19-8075

In the Supreme Court of the United States

No. 20-_____

S. PATRICK MENDEL, et al

Petitioner

v.

UBER TECHNOLOGIES INC., et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Appendices to Petition for Writ of Certiorari

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ARTICLE 7. Transportation Network Companies [5430 - 5450]

Particularly Code sections: 5430, 5431, 5432, 5437, 5440, 5441, 5446.

APPENDIX A

NOT FOR PUBLICATION

FILED

MAR 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARCHIE OVERTON; S. PATRICK MENDEL, Plaintiffs-Appellants, v. UBER TECHNOLOGIES, INC.; et al., Defendants-Appellees.	No. 18-16610 D.C. No. 3:18-cv-02166-EMC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted March 6, 2020**

Before: FARRIS, TROTT, and SILVERMAN, Circuit Judges.

Archie Overton and S. Patrick Mendel appeal pro se the district court's dismissal of their action under the Federal Motor Carrier Act and California law against members of the California Public Utilities Commission ("CPUC"), Uber

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Technologies, Inc., and other defendants. We review de novo the district court's dismissal for failure to state a claim, and we review the denial of leave to amend for an abuse of discretion. *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019); *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1112 (9th Cir. 2019). We review de novo the district court's rulings regarding constitutional standing. *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019), *cert. denied*, 2020 WL 283288 (U.S. Jan. 21, 2020) (No. 19-706). We affirm the district court's judgment.

The district court correctly concluded that Overton and Mendel lacked Article III standing to seek invalidation of the CPUC's licensing scheme for "transportation network companies," or "TNCs," as preempted by the Federal Motor Carrier Act. *See Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020) ("Article III standing requires injury-in-fact, causation, and redressability."). First, appellants did not sufficiently allege an injury-in-fact in any imminent federal enforcement of Federal Motor Carrier Act registration requirements on Uber drivers such as themselves. Second, appellants did not show that any federal enforcement would be caused by the CPUC. Third, appellants did not plausibly allege that invalidation of the TNC statue would redress their alleged harm because, whether or not California administers a TNC program, the federal requirements would still exist.

We affirm the district court's conclusion that 49 U.S.C. § 49505, a Federal Motor Carrier Act prohibition against state collection of fees on interstate passenger transportation, does not preempt California's assessment of "PUCTRA" fees on passenger carriers pursuant to Cal. Pub. Util. Code §§ 421, 431. *See Cal. Ins. Guar. Ass'n v. Azar*, 940 F.3d 1061, 1067 (9th Cir. 2019) (standard for express preemption); *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (standard for conflict preemption). PUCTRA fees are assessed only on intrastate transportation, and the Federal Motor Carrier Act applies only to interstate transportation. *See* 49 U.S.C. § 13501; Cal. Pub. Util. Code § 424(b).

As to appellants' claims against the Uber defendants, the district court properly held that appellants lacked standing, based on fear of federal prosecution or other theories, to allege that Uber was operating as a motor carrier under the Federal Motor Carrier Act without registration in violation of 49 U.S.C. § 14707. *See Planned Parenthood*, 946 F.3d at 1108. The district court also did not err in concluding, alternatively, that plaintiffs' registration claim failed on its merits. Uber is not a "motor carrier" required to register under the Federal Motor Carrier Act because it does not own, rent, or lease vehicles. *See* 49 U.S.C. §§ 13102(14), 13902(a). Further, assuming Uber is a "broker" under the Act, registration is required only for brokers for transportation of property, as opposed to transportation of passengers. *See* 49 U.S.C. §§ 13102(2) (defining broker),

13904(a) (registration requirement applies to "a broker for transportation of property").

The district court properly dismissed Overton and Mendel's state law claims against Uber for breach of contract, unjust enrichment, indemnification, violation of California's Unfair Competition Law, and fraud. Insofar as these claims are premised on the notion that Uber was operating without proper authority as a motor carrier or broker under federal law, they lack merit because appellants failed to state a claim that Uber violated the registration requirements of the Federal Motor Carrier Act. Insofar as the state law claims are premised on the notion that Uber was operating as a TNC or a "transportation charter-party carrier" ("TCP") without proper authority under California law, the claims lack merit because, when the district court entered judgment, CPUC Decision 18-04-005, requiring Uber Technologies, Inc., to register as a TCP and TNC, was not yet final and non-appealable.

