN:** Yes, yes, absolutely.

13 Employees may work occasionally. Employees may work
14 part-time. Employees may just fill in on shifts when they're
15 needed or when they want to work. There's nothing really
16 unusual about that.

17 And just while we're on that topic, I just want to point
18 out one, I think, pretty significant point.

19 **THE COURT:** Well, when do they -- when does one become
20 an employee? When you turn on the app and you make yourself
21 available?

22 **MS. LISS-RIORDAN:** Well, you first become an employee
23 after you go through Uber's on-boarding process and follow all
24 of its steps to -- that's like going through the hiring
25 process.

1 But then just because you get hired, you don't necessarily
2 start working that day. You might not start until next
3 Tuesday. You might not start 'til next month. You start
4 whenever you start. But you're actually on duty.

5 And, in fact, Uber has referred to it as being on duty or
6 off duty.

7 **THE COURT:** So there's an employment relationship even
8 if you only work 1 out 180 days; all 180 days you're still in
9 the employ of Uber, you're just not working?

10 **MS. LISS-RIORDAN:** Well, I mean, let's just say a
11 restaurant server, who fills in shifts now and then, once every
12 six months gets called in to do a shift. They're an employee,
13 but they're only obligated to be paid, obviously, when they
14 work.

15 I don't really understand what's so unusual about that.
16 And, like you said, the day laborers, who might get hired for a
17 day, they're employees while they're working. And they're
18 entitled to the benefits of the wage laws while they're
19 working. Same thing for Uber.

20 While we're on this topic, I just wanted to point out
21 something somewhat significant that, I think, has been
22 misstated in defendant's papers, because one of the arguments
23 they make, I'm sure, about -- the next thing that might be
24 coming out of Mr. Hendricks' mouth -- is that Uber allows its
25 drivers to work simultaneously for other companies.

1 And, of course, in a number of the cases that we've
2 already talked about there was no prohibition on working for
3 other companies. I believe that was true as well in the -- in
4 the *Air Couriers* case as well as in other cases.

5 But I want to point out in particular that even though
6 Uber claims that it has no -- and it makes a big point of
7 drivers actually being simultaneously logged into Uber and Lyft
8 at the same time, that's actually prohibited by Uber's
9 contract.

10 In their papers, defendant --

11 **THE COURT:** While they're driving a customer.

12 **MS. LISS-RIORDAN:** No, it's broader than that.

13 In Uber's papers, they say that there's no prohibition on
14 them using the same apps simultaneously. But if you look at
15 Plaintiffs' Exhibit 15, page 3, which is 1679 Bates stamped, in
16 the bottom paragraph --

17 **MR. HENDRICKS:** One moment, Counsel.

18 **THE COURT:** Yes.

19 **MR. HENDRICKS:** What page?

20 **MS. LISS-RIORDAN:** I'm on -- this is Plaintiffs'
21 Exhibit 15. It's page 3 at the bottom. It's Bates stamped
22 1679, Uber 1679.

23 In the bottom paragraph, about halfway down, it says in
24 the contract:

25 "During the time that you are actively signed into the

1 software, you shall perform transportation services only
2 for requests received by you via the software."

3 So, in other words, in their contract they're saying that
4 while you have the Uber app open, you can't accept rides from
5 anyone else.

6 So I just wanted to make that point because that
7 contradicts what defendant has said in a number of its filings.

8 **MR. HENDRICKS:** Well, first to which, the testimony
9 from Mr. Manahan and, quite frankly, the declarations we've
10 submitted, and the testimony from the other plaintiffs indicate
11 differently.

12 That agreement is speaking, which has been consistent,
13 that if you're transporting -- it's intended to speak to if
14 you're transporting a passenger, a rider that you --

15 **THE COURT:** Yeah, but we're now on summary judgment.
16 So now you're asking me to draw an inference and take your
17 counter affidavits as true. And maybe you can present that at
18 trial. But, again, this is an example of a conflict.

19 You know, it says what it says. It doesn't say "while
20 you're driving." It says "while you're actively signed into
21 the software."

22 **MR. HENDRICKS:** "Actively."

23 **THE COURT:** It says that, so --

24 **MR. HENDRICKS:** "Actively signed into the software."

25 **THE COURT:** Okay.

1 **MR. HENDRICKS:** Well, let me say this. Let me come
2 back to a couple of these distinctions as well. And this does
3 go to the issue of Lyft and the simultaneous -- and in terms of
4 the evidence and in terms of all the declarations and the
5 testimony from the plaintiffs themselves.

6 The plaintiffs' understanding of what those obligations
7 were -- and that's always relevant -- you're not seeing a
8 distinction -- while counsel is making an argument, you're not
9 seeing a conflict in the evidence relative to what the
10 plaintiffs have testified to and the evidence that we've
11 submitted.

12 **THE COURT:** Well, and by the way, as we all know, the
13 test is the potential control, the authority to control; not
14 actual exercise of control.

15 So, again, even if somebody has an understanding to the
16 contrary, even if Uber says, well, we never did it that way,
17 but if they had the right to do it per contract, I have to
18 consider that.

19 **MR. HENDRICKS:** But what you have -- the issue is, is
20 there a dispute? And the issue is, what is the evidence of the
21 dispute?

22 All of the parties, the drivers themselves -- let's
23 exclude counsel's characterization. But the testimony from the
24 drivers themselves and the evidence presented by Uber, our
25 declarations indicate that people can simultaneously use that

1 software so long as they're not actually transporting someone
2 in particular. That's the only limitation.

3 But it's understood and it's known and it's accepted. And
4 when you look at issues of contract, it's a question of what
5 did the parties understand and intend. You don't have a
6 dispute between the intent of the parties relative to that.

7 Counsel is making an argument, but it's not counsel's
8 intent that matters --

9 **THE COURT:** But the ultimate question is whether Uber
10 had the ability to exercise the power to restrict people, even
11 if the practice wasn't to do so, or the custom had been that
12 way.

13 Even if one could say, well, these plaintiffs didn't
14 understand it that way, if, as an objective fact, one could
15 find that Uber had that power, the potential power, I have to
16 evaluate that under the *Borello* test, not the actual exercise.
17 And the Courts have emphasized that. It's the potential for
18 power.

19 **MR. HENDRICKS:** Your Honor, the issue is counsel is
20 attempting to argue an interpretation of the agreement. When
21 you're dealing with interpretations, you look at the intent of
22 the parties. She needs evidence as to the intent of the
23 parties.

24 The parties, Mr. Manahan and the other --

25 **THE COURT:** It seems to me the question is whether or

1 not the contract can be reasonably construed in light of the
2 evidence that's before me now in a certain way. Again --

3 **MR. HENDRICKS:** And the evidence before you now
4 includes the deposition testimony and declarations of the
5 parties subject to the agreement. And if you're going to reach
6 an inference as to what that means, you must look at that
7 evidence.

8 **THE COURT:** And what do they say?

9 **MR. HENDRICKS:** They say, "I understood that I could,"
10 and, in fact, with Manahan, "I did use the Lyft application
11 simultaneous." That is our interpretation and understanding of
12 it as well.

13 **THE COURT:** Okay. Ms. Liss-Riordan, what's your
14 response?

15 **MS. LISS-RIORDAN:** Well, my response is the contract
16 speaks for itself. The fact the Uber may or may not have
17 enforced that provision of the contract, as we've said --

18 **THE COURT:** What about your clients? What about the
19 driver's own intent in this case?