The district court properly exercised its discretion in dismissing the action without leave to amend. *See Great Minds*, 945 F.3d at 1112.

All pending motions are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARCHIE OVERTON, et al.,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 18-cv-02166-EMC

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

Docket Nos. 51, 59

Plaintiffs Archie Overton and S. Patrick Mendel sue the California Public Utilities Commission ("CPUC") and CPUC Commissioners in their individual and official capacities (together, the "CPUC Defendants") for creating a licensing scheme for "Transportation Network Companies" (TNCs) which Plaintiffs allege is preempted by federal transportation law and violates their Fourteenth Amendment rights. Plaintiffs also sue Rasier-CA, LLC for "acting in concert with the Commissioners" to secure a TNC permit "to avoid and subvert" federal transportation laws. Finally, Plaintiffs sue Uber Technologies, Inc. and its subsidiaries Uber USA, LLC, Rasier-Ca, LLC, and unknown Doe Defendants (collectively, "Uber Defendants" or "Uber") under the Federal Motor Carrier Act ("FMCA"), 49 U.S.C. § 14102, and for state law causes of action for breach of contract, fraud and intentional deceit, negligent misrepresentation, constructive fraud, and negligent and intentional interference with contract and prospective economic advantage. The CPUC and Uber Defendants have filed separate motions to dismiss all claims with prejudice. For the reasons stated below, the Court **GRANTS** both motions and dismisses all claims with prejudice, except as stated below.[1]

[1] Plaintiffs' pending motion to stay proceedings pending the Ninth Circuit's review of their mandamus petition for review of the Court's order denying a preliminary injunction is **DENIED**

I. LEGAL CONTEXT

Three areas of federal and state regulation are essential to understanding Plaintiffs' allegations: the Federal Motor Carrier Act (FMCA) and California's laws and regulations pertaining to transportation charter-party carriers (TCPs) and Transportation Network Carriers (TNCs). Each is summarized below.

A. Federal Motor Carrier Act (FMCA)

The Federal Motor Carrier Act (FMCA), 49 U.S.C. §§ 13102, *et seq.*, regulates "transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier—

> (1) between a place in—
> (A) a State and a place in another State;
> (B) a State and another place in the same State through another State;
> (C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
> (D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
> (E) the United States and a place in a foreign country to the extent the transportation is in the United States; and
>
> (2) in a reservation under the exclusive jurisdiction of the United States or on a public highway."

49 U.S.C. § 13501. The regulatory reach of the FMCA thus essentially extends to motor carrier transportation that crosses state or international boundaries. The statute exempts several specific forms of transportation that would otherwise fall with the FMCA's reach, 49 U.S.C. §§ 13502-13506, but the main exemption relevant here is that related to "transportation of passengers by motor vehicle incidental to transportation by aircraft." 49 U.S.C. § 13506(a)(8)(A) (hereinafter, the "incidental-to-air exemption"). The U.S. Department of Transportation has construed motor vehicle transportation to be "incidental to transportation by aircraft" when:

> (1) . . . it is confined to the transportation of passengers who have had or will have an immediately prior or immediately subsequent

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as moot. *See* Docket No. 78. The Ninth Circuit has resolved the appeal. *See* Docket No. 83 ("Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus.").

> movement by air and
>
> (2) . . . the zone within which motor transportation is incidental to transportation by aircraft [except as the Secretary otherwise determines] shall not exceed in size the area encompassed by a 25-mile radius of the boundary of the airport at which the passengers arrive or depart *and* by the boundaries of the commercial zones (as defined by the secretary) of any municipalities any part of whose commercial zones falls within the 25-mile radius of the pertinent airport.

49 C.F.R. § 372.117(a) (emphasis added). The FMCA does not purport to regulate motor carrier transportation that occurs entirely within the boundaries of a single state when such transportation is not part of a longer trip between two states or two countries (*i.e.*, one leg of a longer trip).

The FMCA defines two groups of regulated service providers: "brokers" and "motor carriers." A "motor carrier" is "a person providing motor vehicle transportation for compensation." *Id.* § 13102(14). A "broker" is a "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for transportation by motor carrier for compensation." 49 U.S.C. § 13102(2). The difference is, essentially, between those who provide the transportation service (motor carriers) and those who arrange it (brokers).

Plaintiffs assert that the FMCA requires brokers and motor carriers to register with the United States Department of Transportation (USDOT). In fact, the FMCA's registration requirements do not apply to *all* covered brokers and motor carriers, but only a subset. For example, only a "broker for transportation of *property*," 49 U.S.C. § 13904(a) (emphasis added), not of passengers, is required to register. Similarly, the FMCA requires registration of "a motor carrier using self-propelled vehicles the motor carrier owns, rents, or leases." *Id.* § 13902(a). To obtain registration, a broker or motor carrier must demonstrate various proficiencies and satisfy certain insurance requirements. *See* 49 U.S.C. § 13902(a)(1)(A)-(D) and § 13904(a)(1)-(2).

Although enforcement of the FMCA is generally handled by government agencies, *see* 49 U.S.C. §§ 14701-14703, the FMCA also creates two private rights of action. First, under Section 14704, "[a] person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as

applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection." 49 U.S.C. § 14704(a)(1); *see also id.* § 14704(a)(2) (permitting recovery of "damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part"). Second, Section 14707 provides that "[i]f a person provides transportation by motor vehicle or service in clear violation of [the statutory registration requirements], a person injured by the transportation or service may bring a civil action to enforce any such section." 49 U.S.C. § 14707(a). Under Section 14707, the requirement for a "clear violation" is jurisdictional rather than a standard of proof. *See Mercury Motor Exp., Inc. v. Brinke*, 475 F.2d 1086, 1093 (5th Cir. 1973) (quoting legislative history stating that the words "clear and patent" "are intended as a standard of jurisdiction rather than a measure of the required burden of proof and that the district courts of the United States should entertain only those actions under these sections, as amended, which involve clear and patent attempts to circumvent regulation in the areas involved"); *Tri-State Motor Transit Co. v. Int'l Transport, Inc.*, 479 F.2d 171, 175 (8th Cir. 1973) (quoting legislative history explaining that "[t]he language of the section is designed to make it clear that the courts would entertain only those suits which involve obvious attempts to circumvent operating regulation"). Plaintiffs' First Amended Complaint only asserts a cause of action against Uber under Section 14707, for failure to comply with registration requirements.

B. California Regulation of TCPs and TNCs

Separate from federal regulation under the FMCA, the California Public Utilities Commission (CPUC) regulates certain transportation services. The two relevant services here relate to charter-party carriers (TCPs) and transportation network carriers (TNCs).

TCPs are defined to mean "[e]very person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state. Charter-party carrier of passengers includes any person, corporation, or other entity engaged in the provision of a hired driver service when a rented motor vehicle is being operated by a hired driver." Cal. Pub. Util. Code § 5360. TCPs must have a permit to provide transportation services with limited exceptions not relevant here. *See* Cal. Pub. Util. Code § 5371. There are several species of TCP authorization, but the two relevant here are Class A and Class B

certificates: a Class A certificate has no "restrict[ions] as to point of origin or destination in the state of California," Cal. Pub. Util. Code § 5371.1(a), while a Class B certificate only permits the holder to "operate from a service area to be determined by the [CPUC]," but not to "encompass more than a radius of 125 air miles from the home terminal," *id.* § 5371.2(a). The key distinguishing characteristic of TCPs, as opposed to traditional taxis, is that the transportation must be "prearranged" rather than hailed on the street. *Id.* §§ 5360.5, 5381.5(a).

The CPUC has statutory authority to charge TCPs an annual fee. *See* Cal. Pub. Util. Code § 421(a). These are known as PUCTRA ("Public Utilities Commission Transportation Reimbursement Account") fees and they are currently charged a quarter of one-percent of a TCP's "gross intrastate operating revenue" (0.25%). *See* http://www.cpuc.ca.gov/General.aspx?id=3764.[2] The CPUC does not purport to charge fees for interstate operating revenues. A TCP license may be suspended for failure to pay the required fees. *See* Cal. Pub. Util. Code § 5387.5.