20 **MS. LISS-RIORDAN:** Well, I mean, first of all, he
21 didn't have both an Uber client and a Lyft client in the car at
22 the same time.

23 We also do have evidence in the record of a driver being
24 reprimanded for having Lyft branding visible while driving an
25 Uber client, which is also prohibited by the contract.

1 So the fact -- so even though Mr. Manahan may have,
2 against the contract, had both apps on at the same time, he was
3 either only driving an Uber passenger or a Lyft passenger at
4 that time.

5 But we also have evidence that Uber was discouraging
6 drivers from driving for the competition. And Exhibit 48L
7 shows the driver who was reprimanded for having the -- the Lyft
8 branding available.

9 But the point is that all of this goes to this issue in
10 *Air Couriers* again. There was no prohibition on the drivers
11 working for other companies.

12 **THE COURT:** All right. So here there is some
13 prohibition. The exact scope of that may be in dispute, but it
14 is not extreme where you're totally free. On the other hand,
15 you're not totally prohibited.

16 It's a gray area that, you know, one has to resolve
17 exactly to what extent the limitations are. It's a gradation
18 question.

19 **MS. LISS-RIORDAN:** Right. And also --

20 **MR. HENDRICKS:** Going to the *Air Couriers* case -- and
21 this is important -- there have been characterizations of these
22 cases. The facts have to be looked at very, very carefully.

23 If you look at that case, *Air Couriers*, the finding that
24 the Court was limited to was the following:

25 "The Court also rejected Sonic's claim that the drivers

1 themselves controlled the hours they worked."

2 So you talk about distinctions in cases, this is why I say
3 you have to look at the factual posture. In that proceeding,
4 the agency -- and I'm reading from page 937 of that case.

5 So in that situation you have the fact where the evidence
6 that -- that was found and upon which the Court of Appeal had
7 to consider in this decision was that, in fact, the Sonic
8 drivers did not control the hours that they worked. Okay?

9 There are other distinctions. At trial, a Sonic manager
10 testified that drivers, as a practical matter, did not turn
11 down jobs. Each driver testified he infrequently turned down
12 jobs. So there's these characterizations of certain aspects of
13 these cases.

14 But when you look at them closely, this is dealing with
15 delivery of packages that Air Courier, Sonic, had already
16 agreed to deliver. They did not have freedom regarding their
17 hours or circumstances. And that's not the record involved in
18 this particular case.

19 In addition, the Court noted the evidence was
20 uncontroverted that Sonic's drivers were performing an integral
21 and entirely essential aspect of Sonic's business.

22 We dispute that. Okay. That is something that -- that,
23 in fact, we've presented evidence in terms of the economic
24 relationship between transportation providers, riders, and
25 Uber. And there is no real evidence speaking to that. There

1 really is no evidence saying, you know something, you have to
2 deliver these -- you have to transport these passengers because
3 you're obligated to do so. We're not. You know, or that you
4 have such an investment -- and remember this, Your Honor, going
5 back to *Yellow Cab*.

6 You know, if my capital investment is all these taxis,
7 okay, I really can't be doing too much other with that. I'm
8 really in the taxi business when I'm leasing these taxis.

9 Uber, its technology which connects people together in
10 real time can be used in other applications, as it is.

11 People demand ice cream. We have vendors, vendors who
12 produce ice cream that are able, through our software,
13 demanded -- on demand to people that want ice cream. We
14 facilitate that transaction. We're not in the ice cream
15 business, you know.

16 **THE COURT:** You mean there's something called Uber Ice
17 Cream?

18 **MR. HENDRICKS:** Yeah. Yeah, yeah. I mean --

19 **THE COURT:** I've never heard of it.

20 **MS. LISS-RIORDAN:** Uber Kittens. They deliver kittens
21 too. These are not core parts of their business.

22 **MR. HENDRICKS:** Well, see, then this --

23 **THE COURT:** But we're going this business right now.
24 The fact that you have other enterprises that -- you know.

25 **MR. HENDRICKS:** We're talking about the application

1 and the intellectual property and -- and the use of that. And
2 we're rebutting the notion that somehow the only application of
3 it deals in this particular space. That's not the evidence
4 that's been presented.

5 Counsel has presented no specific evidence that somehow
6 that --

7 **THE COURT:** Well, let me ask you this question.
8 Here's another factor that may inform what you just said, but
9 also informs the control factor, and that's this dispute over
10 whether there's a requirement or any sanctions for not -- for
11 rejecting calls.

12 And Uber claims that you can reject any proposed fare
13 without penalty. But there is some evidence that's been
14 submitted by the plaintiffs -- Exhibit 48 is an example, 48J is
15 an example -- of a driver who's threatened with suspension if
16 he didn't raise his acceptance rates towards the 80 percent,
17 which is consistent with Exhibit 17, which, I guess, is the
18 handbook or something that says we expect you to maintain an
19 80 percent acceptance rate. If you go below that, you know,
20 red flags will go up.

21 And so that suggests that there are consequences,
22 potential consequences if you go below the 80 percent
23 acceptance rate.

24 Now, again, you may dispute that. You may say that that's
25 inaccurate or that's a misreading of the handbook. But, again,

1 assuming all the facts proffered by the plaintiff are true, and
2 drawing all inferences therefrom, why doesn't that suggest that
3 there is, certainly, at least an incentive, if not a
4 requirement, to pick up fares or at least not reject fares at a
5 rate greater than 20 percent?

6 **MR. HENDRICKS:** Okay. One, the contracts provide that
7 drivers can reject -- and transportation providers can reject
8 fares. That's the first point.

9 **THE COURT:** Yes.

10 **MR. HENDRICKS:** So to the extent -- and I want to get
11 to this issue about control.

12 To the extent plaintiffs are claiming that we've exercised
13 control beyond what the contract provides, then that's a
14 different kind of claim. The consequence of that is not to
15 make them employees. It may mean that if someone were
16 deactivated in contravention of the contract, they have a
17 breach of contract claim. So that's one issue.

18 Second, let's look at the underlying issue. Drivers are
19 not expected to accept any number of rides. The acceptance
20 rate issue -- as explained by Mr. Coleman in his declaration,
21 and as the plaintiffs themselves have testified to -- it's
22 simply about if you are going to be online then you should be
23 accepting a certain number of requests, because if you don't it
24 affects the service and the experience of others using the
25 application.

1 **THE COURT:** Well, I understand the reason for that.
2 But that does suggest that it's not so free -- that Uber does
3 have an interest in the behavior and acceptance and the
4 volunteer acceptance of the drivers, because if they don't
5 volunteer and accept when they get the call --

6 **MR. HENDRICKS:** No.

7 **THE COURT:** -- it creates a problem.

8 And, therefore, that's why, in this Exhibit 17, which I
9 assume is some kind of handbook, it says if we get -- we'll
10 take more serious action if we get a report of more than one
11 issue every 45 trips.

12 And one of those issues is not responding to client or
13 Uber phone call or rejecting too many trips.

14 **MR. HENDRICKS:** Okay. First of which, not one of the
15 plaintiffs in this case has said that they were exposed to that
16 particular document or were subject to it or understood it.
17 There is no foundation as to who it was sent to, whether it was
18 a draft, how long it was in use, et cetera.

19 So, as an evidentiary matter, I'm very concerned that
20 that's being relied upon in some sort of fashion. But it's
21 important --

22 **THE COURT:** So Exhibit 48, the declaration of Taj
23 Korea, which shows a reprimand letter, you dispute the
24 authenticity of that?