In 2017, California enacted laws regulating "transportation network companies" (TNCs), the new business model represented by Uber and similar companies. *See* Cal. Pub. Util. Code §§ 5430, *et seq.* A TNC is "an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle." *Id.* § 5431(c). TNCs are required to keep certain forms of insurance, *id.* § 5433, and run criminal background checks on their drivers, *id.* § 5445.2. TNCs are considered a subset of TCPs. Under the TNC model, individual drivers using their personal vehicles are not required to obtain separate TCP authorization; the TNC's authorization acts as an umbrella.

C. Recent CPUC Decisions Related to Uber

Shortly after the appearance of Uber and other ridesharing services, the California Public

[2] The Court takes judicial notice of the CPUC's website regarding current fee rates as the "record of a state agency not subject to reasonable dispute." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1223, n.2 (9th Cir. 2004).

Utilities Commission (CPUC) issued an "Order Instituting Rulemaking" on December 27, 2012. *See* Uber's Request for Judicial Notice ("RJN"), Ex. A. During the rulemaking process, the CPUC "entered into settlement agreements intended to ensure the public safety of both riders and drivers with Uber, Lyft, and SideCar, allowing the companies to operate." Uber's RJN, Ex. B at 1, n.2. The agreement permits Uber and other ridesharing companies to operate until the "issuance by the Commission of a final non-appealable decision in the Rulemaking." Uber's RJN, Ex. C at 3.

On April 27, 2018, the CPUC issued a proposed decision ("Proposed Decision"). FAC ¶¶ 116, 123. The Proposed Decision would require Uber Technologies, Inc. to register as a TCP and TNC. Uber concedes that the CPUC adopted the Proposed Decision on May 4, 2018. However, Uber intends to challenge the decision pursuant to the CPUC Rules of Practice and Procedure, and has also sought a stay of enforcement of the decision. See Uber's RJN, Ex. E. Thus, the May 4, 2018 adoption of the Proposed Decision does not appear to be the "final non-appealable decision in the Rulemaking" that would supersede the CPUC's December 2012 interim grant of operating authority to Uber. Prior to the Proposed Decision, Uber Technologies, Inc. was party to a settlement agreement with the CPUC which allowed Uber to connect passengers both with TCP-holding and non-TCP-holding drivers subject to specified terms and conditions, pending a determination as to its status as a TNC and/or TCP. *See* Uber's RJN, Ex. C.

II. PLAINTIFFS' ALLEGATIONS

The gist of Plaintiffs' allegations is that they had a "thriving Black Car Livery business" until Uber appeared with a phone app allowing "passengers [to] sidestep [taxi] dispatchers and place their request[s] directly with drivers." First Amended Compl. ("FAC") at 3. Plaintiffs had a business as a TCP. In addition to their own customers, they also drove for Uber. Uber allegedly improperly influenced the CPUC to give it authority to provide services as a "Transportation Network Carrier" (TNC) throughout the state "with little consideration of Federal laws" in return for significant fees paid to the State of California. *Id.* at 4. Under California's TNC scheme, a TNC does not "operate vehicles or own a fleet" but rather "may operate, dispatch trips, from any point of origin to any destination in California." *Id.* TNC *drivers* are not required by California to

have commercial operating authority or commercial insurance; only the TNC service providers are. *Id.* According to Plaintiffs, Uber also violates California law by offering transportation services as a TCP or TNC without authorization and without paying the required PUCTRA fees. *Id.* ¶¶ 117-119.

Plaintiffs' CPUC licenses were suspended on April 6, 2018 allegedly because the CPUC claimed that Uber was not a licensed "Primary Carrier" and thus Plaintiffs were required to pay the unpaid fees and taxes. *Id.* ¶¶ 106, 108-109. Plaintiffs contend Uber should have paid the PUCTRA fees but did not do so because Uber was not yet classified by the CPUC as a TCP. The CPUC lifted the suspension on April 25, 2018 after Plaintiffs provided the CPUC with tax Form 1099's reflecting their gross fares earned through Uber. *Id.* ¶ 110.

Furthermore, Plaintiffs allege that Uber also meets the definition of a for-hire "motor carrier" under 49 U.S.C. § 13902, Compl. ¶ 53, but that Uber has not secured operating authority from the Federal Motor Carrier Safety Administration ("FMCSA"), *id.* ¶ 56. Uber allegedly falls within the FMCSA's jurisdiction because its drivers provide services between the United States and Mexico, between states, and transportation to or from airports that exceeds 25 miles and thus falls outside the incidental-to-air exemption. *Id.* ¶¶ 59-63.

Plaintiff Mendel specifically alleges that Uber once directed him to load a passenger with luggage from an airport for a destination more than 25 miles away from the airport, which he contends "exposed him to potential fines in excess of $25,000.00 and up to 1 year imprisonment for providing Uber's passenger with transportation in 'clear' violation of the federal regulations and laws requiring Federal motor carrier passengers operating authority." *Id.* ¶¶ 64-65. Indeed, Plaintiffs allege that they are "in constant fear of federal enforcement of fines in excess of $25,000 and imprisonment for up to 1 year." *Id.* ¶ 105. Yet, at the same time, Plaintiff complains that federal regulators have turned a blind eye to Uber because they are "woefully understaffed and underfunded." *Id.* ¶ 93. Plaintiff poses a rhetorical question: "Has anyone ever heard of a FMCSA Inspector questioning a livery or taxi vehicle on the street, even a police officer checking for federal operating authority . . . didn't think so . . ." *Id.*

Plaintiffs also allege that Uber, by arranging transportation services without federal or state

operating authority, has been unlawfully enriched by deducting service fees from individual Uber drivers. *Id.* ¶¶ 101, 126. They seek disgorgement of those fees in excess of $82,000. *Id.*

Plaintiffs also claim that Uber's contracts contain unlawful arbitration clauses under the Federal Arbitration Act because Plaintiffs are exempt "workers engaged in interstate commerce." Compl. ¶¶ 134-142.

As relief, Plaintiffs seek: (1) an injunction barring the CPUC Commissioners from enforcing the TNC permitting program which they contend is in conflict with the federal FMCA registration requirements under 49 U.S.C. §§ 13901-13902; (2) an injunction forbidding Uber from rendering any prearranged motor carrier transportation of passengers until they have secured both federal operating authority and TCP operating authority under California state law; (3) damages for Uber's breach of contract based on its failure to secure operating authority but holding itself out as having such authority; (4) declaratory relief that Uber lacks proper licenses to operate; (5) disgorgement of commissions unlawfully deducted from Plaintiffs' fares by Uber to prevent unjust enrichment; (6) indemnification from any federal or state regulatory action; (7) injunctive relief against unfair competition based on Uber's operation without lawful authority; (8) damages under intentional and negligent infliction with contractual relations and prospective economic advantage theories based on Uber's interference with Plaintiffs' relation to the CPUC and their customers; and (9) damages premised on Uber's fraudulent misrepresentations that it had lawful operating authority and has paid its PUCTRA fees.

III. DISCUSSION

A. Claims Against CPUC Defendants

Plaintiffs allege that CPUC's regulations creating a permitting-scheme for TNC drivers is preempted by the FMCA, and also violate the interstate commerce clause and equal protection clause. The CPUC Defendants argue that Plaintiffs lack standing to bring their preemption claim and that they have not pleaded facts to support their commerce clause or equal protection claims.

1. Federal Preemption Based on Fear of Prosecution

Plaintiffs' basic allegation is that Uber, its drivers, or both are subject to federal motor carrier laws and thus must obtain licenses from the FMCA. *See* FAC at 27:5-10, 32:21-26.

Plaintiffs allege, however, that California's TNC laws conflict with and are preempted by these federal laws. *See* FAC at 59-66. Conflict preemption is the "implicit preemption of state law that occurs where 'there is an actual conflict between state and federal law.'" *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (citation omitted). It arises when "[1] compliance with both federal and state regulations is a physical impossibility, or [2] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations, quotations, and internal ellipses omitted).

Plaintiffs claim they have standing to bring this claim because California's TNC laws make it more likely that the FMSCA will prosecute them for providing interstate transportation subject to the FMCA without requisite authorization. Article III standing requires a plaintiff to show (1) "injury-in-fact" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); (2) a causal relationship between the Plaintiffs' injury and Defendants' alleged wrongdoing, *id.*; and (3) the that the injury is "redress[able] by a favorable decision," *id.* at 561 (internal quotation marks omitted). Plaintiffs' theory of standing fails on all three counts.