25 **MR. HENDRICKS:** I dispute that any of these particular

1 plaintiffs ever -- the plaintiffs ever received those kinds of
2 notices. I'm referring to the handbook.

3 You know, if he indicates that he received some sort of
4 document, I'm not going to suggest that he didn't receive it.
5 The question is what is the significance here.

6 You know, the acceptance rate issue, Your Honor, is not
7 about accepting trips. It's about being online only when you
8 decided that you, in fact, want to accept trips.

9 The reason why that's not a sanction is because the
10 transportation provider, or the driver, doesn't have to be
11 logged in. Just don't log-in. That's all that's being said
12 here. It's not saying you have to make sure you take a hundred
13 trips in a month.

14 **THE COURT:** I understand that. But once you log-in,
15 there's a degree of control that's being exercised, because if
16 you're not logged in, you're not reasonably working.

17 **MR. HENDRICKS:** But the point of that control is not
18 to increase their activity. The point of that control is to
19 ensure that riders and other --

20 **THE COURT:** Oh, I understand. I understand why. It
21 would be a disaster if you just, oh, I don't want to go that
22 neighborhood, I'm not going to pick this person up, and then
23 people start waiting 20 minutes. You might as well catch to
24 Yellow Cab at that point.

25 (Laughter)

1 **MR. HENDRICKS:** I would never suggest that. But it's
2 not --

3 (Laughter)

4 **THE COURT:** I didn't think you would.

5 **MR. HENDRICKS:** Always Uber. Always Uber.

6 But, you know, the fact of the matter is -- and this is
7 why I think it's so important. Judge Chhabria made an
8 interesting point yesterday, in the hearing in connection with
9 Lyft, about how the laws seem not quite fit for this sort of
10 new, sort of, technology.

11 We come back --

12 **THE COURT:** I don't necessarily disagree with that.
13 But I'm stuck with the precedent right here.

14 **MR. HENDRICKS:** But a part of that is we presented you
15 with a model that explains why -- how it works. And I've not
16 heard facts. I've heard feelings from Counsel. But I've not
17 heard facts that explain why this is not the case.

18 Drivers are our customers. This is a commercial platform.
19 Okay? If you go to a restaurant, right, you're a customer. If
20 you start yelling at other patrons, if you disrupt the ability
21 of others to enjoy their meal, I have the right to refuse
22 service, okay, in that sort of commercial relationship. It
23 maintains the integrity of the business.

24 What you are seeing is commercial and business control,
25 not employment control. And that's why I invite the Court to

1 go back and analyze the actual relationships between these
2 parties.

3 **THE COURT:** But if I find that they are serving Uber,
4 then they're not just restaurant customers. They're more than
5 that. And, therefore, the control at that point is a control
6 that's designed to ensure that the service is being provided in
7 a way that is -- meets the standards of the employer, the
8 putative employer.

9 **MR. HENDRICKS:** No, it's not dictating. It's not
10 dictating anything about -- remember that's a denial of a trip.
11 They've just decided not -- that they're not going to accept
12 it. It's not dictating the actual service of getting from
13 point A to point B.

14 As you pointed out, the service that the riders receive is
15 getting from point A to point B. This particular control is
16 not impacting specifically what's taking place in that vehicle
17 once that rider gets in.

18 **THE COURT:** But it does impact how long it takes for
19 somebody to get a car, because if you don't have this rule and
20 people are --

21 **MR. HENDRICKS:** But that's a different kind of
22 control. That's a different kind of control.

23 You know, when *Borello* talks about the control of the
24 manner and means of carrying out the work -- remember, you just
25 indicated that -- that when they're online, they're not

1 necessarily employed or engaged even under that model.

2 That issue about acceptance rates is all before they
3 accept the trip. So it's not in connection with providing the
4 service to a rider that -- that the concern of acceptance rates
5 arises.

6 **THE COURT:** I want to say they're at work once they
7 turn on the app and say they're ready to receive calls. That's
8 when it starts.

9 **MR. HENDRICKS:** And that's when they have both the
10 Lyft app on and both the Sidecar app on.

11 **THE COURT:** That's disputed.

12 **MR. HENDRICKS:** That's not disputed. The evidence is,
13 in fact, that's what they do. That's what they have.

14 **THE COURT:** That's what they do, but there's also
15 evidence that the contract prohibits that.

16 But it goes to another point that I was going to go back
17 to. To the extent there is some control, an 80 percent rule or
18 a soft 80 percent rule or don't reject too many trips, that
19 again goes back to our first point.

20 Doesn't that underscore an interest beyond just selling a
21 software application? It goes to running a transportation
22 service --

23 **MR. HENDRICKS:** No.

24 **THE COURT:** -- because you're concerned -- your client
25 is concerned with making people wait too long. And the way

1 that they prevent that is to have enough drivers, set the right
2 pricing, and impose a benchmark that you're not to reject too
3 many trips.

4 And in the case of this one individual in Exhibit 48J, I
5 think it is, got a warning letter. And that's in the interest
6 of how well it is responding in providing transportation, not
7 in just providing software.

8 I'm only simply making the point that Uber has done so
9 many things to make sure that the transportation that people
10 are partaking in, purchasing, is a good one, a responsive one,
11 a quality one, which transcend the mere sale of a piece of
12 software.

13 **MR. HENDRICKS:** Your Honor, it's about the experience
14 of using the software. And, you know, that's a distinct
15 aspect. The functionality and the experience of using the
16 application is a distinct -- is a distinct aspect --

17 **THE COURT:** Well, you can characterize it that way,
18 but you're totally ignoring the fact that using the software
19 leads to a ride somewhere.

20 **MR. HENDRICKS:** Okay. So let's go through this then.
21 You have a rider who requests a trip. A driver shows up. The
22 rider says, "Take me to this location." The rider says, "Turn
23 the radio off." The rider says, "Oh, wait, stop, I want to go
24 here." The rider says, "Oh, could you turn the air
25 conditioning down?"

1 The rider is controlling the means and manner of the
2 service actually being provided to the rider. That is the
3 control that's relevant in *Borello* and these other tests.
4 That's what's really going on here. The rider is dictating
5 those specific aspects.

6 If the rider says, you know something, I decided that, as
7 opposed to this stop, I want to go to a different direction or
8 I want to take this particular route because it's going to take
9 me near a friend and I want to say hello to them, okay, the
10 rider is doing that.

11 Under plaintiffs' theory and that notion, all riders who
12 request a service, pay a fee, get the service, direct the
13 driver where to go are now employers. Okay? That's not --
14 that's not what's at issue.

15 In this case you have the plaintiffs who -- take, for
16 example, O'Connor and Colopy. They work for transportation
17 companies. They negotiated their rate with them. These are
18 companies that had trips to Napa, that had accounts with Apple,
19 that had other sort of things that could have used Lyft,
20 Sidecar, any sort of lead generation service they wanted to in
21 order to increase their business.

22 And suddenly, because they use an application to increase
23 an aspect of their business, we're now the employer?

24 I come back to you and tell you that *Martinez* -- the Court
25 in *Martinez v. Combs* made clear that simply because you benefit

1 from something does not mean that you are in service or
2 receiving service for that.