First, Plaintiffs have not plausibly alleged a credible threat of harm to pursue declaratory and injunctive relief. Even assuming that Plaintiffs currently drive for a TNC, Plaintiffs have not cited a single example of the FMCSA ever requiring a TNC driver to obtain a federal license, prosecute one for failure to obtain one, or threaten any with prosecution or fines. Despite Plaintiffs' several requests that the FMCSA weigh in on this dispute, it has declined to do so. Indeed, Plaintiffs themselves emphasize that the FMCSA is understaffed and that FMCSCA enforcement against drivers is unheard of. *See* FAC at 40:11-17 ("Has anyone ever heard of a FMCSA Inspector questioning a livery or taxi vehicle on the street . . . didn't think so . . . ."). The mere existence of a federal regulation without some credible threat that it will be prosecuted against Plaintiffs is insufficient to meet Article III's requirements. *See Anchorage Equal Rights Comm'n*, 220 F.3d at 1139 ("[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement."); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (standing for "pre-enforcement review"

of a law is permitted only "under circumstances that render the threatened enforcement sufficiently imminent" rather than "chimerical"). Plaintiffs have not pointed to any indication that there is a specific credible threat of prosecution. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (courts consider "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute" (quotation omitted)). Indeed, any threat of prosecution seems particularly remote here because Plaintiffs (a) concede that they do not provide services through their independent TCP business that would subject them to FMCA jurisdiction; and (b) out of the thousands of rides they have been directed by Uber to provide in their capacity as TNC drivers, Plaintiffs have only identified a handful of examples of rides that they contend is within the FMCA's jurisdiction.

Second, even assuming that Plaintiffs could allege a credible threat of prosecution by the *federal* government based on *federal* law, Plaintiffs cannot show that the CPUC is responsible for that harm. The CPUC does not enforce federal law and Plaintiffs made no allegations that prove the CPUC rules make it more likely that the federal government will take enforcement action against them. Nor have Plaintiffs shown that "it is impossible to comply with both federal and state law," *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016), such that a risk of prosecution under federal law arises from mere compliance with state law. Indeed, California law does not preclude a TNC driver from applying for and obtaining FMCA registration; drivers are free to comply fully with both regimes.

At the hearing, Plaintiffs argued for the first time that federal motor carriers must own or lease their vehicle, and thus the CPUC's TNC authorization for entities that do not own the vehicles conflicts with federal law. This argument fails for several reasons. As a preliminary matter, the federal statute cited by Plaintiffs does not require motor carriers to own or lease their vehicles. Rather, it merely provides that "[t]he Secretary may require a motor carrier providing transportation . . . that uses motor vehicles not owned by it to transport *property* under an arrangement with another party to – (1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier; [and] (2) carry a copy

of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect[.]" 49 U.S.C. § 14102. The purpose of these "truth-in-leasing regulations [is to] protect independent truckers from motor carriers' abusive leasing practices." *Fox v. Transam Leasing, Inc.*, 839 F.3d 1209, 1211 (10th Cir. 2016). Section 14102 has no relevance here because it applies only to motor carriers transporting property (not passengers), and it does not contain an ownership requirement. It merely provides that when a vehicle that is not owned is used to transport property, certain documentation must exist and be carried in the vehicle. Nor do other provisions of the FMCA appear to contain an ownership or leasing requirement as Plaintiffs purport. Section 13902 merely requires motor carriers who "own[], rent[], or lease[]" their vehicles to register with the Secretary, but does not generally require all motor carriers to own, rent, or lease their vehicles. 49 U.S.C. § 13902(a)(1). In any case, even assuming that the FMCA required all motor carriers to own or lease their vehicles, California does not force any entity to violate federal law: rather, as the CPUC pointed out at the hearing, an entity that owns or leases its vehicles would merely be regulated as a TCP rather than a TNC. The CPUC regulatory scheme does not interfere with or impede enforcement of the FMCA. There is no basis for conflict preemption.

Third, Plaintiffs have not plausibly alleged that the relief they seek—invalidation of the TNC statute—would redress their alleged harm. They must allege that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561 (quotation omitted). Whether or not California administers a TNC program, the federal licensing requirements would still exist. Thus, even if California is enjoined from administering a TNC licensing scheme, Plaintiffs would still be required to comply with federal law by obtaining an operating license from the federal government (if the law in fact requires them to do so), and would thus still face a threat of enforcement by their failure to do so. To the extent Plaintiffs argue that the TNC licensing scheme enables Uber to operate and expose its drivers to the risk of violating the FMCA, *e.g.*, by transporting passengers across state lines, Plaintiffs are not compelled by state law to do so. They do not have to driver for Uber. They can refuse a ride that requires crossing state lines. Or they can register under the FMCA as a motor

carrier.

For these reasons, Plaintiffs lack Article III standing to raise a federal preemption challenge to the TNC statute based on their unfounded fear that federal authorities will prosecute them. Further, their pre-emption argument is meritless. The pre-emption theory is **DISMISSED** with prejudice, because amendment would be futile; in their proposed Second Amended Complaint ("SAC"), Plaintiffs merely confirm that enforcement by the FMCSA is not credibly imminent. *See* SAC ¶ 180 ("Apparently it is the official policy of the FMCSA NOT to themselves enforce the federal registration requirements for 'clear' violations . . .").

2. Federal Preemption Based on PUCTRA Fees

At the hearing, Plaintiffs proposed another theory of preemption for the first time. They claimed that California's PUCTRA fees taken from TCP drivers are preempted by the FMCA because TCP drivers engage in interstate commerce. The FMCA provides that "[a] State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other change on – (1) a passenger traveling in interstate commerce by motor carrier; (2) the transportation of a passenger traveling in interstate commerce by motor carrier; (3) the sale of passenger transportation in interstate commerce by motor carrier; or (4) the gross receipts derived from such transportation." 49 U.S.C. § 14905. If there is preemption here, it would appear to be express.

Plaintiffs seem to assume that the phrase "in interstate commerce" as used in Section 14905 has the broadest possible interpretation with respect to all activities that Congress has the power to regulate under the commerce clause. *See U.S. v. Morrison*, 529 U.S. 598, 608-609 (2000) (explaining that the "three broad categories of activity that Congress may regulate under its commerce power" include "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "activities that substantially affect interstate commerce" (quotation added)). That is not the case. The Supreme Court has "drawn a sharp distinction between activities in the flow of interstate commerce and intrastate activities that affect interstate commerce." *U.S. v. Am. Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). For example, the use of the term "engaged in commerce" in a statute, rather than the broader term "affecting commerce," has been held to be a "term of art, indicating a

limited assertion of federal jurisdiction," rather than an exercise of Congress's full authority under the commerce clause. *Id.* Here, there is no reason to think that Congress intended to exercise the full scope of its constitutional commerce clause authority when it enacted Section 14505 of the FMCA. To the contrary, the FMCA suggests that Congress self-consciously and deliberately chose to assert federal jurisdiction in a limited fashion: it expressly limited the FMCA's scope to transportation that at some point physically crosses state lines or international borders, *see* 49 U.S.C. § 13501, not any transportation which could conceivably "affect" interstate commerce. Moreover, even the reach of the FMCA is limited by substantial exemptions.[3] Those exemptions provide a clear indication that Congress did *not* intend the FMCA to cover all transportation that conceivably falls within the scope of Congress's constitutional commerce clause power.

Here, there is at most a question whether one intrastate leg of an interstate trip falls within the FMCA's reach, even when each leg is separately arranged. Plaintiffs specifically assert the example of taking a passenger to or from an airport beyond a 25-mile radius so that the passenger can then take an interstate flight. *See* 49 U.S.C. § 13506(a)(8)(A) (exempting "transportation of passengers by motor vehicle incidental to transportation by aircraft"); 49 C.F.R. § 372.117(a) (interpreting exemption to be "confined to the transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air" within a 25-mile radius of the airport and any contiguous commercial zones). The FMCSA (the agency enforcing the FMCA) explains that "[i]f a trip starts in one State and ends in another and the travel uses multiple modes of transportation . . . , every part of the trip is considered interstate commerce *if the entire*