3 The fact that we gained economic --

4 **THE COURT:** If you find more than just a benefit, if
5 one were to find a reasonable jury could find that, under the
6 facts of this case construed in favor of the plaintiff, that an
7 employment relationship could be found, that there's sufficient
8 indicia of control and some of the other factors -- they go
9 both ways, but some of the other factors, that -- what would
10 preclude them from -- just because they're employed, they've
11 leased these limousines or Mercedes from this other -- these
12 other companies who share in the revenues, why would that
13 negate the otherwise *Borello*-type finding with respect to Uber
14 over these drivers who do sign the contract? Right?

15 There's a driver addendum?

16 **MR. HENDRICKS:** The driver addendum is a contract
17 between the transportation provider and the driver merely
18 acknowledging that they will honor the licensing agreement and
19 some other sort of characteristics, that's correct.

20 **THE COURT:** Right. They agree to be bound by the
21 terms of the Uber --

22 **MR. HENDRICKS:** Your Honor, the notion that -- if you
23 take a look at the facts of *Colopy* and *O'Connor*, that
24 negotiated their wages, that received a vehicle, their hours of
25 work were set and controlled by these other entities and what

1 vehicles they had or did not have under those situations,
2 there's no -- from our perspective, there's no way that, under
3 *Borello* or any of these other cases, there could be the
4 argument that O'Connor or Colopy are our employees. There's
5 just none.

6 **THE COURT:** But they're still subject to the same
7 rules. They're still subject to the -- once they're on duty
8 and they have the app on if they get a call --

9 **MR. HENDRICKS:** No, no, Your Honor.

10 Your Honor, they can still work with L&S Limo or any of
11 the other limo companies they're working for, and simply not
12 use the Uber -- in fact --

13 **THE COURT:** Well, but my point is even if they're
14 working for the limo company while they have their Uber app on,
15 they cannot -- you would concede that they cannot then turn on
16 the Lyft app while they've got a customer -- an Uber customer
17 in the backseat, right?

18 **MR. HENDRICKS:** I think we're talking --

19 **THE COURT:** No, no, answer my question.

20 That rule applies whether they're on their own or working
21 through a limousine company, correct? If they're an Uber
22 driver and they've got an Uber passenger in the backseat, they
23 cannot turn on the Lyft application in the middle of that trip,
24 correct?

25 **MR. HENDRICKS:** The transportation company has agreed

1 that they would honor the --

2 **THE COURT:** And that driver is bound by that through
3 the driver addendum.

4 **MR. HENDRICKS:** Ultimately -- ultimately, the only
5 thing -- I think this is a very good point, yes.

6 And so to that extent, what would happen, we disallow use
7 of the service, right? They're still driving. They're still
8 picking up the same Apple customers --

9 **THE COURT:** They're not driving for Uber.

10 **MR. HENDRICKS:** They never were driving for Uber.

11 **THE COURT:** They're not driving -- they're not able to
12 use a driver app.

13 **MR. HENDRICKS:** Oh, so now we've created an
14 application and we're obligated to make sure people use it on
15 their terms?

16 **THE COURT:** I'm just saying once you exercise control,
17 the fact that somebody else exercises some additional control
18 over that doesn't negate the initial control.

19 **MR. HENDRICKS:** Oh, Your Honor, I mean, again, the
20 premise of your question is, somehow once we've created this
21 application that helps people connect people together and the
22 moment we once give them use to it under certain terms and
23 conditions that made them our employees.

24 There are terms of service agreements all the time with
25 intellectual property in software. And the fact of the matter

1 is, is that simply because they're not using the Uber
2 application -- which many of them were not using in the first
3 instance; they were working for other transportation
4 companies -- does not now convert them into employees.

5 We don't control any aspect of whether they continue to
6 provide services for the company that they are ostensibly
7 employed for.

8 And I do think this is an important -- this is an
9 important distinction. You have agreement for people who have
10 indicated that they are in an independent contractor
11 relationship.

12 I believe the standard when weighing those factors is, is
13 that if there is evidence supporting that that is a bona fide
14 designation, that that should be honored by the Court. Here we
15 have the most essential element --

16 **THE COURT:** So you're elevating that now to a
17 presumption that if there's a contract that sets forth -- that
18 labels this an independent contractor situation, that now
19 becomes a primary factor and your burden of -- the burden of
20 persuasion shifts?

21 **MR. HENDRICKS:** I've never said that.

22 **THE COURT:** Sounded like you're saying that.

23 **MR. HENDRICKS:** I'm not saying that it creates a
24 presumption. What I'm saying is -- I mean, *Borello* tells us
25 that the weight you give to factors will vary depending upon

1 the factual context. Okay?

2 I'm saying in a context like this where you have, in fact,
3 a bona fide driving industry out there, Uber did not create
4 black car service. Uber did not create taxis. Uber did not
5 create ride sharing. Okay? This is a bona fide industry
6 that's out there.

7 What we've done is we've implemented an application that
8 riders and drivers find attractive to utilize their vehicles
9 where they would otherwise be unutilized. It's a benefit to
10 them; it's a service to them.

11 That view of what Uber does is consistent with the
12 deposition testimony of Mr. Manahan, who characterized Uber as
13 a platform like eBay, who acknowledged he pays us a fee. All
14 he does is pay us a fee to use our application.

15 We don't provide him with a vehicle. We don't tell him
16 where to show up, when to show up, whether to show up. None of
17 those things.

18 In an instant, he makes a choice. What's his testimony?
19 "I decided to use Lyft one day because of my mood. And, you
20 know, if I'm in a good mood or a chatty mood, I'll use Lyft.
21 If I'm not so much, I'll just Uber." That is not an employment
22 relationship. Okay?

23 And if you go to *Borello*, as for harvesting these pickles,
24 this crop, they're not at the same time saying, you know, oh,
25 man, I'm going to do this crop right now. They're at a

1 physical location, the property of *Borello*, the crop of
2 *Borello*, okay? The crops --

3 **THE COURT:** They could get up and leave.

4 **MR. HENDRICKS:** What's that?

5 **THE COURT:** They could get up and leave.

6 **MR. HENDRICKS:** Yeah. But what's the implication of
7 that?

8 **THE COURT:** The implication of that is even if they
9 have a great deal of freedom deciding when to work, how long to
10 work, does not prevent them -- these agricultural workers,
11 migrant workers -- from being employees within the meaning of
12 the law.

13 **MR. HENDRICKS:** I think they can. I'm saying we're
14 not.

15 **THE COURT:** I know what you're saying. I'm just
16 saying that -- it's my initial opening point. Yeah, there are
17 a lot of factors. And that fact tends to support the
18 employer's view. But it is not dispositive, as the *Borello*
19 case itself points out.

20 **MR. HENDRICKS:** In a case -- in a case where you don't
21 have the same overlay that we have here, where they're using
22 multiple applications, where in *O'Connor* and *Colopy* they're
23 already working for another company, these are not our
24 employees in that situation and we don't exercise control in
25 that situation.

1 **THE COURT:** Right. Let me ask Ms. Liss-Riordan.

2 Your response on this last point about the joint employer
3 situation, doesn't that -- does that present a problem?

4 The fact that you've got another potential employer
5 exercising some control, does that tend to negate the
6 employment relationship -- the putative employment relationship
7 between Uber and the driver?

8 **MS. LISS-RIORDAN:** No, no, because --

9 **THE COURT:** Isn't the contract between the
10 transportation company and Uber?

11 **MS. LISS-RIORDAN:** And the drivers themselves have to
12 sign on to this contract. There are many points to be made
13 here.

14 But to respond to that, Exhibit 17, which defense counsel
15 just said that there is no evidence was even shown to any of
16 the plaintiffs, this is -- if you look at Exhibit 17, it's an
17 email from Uber to Douglas O'Connor. It's "Your Guide to the
18 Rating System."

19 Despite the fact there are these intermediary
20 transportation companies, this is one of many emails that Uber
21 drivers receive that describes, among other things, on page
22 101, several pages into this exhibit, the last page of this
23 exhibit, "What else does Uber use to evaluate drivers?"

24 And it describes how, in addition to the whole rating
25 system, which we haven't even touched upon today very much, it

1 explains how, at the bottom, "You should remember a user's
2 experience begins from when they request you, not just when
3 they get in your vehicles. That's why we monitor things like
4 acceptance rate, cancellation rates, and ETAs."

5 **THE COURT:** Well, and acceptance rates is bullet item
6 number 2, at the top of the page.

7 **MS. LISS-RIORDAN:** Yes. And also, to go back to some
8 of the points that were made before -- I haven't had a chance
9 to respond to many of them -- Exhibit 48A is a declaration from
10 Guy Gottlieb and a series of emails showing that he was
11 deactivated or -- apparently several times, due to his
12 cancellation rate, that he was calling -- allegedly, he was
13 calling up customers to find out where they were going, and
14 then canceling because he didn't want to take those trips.

15 So remember, of course, the drivers, when they're on duty,
16 they are expected to accept most of their trips. They don't
17 know where the passenger is headed, so they have to take the
18 trip whether or not they like the destination it's going to.
19 And they terminate or threaten to terminate drivers who then
20 cancel when they find out where they are going.

21 I also want to highlight Exhibit 2020 in response to
22 Uber's saying, no, this is all just about the customer
23 experience.

24 Now, of course, any service industry is going to care
25 about the customer experience and is going to rely in part on

1 customer feedback to evaluate its service employees.

2 If you look at Exhibit 20, it's not talked about in terms
3 of how much the customer will like this or that. It uses these
4 words: Do this; not that. Do this; not that.

5 It talks about issues of cleanliness, timeliness, proper
6 appearance, wearing a nice suit jacket, nice slacks, button-up
7 shirt, dress shoes. Don't have an untucked shirt.

8 It goes into detail about customer pick-up details, that
9 you should be on the correct side of the street, that you
10 should do this. Pick the customer up on the correct side of
11 the street.

12 **THE COURT:** Well, let me ask you this,
13 Ms. Liss-Riordan.

14 **MS. LISS-RIORDAN:** Yes.

15 **THE COURT:** How are the "do this and do that and not
16 do that" enforced and monitored?

17 **MS. LISS-RIORDAN:** Okay. Well --

18 **THE COURT:** Other than -- I understand there's
19 customer ratings. Customer ratings gives 1 through 5. Was
20 there a -- a survey that says, Was the seat clean? Was there
21 no clutter? No paper in the visor?

22 **MS. LISS-RIORDAN:** We have -- we have a lot of
23 evidence in the record it's constantly monitored.

24 At one point, in fact, the *FedEx* case -- the FedEx
25 drivers, they had very detailed instructions, but they had

1 managers who drove along with them four times a year.

2 In contrast, Uber is monitoring these drivers every single
3 day. They work in real time.

4 **THE COURT:** Via customers.

5 **MS. LISS-RIORDAN:** Well, how else can a customer
6 service company know what they're doing? And they do -- and it
7 goes beyond the customer service rating.

8 That's why in the exhibit that I just read to you they
9 say, "We go beyond the customer service rating to look at
10 things like acceptance rates, cancellation rates, and ETAs."
11 They explain what else Uber does to evaluate their drivers.

12 We have -- well, getting into the evidence of the
13 deactivation -- I haven't gotten to my major points yet, but
14 trying to respond to what you're asking for now.

15 We have ample evidence through the declarations we've
16 submitted and the evidence in -- I believe it's Exhibits
17 approximately 21 through 27, showing that Uber deactivates
18 drivers for a whole lot of reasons.

19 One reason is the -- this rating that the customers give
20 them. But, of course, Uber decides, and the 30(b)(6) deponent,
21 Matthew Coleman -- whose deposition excerpts are in Exhibit
22 2 -- agree that the general manager for each city has
23 discretion to determine whether or not to deactivate drivers.

24 Even based on these customer ratings, the managers decide
25 on what the minimum rating is, which varies from location to

1 location under the manager's discretion. It even varies from
2 week to week. And we have evidence in here showing the minimum
3 rating has changed at various times from 4.6 to 4.7 to 4.5.

4 So -- and that also we have evidence showing that the
5 managers don't automatically -- in fact, Mr. Coleman testified
6 that there's no automatic deactivation for drivers when they
7 hit below a certain rating. It's in the discretion of the
8 managers to decide whether or not to deactivate them.

9 We also have lots of evidence that when the drivers have
10 gotten -- whose ratings have gotten lower, they've been
11 given -- some but not all have been given an opportunity to
12 take a refresher class to refresh them about Uber. And then
13 Uber has, in its discretion, decided whether or not to rehire
14 these drivers. It's also used its discretion to decide whether
15 to rehire the drivers.

16 Based on some of the declarations we have, Uber managers
17 have deactivated drivers to reflect on what you could do better
18 and how you could be a better Uber driver. And based on the
19 responses, some drivers have been given another chance.

20 So we have a lot of evidence that they're using -- they're
21 using their discretion. It's not solely based on ratings.
22 It's not solely based on feedback from customers. But,
23 obviously, customer feedback is going to be an important
24 criterion for a company that provides customer service.

25 We also obtained -- through the sample deactivations that

1 we obtained -- retained a sampling of them through the
2 discovery process, we've also gotten further evidence in
3 Exhibits 21 through 27 of Uber using its discretion, managers
4 using their discretion, based on a number of factors, to decide
5 that drivers are going to be terminated. Not just the rating
6 system but individual customer complaints.

7 And then, also, we have -- in Exhibit 13, Uber explains
8 their -- the different levels of infractions. There's the zero
9 tolerance infractions. There's majors, minors, and cites.

10 And in Exhibit 13, on page 5, which is Uber 3426, it
11 explains we categorize issues into four categories, zero
12 tolerance, major, minor, and cites, and we try to follow up on
13 every quality issue.

14 Uber is watching every driver every day when they are
15 working for Uber. I would argue even more so than the FedEx
16 managers who do ride-alongs four times a year.

17 **MR. HENDRICKS:** There's simply no --

18 **THE COURT:** Hold on. Let her finish.

19 **MS. LISS-RIORDAN:** Now, if I may, Your Honor, get to
20 what -- they also talk about how -- going back to Exhibit 20,
21 it explains "We have developed an extensive quality framework
22 for which we assess our drivers." And, again, it puts things
23 in terms of Uber drivers should do this, Uber drivers should do
24 that.

25 But if I can get to the main point -- actually, let me

1 just discuss the joint employment issue with O'Connor and
2 Colopy for a moment, then if I can get to the main point that
3 I've been wanting to make today.

4 The evidence shows that O'Connor and Colopy worked for
5 Uber through different transportation companies. So Uber was
6 the constant, and these intermediary companies changed.

7 So Colopy, for example, he was working for Uber through
8 one company. But he was upset he wasn't able to get access to
9 a vehicle to work for Uber enough, so he switched to another
10 company which was referred to him. Uber gave him the name of
11 another company to go to where he could work full-time for
12 Uber. And he did that.

13 There's also evidence that Elie Gurfinkel, one of the
14 plaintiffs, was sent lists of these intermediary companies who
15 were looking to employ Uber drivers.

16 O'Connor worked for Uber through several different
17 intermediary companies. He switched among them. But it was
18 Uber he had to apply for. He went and showed up and did an
19 interview for them. He was reprimanded because he wasn't
20 dressed well enough at the interview.

21 When O'Connor was deactivated eventually, because he
22 refused to submit to the background test, he was out of his
23 company. Uber then says, well, he was obviously an independent
24 contractor because he went on to work for a limo driver -- as a
25 limo driver somewhere else.

1 Yes, he went and he got another job as a limo driver. But
2 it was when he was deactivated for refusing to submit to Uber's
3 background test that he was out of the job at that intermediary
4 company.

5 Now, if I can go to the main point that I've been --

6 **THE COURT:** If you would close with that, I'd
7 appreciate that.

8 **MS. LISS-RIORDAN:** Excuse me?

9 **THE COURT:** If you would close with that, I'd
10 appreciate it.

11 **MS. LISS-RIORDAN:** I would very much like to.

12 Your Honor, if you look at the contracts that Uber has
13 with both its Uber Black drivers, the drivers who -- well, the
14 addendum that applied to Uber Black drivers, such as O'Connor
15 and Colopy, as well as the contract with the uberX drivers,
16 such as Manahan and Gurfinkel, Uber retains -- and I'm looking
17 now at Exhibit 16, on the second page, which is at the bottom
18 1137, it says in the contract:

19 "Uber reserves the right at all times and at Uber's
20 sole discretion to reclaim, prohibit, suspend, limit or
21 otherwise restrict the subcontractor from accessing or
22 using the driver app or the device if the transportation
23 company or its drivers fail to maintain the standards of
24 appearance and service required by the users of Uber
25 software."

1 And it says that Uber may deactivate the drivers in its
2 sole discretion.

3 And then if you look at Exhibit 15, which is the contract
4 for drivers such as Manahan and Gurfinkel -- in fact, this is
5 Manahan's contract. And if you look at the bottom of page 7,
6 which is Bates stamped 1683, again, it says:

7 "The company reserves the right to withhold or revoke
8 its approval and authorization of any driver at any time
9 in its sole and unreviewable discretion."

10 This is exactly what the California Supreme Court last
11 year, in *Ayala*, said is the preeminent factor; the ability to
12 terminate at will. The ability of the employer to terminate in
13 its discretion.

14 And we have it right there in the contracts. We have
15 ample evidence of it being exercised.

16 But, as this Court knows, what's significant under
17 California law is the right to control; most significantly, the
18 right to terminate in its discretion.

19 Now, I'm expecting that Uber might point to another
20 provision. And I expect it will point to it because they cite
21 it in its brief. But it actually favors plaintiffs.

22 If you look a little further down, in Exhibit 15, there
23 are -- there's a list of -- it's under -- the caption under the
24 heading "Termination of Agreement." If you go on to the next
25 page, page 10, which is 1686, it says:

1 "This agreement shall remain in effect until
2 terminated as follows:" Number 3 is: "By either party
3 without cause upon 30 days' prior written notice to the
4 other party."

5 Now, Uber cited that as somehow an argument in favor of
6 independent contractor status. But if you look at *Ayala*, *Ayala*
7 said that -- an identical provision -- that termination without
8 cause with 30 days' notice is a strong indicator of employee
9 status.

10 And if you look at *Narayan*, on page 903, the Ninth Circuit
11 said the same thing. I'm looking at page 903.

12 "Significantly, the contract signed by the plaintiff
13 drivers contained automatic renewal clauses and could be
14 terminated by either party upon 30 days' notice or upon
15 material breach of the agreement.

16 "Such an agreement" -- that's without cause, with 30
17 days' notice. "Such an agreement is a substantial
18 indicator of an at-will employment relationship."

19 Citing *Estrada*. Citing an earlier *Antelope Valley* case.

20 When I opened today -- when I opened today, I said that I
21 thought there was a factor that could very well be dispositive
22 here, and that is the factor. It's right here in Uber's
23 agreements. They can't run away from their own contract. It
24 shows that ultimate right to control because they can terminate
25 in their discretion.

1 In Exhibit 2, Mr. Coleman, who was their 30(b)(6)
2 deponent, admitted and agreed multiple times that Uber managers
3 could decide in their own discretion when to terminate. Some
4 of the examples we have here of termination shows Uber managers
5 using language saying, "We're exercising our right to terminate
6 you."

7 That -- under California law, under *Ayala*, under *Narayan*,
8 under *Estrada*, that is the end of the story. Could be the end
9 of the story right there.

10 We have all these other factors we've been talking about.
11 We have ample evidence of control. So I don't see how Uber
12 could possibly get summary judgment, given all of this ample
13 evidence.

14 Given that we have that undisputable control right there
15 in the contracts, I submit, Your Honor, that that is most
16 important to the California Supreme Court.

17 **THE COURT:** All right. So besides citing the *Brown*
18 decision, which is a "but see" in the -- in the *Narayan* case as
19 an example where the Court finds that a 14-day termination
20 requirement is consistent with either employment at-will
21 relationship or parties in a continuing contractual
22 relationship, I'd like you to respond to that last point about
23 the right of termination, both that it appears, in one part of
24 the contract, to be -- at least deactivation can be at-will at
25 any time, or at least certain termination of the agreement

1 without cause on 30-day notice.

2 Why does that not support a finding of employment
3 relationship here?

4 **MR. HENDRICKS:** Well, for a lot of reasons, the first
5 of which I go back to the threshold question that they are not
6 providing a service to us.

7 I go to the second premise that they are not integral to
8 the business based upon the contracts.

9 And then I go specifically to the case law.
10 *Beaumont-Jacques vs. Farmers Group, DeSimone* case, the *Arnold*
11 *case, the Hennighan case, Varisco v. Gateway* -- these are all
12 cases we cited on page 9 of our brief, including the *Brown*
13 case -- all speak in the context of these kinds of
14 relationships, the fact that parties have a mutual ability to
15 terminate or even on, you know, 14 days' notice or in some
16 other capacity, is not necessarily indicative of an employment
17 relationship.

18 How do I say that? You have an accountant. You find out
19 your accountant made a mistake in preparing your taxes. You
20 fired him. Okay. Are they now your employee versus an
21 independent contractor?

22 You know, the standard that counsel is presenting with
23 respect to the ability to terminate is an inherent right in any
24 sort of commercial relationship.

25 People have the freedom of contract and the freedom to,

1 you know, decide for themselves the circumstances under which
2 they want to engage in a relationship and when they want to end
3 that relationship.

4 And that's consistent with independent contractor status,
5 or in some regards not. But the fact is I don't think it's
6 dispositive by any means. Every independent contractor
7 relationship that we exist in -- you hire a lawyer. You hire
8 an accountant. You hire -- you go to a barber to get your
9 haircut. Any service like that. A gardener. If they don't
10 perform good service, you can end the relationship. And that
11 doesn't mean that they become your employee.

12 That goes to the threshold question. Counsel is
13 presenting the false notion that because there are quality
14 controls, because we have standards in place that says this is
15 what we think is providing good service, and we expect that
16 you'll provide good service as measured by rider feedback means
17 that somehow we've converted them to employees.

18 Drivers evaluate riders. Riders can be deactivated from
19 the service as well.

20 And the fact that there is an ultimate quality, i.e.,
21 don't get into arguments with riders, don't hit a rider, if you
22 hit a rider, we won't let you use our service again, under
23 counsel's premise, if we had the knowledge that someone was
24 using our application for nefarious purposes, under their
25 theory we're put into the rock and the hard place of, well, if

1 you deactivate and don't let them use that service anymore,
2 you've now converted them into an employee.

3 **THE COURT:** Well, except that's not their argument.
4 They're not saying any degree, any control or deactivation that
5 affects quality suddenly converts you into an employer. You
6 look at the degree and the nature and the specificity of the
7 standards and the control.

8 And, obviously, the more specific it is, the more it
9 begins to look like control, and the more it only is focused on
10 larger issues and ultimate quality of the end product, the more
11 it arguably looks like an independent contractor. So it's a
12 scale, it's a gradation.

13 **MR. HENDRICKS:** And the fact --

14 **THE COURT:** And they have pointed out a number of
15 things that seem quite specific in terms of the dress that you
16 wear; et cetera, et cetera; how and where to put the bottled
17 water; whether to carry an umbrella.

18 **MR. HENDRICKS:** So let's walk through that.

19 You know, the California Supreme Court, in *McDonald vs.*
20 *Shell*, said making suggestions or recommendations as to the
21 details of work does not convert an independent contractor
22 relationship to an employee relationship.

23 **THE COURT:** And couple that with the right of
24 termination and some monitoring mechanism, and perhaps we have
25 something different.

1 **MR. HENDRICKS:** Okay. So, again, I go to my
2 accountant and say -- you know, this is the interesting thing.
3 An accountant, a professional who is -- is servicing a lot of
4 different people and preparing their taxes. Under plaintiffs'
5 rubric, what happens is this: Well, I didn't know what
6 deductions to make. They came in with all these receipts, and
7 so they were telling me what deductions to make. And, you
8 know, so the person seeking my services really employs me.
9 They know it's going to take time for me to review it. They
10 authorize me to review it. And suddenly, you know something, I
11 got them an audit because I screwed up and now I'm their -- I'm
12 their employee.

13 The fact that you have an independent -- what would
14 otherwise be an independent contractor relationship doesn't
15 change simply because, hey, could you look at this --

16 **THE COURT:** No, but you look at many factors. And
17 that's where the degree of skill is important, because you
18 don't expect -- you know, you expect a certain level of
19 deference and -- in that situation. And it doesn't convert it
20 into an employment relationship.

21 **MR. HENDRICKS:** So we look to all the factors. And
22 this is my point with the review system. The very fact that
23 you have standards -- I think this was the *Millsap* case. And I
24 could be wrong. I think it was *Millsap*. The very fact that
25 you articulate standards underscores the fundamental lack of

1 control. What would happen is, if someone didn't do a certain
2 thing, you just terminate them. That's not what happens here.

3 The right --

4 **THE COURT:** Wait a minute. How could you otherwise
5 control somebody who's a driver? Are you going to have to sit
6 somebody right there in the car with them? I mean --

7 **MR. HENDRICKS:** I could sit back and say every time --
8 at the beginning of a day when you are utilizing the app, I
9 want you to send me a picture of your trunk and show me that
10 you have bottled water there. I --

11 **THE COURT:** All right. All right. The cases also say
12 you look at the nature of the task and the job, and that
13 calibrates the level of supervision one would expect. It's a
14 bit of a sliding scale.

15 So when somebody's out in the field driving a truck,
16 driving a limousine or driving a Honda, you don't expect the
17 same level of supervision as you would somebody working under
18 your nose and putting bottles in a cart or whatever.

19 **MR. HENDRICKS:** Well, Your Honor, Counsel is taking
20 what the plaintiffs have said were suggestions.

21 I want to come back to this point as a matter of evidence.
22 We made certain objections to her declaration because she
23 attaches documents without any foundation as to their
24 application or their circumstance.

25 And I know that none of particular plaintiffs have

1 submitted declarations regarding these documents and how they
2 impacted them. Okay. That's -- that's an important fact on
3 summary judgment. They have testified that these things --

4 **THE COURT:** Although, on summary judgment, the test is
5 not admissibility of the evidence being proffered. The
6 question is whether the content of that evidence could be
7 admitted.

8 **MR. HENDRICKS:** I would take issue.

9 I think they have an obligation of presenting competent
10 evidence. And a part of competent evidence is -- I think
11 Judge Orrick reached that same conclusion in the -- in the
12 *Hennighan* case, where the declarations there he found lacked
13 the foundation of context to give the evidence any meaning --

14 **THE COURT:** You presented no -- nothing to suggest
15 that the documents that you are now objecting to as a matter of
16 admissibility are not authentic.

17 **MR. HENDRICKS:** Authenticity is a different question.
18 Authenticity -- is this a document at some point that Uber
19 created? I'm not necessarily disputing that. But that's not
20 material for analyzing it for summary judgment.

21 The issue is who got it, what was the circumstances --

22 **THE COURT:** But if it's authentic and it had Uber's --
23 and you're not disputing that it has Uber's letterhead on it
24 and it comes from Uber, that's a party admission. It's
25 admissible.

1 **MR. HENDRICKS:** We're mixing two different issues.
2 These -- these drivers, for example, began using the Uber app
3 some in 2013, some in 2011. Some of the documents -- and I
4 don't have a complete memory of everything, but some of the
5 documents that they are referring to no longer were in use as
6 of the time that these particular plaintiffs were at issue.

7 It's plaintiffs' burden to demonstrate, if she's going to
8 refer to specific documents, when were they in use? How were
9 they communicated? Were they communicated to these plaintiffs,
10 et cetera?

11 That's the foundation that's missing. That's why this
12 doesn't provide any material dispute here. It's a defect in
13 the evidence that's been submitted. And that's the problem.
14 And that's the basis of the objections --

15 **THE COURT:** All right. Let me get a response to that.

16 What about that? What about the fact that -- how do I
17 know these documents are relevant in time, the various manuals
18 and things?

19 **MS. LISS-RIORDAN:** Okay. Well, let's look at
20 Exhibit 17. This was an email that was sent to Douglas
21 O'Connor September --

22 **THE COURT:** Okay. That has a date on it. What
23 about -- is it 48? Or which one that has -- the handbook, the
24 handbook that has all this and -- the list of do's and don'ts
25 and things. How do we know that those were in effect at the

1 relevant time period?

2 **MS. LISS-RIORDAN:** Well, I mean, they were produced by
3 Uber. We requested documents relevant to this case. They
4 objected to many, many things. They produced this document for
5 us, among others.

6 The documents that they're objecting to are -- pretty much
7 almost all of them are documents that they produced or emails
8 back and forth between drivers and Uber. For Uber to somehow
9 claim that the Court can't look at them just seems a little --
10 seems --

11 **THE COURT:** Well, let's talk about a specific example.

12 Give me an example of a critical document that she's
13 relied upon to show, for instance, control or some other aspect
14 that you think is -- should not be considered.

15 **MS. LISS-RIORDAN:** I mean, we'll point out that the
16 contracts that we submitted are the contracts with the
17 plaintiffs. And, again, I think the contracts, under *Ayala*,
18 are of --

19 **THE COURT:** Well, I understand that.

20 **MS. LISS-RIORDAN:** -- utmost importance.

21 **THE COURT:** It shows it's directly applicable if it's
22 a contract signed by the parties.

23 **MR. HENDRICKS:** This is -- take, for example, Exhibit
24 No. 3, that they submitted.

25 **MS. LISS-RIORDAN:** Okay. Exhibit No. 3, if you look

1 at the Bates stamp at the bottom, it's labeled "Colopy 901."
2 That means we produced it because Thomas Colopy received this
3 document.

4 **MR. HENDRICKS:** And where is the declaration or
5 evidence from Mr. Colopy that he received it, and the impact it
6 had and the context of his receipt of it?

7 **THE COURT:** So this was not produced by Uber. This
8 was --

9 **MS. LISS-RIORDAN:** Well, it was produced by Uber. We
10 both produced it. It's not in evidence in this record, but the
11 exact same document was produced by Uber. It was also produced
12 by Mr. Colopy.

13 **MR. HENDRICKS:** I don't know where he got it. I don't
14 know when he got it. I don't know whether he got it yesterday
15 or --

16 **THE COURT:** Well, if it was produced by Uber, then --

17 **MR. HENDRICKS:** Well, it doesn't mean -- take, for
18 example, the logo on this. This logo is not a contemporaneous
19 logo. We know that this logo, probably as of 2011, maybe even
20 2010, at some point was no longer used.

21 Mr. Colopy and O'Connor and other people began their
22 activities using the application in 2012, 2013.

23 You know, granted, we're a startup company. They made
24 requests for documents. We've produced what we have. But,
25 quite frankly, on some of these things we don't know whether

1 they were drafts or actually disseminated; which city they were
2 disseminated in. And we provided the best information we have.

3 But if Counsel is going to use it in the context of
4 summary judgment, then it's Counsel's burden to explain the
5 foundation so that it is clear how it's pertinent and relevant.
6 And that's been the core of our objection with that.

7 But, Your Honor, again, you know, the Supreme Court has
8 made clear that making suggestions in terms of approaches does
9 not convert the independent contractor relationship into an
10 employment relationship, that you can do that. You can have
11 standards.

12 Our standard is we want to make sure that there's
13 excellent service that's being provided to riders. And riders
14 become the ultimate measure of that.

15 I go back to my concierge example. I referred you, Your
16 Honor, to -- to a hotel guest to provide a particular service.
17 And, unfortunately, I got word back from that guest that they
18 didn't necessarily like that service.

19 The next time someone asks me to refer someone out, I may
20 not refer you because of that. That doesn't interfere at all
21 at that point when you are providing the service. You actually
22 did the job, you got compensated, all the rest. That was
23 between you and the other hotel guest.

24 But in a commercial setting, which we believe this
25 relationship is, a nonemployment commercial setting, we can

1 assess whether or not someone is able to provide the result
2 that's being sought. And that is excellent service.

3 And if we believe that they're not able to provide that
4 result, we don't have to continue to refer them subsequent work
5 in that sense, or tips in that sense. Okay? And that's what
6 takes place here.

7 We're simply saying we're a lead generation business. A
8 part of what we market and promote --

9 **THE COURT:** I understand what you're saying. Case is
10 submitted.

11 Let's talk about the CMC for a moment here.

12 If I were to deny defendant's motion for summary judgment,
13 are the parties interested in going back to the mediator and
14 having discussion prior to moving forward to the class cert
15 process?

16 **MS. LISS-RIORDAN:** I think that's up to Uber.

17 **MR. HENDRICKS:** Uhm, Your Honor, may we take a short
18 recess?

19 **THE COURT:** Sure.

20 **MR. HENDRICKS:** Okay.

21 (Recess taken from 4:36 to 4:39 p.m.)

22 **THE COURT:** Okay.

23 **MR. HENDRICKS:** Thank you, Your Honor. I did need to
24 get some water.

25 We think it's probably best that we just continue to

1 proceed with the current path. If, during the course of
2 whatever else, the parties come to think that that might be
3 productive, we can address it at that time.

4 But we think that we should necessarily defer other
5 aspects of the case pending some sort of mediation or anything
6 like that.

7 **THE COURT:** All right. And you have proposed a
8 timetable, if I were to deny summary judgment, that the motion
9 for class cert be filed 90 days thereafter, and a briefing
10 period that you've set forth here.

11 So the only question is, the defendant wants an
12 opportunity to file a motion to deny class cert. And I guess
13 my question is: What's the purpose of that? How is that
14 anything different from a full opposition to class cert?

15 **MR. HENDRICKS:** Well, you know, we may just take a
16 different focus on how the issue is framed. And we think that
17 having the ability to do that might be helpful.

18 If we conclude in further discussions that it didn't make
19 sense, you know, we could choose not to. But we want to
20 preserve our ability to be able to do that in concurrent
21 briefing.

22 **THE COURT:** Well, if you want to do that, you're going
23 to have to seek leave. I'm not going to allow that. Seems to
24 me that's just asking for two sets of briefs. And I don't need
25 two sets of briefs.

1 You know, if you could point out something unique about
2 the procedure or something, especially given that you've now
3 elongated the briefing schedule to get 28 days instead of the
4 normal 14 days, you know, if you need another -- if you need
5 more time -- and I hate to offer any page enlargement, but, you
6 know, I would be -- I would consider that request. Hopefully,
7 it's not going to be that complicated.

8 So let's cross that bridge when we get there.

9 As I said, I've taken it under submission. And I will
10 take a second look at the record and the cases.

11 And, you know, it's clear that there are cases, frankly,
12 that kind of go on any particular point. One seems to tug one
13 way, and one seems to tug the other way. And so it's not the
14 easiest thing to reconcile all these cases. But I will do
15 that.

16 But if I do deny, I will set forth a briefing schedule and
17 we'll proceed to the next stage.

18 **MS. LISS-RIORDAN:** Your Honor --

19 **MR. HENDRICKS:** Yes, Your Honor.

20 **MS. LISS-RIORDAN:** -- there was one more matter that
21 we noted in the case management conference that we sought your
22 guidance on.

23 **THE COURT:** Yeah.

24 **MS. LISS-RIORDAN:** There are discovery issues that are
25 still outstanding. And Uber has requested that we not have to

1 pick those up again until you've ruled.

2 I understood that you had ordered we should be continuing
3 with discovery. There's still much that we want to do.

4 **THE COURT:** Oh, yeah. There is no stay on discovery
5 at this point. If there were one -- I didn't think there was
6 one, but if there were one, it's not my intent to keep that in
7 place.

8 I want to move forward. If we're not going to resolve
9 this case by summary judgment, I want this -- we're going to
10 move forward.

11 **MS. LISS-RIORDAN:** Thank you.

12 **THE COURT:** You do have a discovery judge if there's
13 an issue here. So, just to be clear, there is no stay on
14 discovery.

15 **MS. LISS-RIORDAN:** Thank you.

16 **MR. HENDRICKS:** The only issue was simply whether we
17 should wait until getting a ruling. There has been no stay.
18 We understand there was no stay.

19 **THE COURT:** Okay.

20 **MR. HENDRICKS:** The only issue is whether we should
21 wait to get a ruling, to see how that ruling turns out, before
22 we start writing motions and other sorts of things. That was
23 the only -- that was the only indication.

24 **THE COURT:** All right. Well, I would not stop on
25 discovery. Continue on discovery. All right?