[3] *See, e.g.*, 49 U.S.C. § 13503 (exempting jurisdiction over motor vehicle transportation provided in a terminal area where the transportation is a transfer, collection, or delivery; is provided by a rail or water carrier or freight forwarded; and is incidental to the carrier or freight forwarder's services); 49 U.S.C. § 13504 (exempting transportation operating solely within the State of Hawaii); 49 U.S.C. § 13505 (exempting transportation by a person engaged in non-transportation business for the furtherance of that primary business); 49 U.S.C. § 13506(a)(1)-(7) (exempting, inter alia, motor vehicles transporting school children, taxicab services, hotel shuttles, certain vehicles used for farming and agricultural purposes, newspaper distribution vehicles); 49 U.S.C. § 13506(a)(8)(A) (exempting transportation of passengers by vehicle incidental to transportation by aircraft); 49 U.S.C. § 13506(b) (exempting transportation provided entirely in a municipality, in contiguous municipalities, or in a zone adjacent to and commercially part of the municipalities, with certain special requirements for transportation across state lines to also possess state authorization).

trip is prearranged." Federal Motor Carrier Safety Administration, U.S. Department of Transportation, *Multi-Modal Passenger Transportation: Tips for Buses and Vans That Transport Passengers to and From Airports, Train Stations, and Ship Ports*, available at https/www.fmcsa.dot.gov/regulations/multi-modal-passenger-transportation.[4] The statement provides as an example: "if a passenger did not make prior arrangements and obtains transportation after arriving at an airport, port, or train station, subsequent highway transportation is not a continuation of the trip and is not considered interstate commerce." *Id.*

While the deference under *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) may not be warranted, the Court may rely on such informal statements to the extent they have the "power to persuade" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, the FMSCA's guidance is entirely consistent with the exemption under § 13506(a)(8)(A) of transportation "incidental" to transportation by aircraft. To the extent Plaintiffs claim they paid PUCTRA fees on fares for rides to airports longer than 25 miles, they still fail to adequately allege pre-emption. The exemption under 49 C.F.R. § 372.117(a) extends to commercial zones contiguous to the 25-mile radius, and Plaintiffs have not alleged they gave rides beyond such zones. Moreover, even if Plaintiffs provided transportation covered by the FMCA (and not exempt), they have not alleged they were prevented by the CPUC from excluding *those* fares (as opposed to other intrastate fares) from their self-reported PUCTRA fee statements.

3. Interstate Commerce Claim

Plaintiffs' First Amended Complaint also alleges that the TNC program violates the interstate commerce clause. That clause is violated when state action "unjustifiably . . . discriminate[s] or burden[s] the interstate flow of articles of commerce." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994)). Plaintiffs' theory of discrimination and burden is unclear. All that Plaintiffs allege is that some TNCs engage in interstate commerce by providing transportation across state lines. But they have not explained

[4] The Court takes judicial notice of this agency statement. *See City of Sausalito*, 386 F.3d at 1223, n.2.

how that means that California's regulation of TNCs burdens, interferes with, or discriminates against interstate commerce. As this Court explained in another case, "the mere fact that TNCs *engage* in interstate commerce is not enough to establish *interference* with interstate commerce." *DeSoto Cab Co., Inc. v. Picker*, 196 F.Supp.3d 1107, 1114 (N.D. Cal. 2016) (emphasis in original). Just because the federal government may require a permit for a particular activity does not preclude the state from requiring similar permits, so long as there is no conflict or undue burden on interstate commerce—Plaintiffs do not plausibly allege any burden on interstate commerce. This claim is **DISMISSED** with prejudice; Plaintiffs' proposed amended complaint does not resolve this deficiency.

4. Equal Protection

Plaintiffs also conclusorily claim that the CPUC has violated the Fourteenth Amendment's equal protection clause, which "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). They do not allege that they have been treated differently from similarly situated persons. They cite no basis for any such claim.

In their proposed Second Amended Complaint, Plaintiffs allege that the TNC regulations do not satisfy strict scrutiny, *see* SAC at 138, but they have not alleged that the regulations are based on suspect classifications or that they burden fundamental rights so as to trigger strict scrutiny. *See Kahawaioloa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004). Here, the economic regulation, not based on a suspect classification, "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). It is generally very difficult for a plaintiff to prevail under this deferential standard of review. *See Desoto CAB Co., Inc. v. Picker*, 228 F.Supp.3d 950, 959 (N.D. Cal. 2017) (holding that CPUC did not violate equal protection clause by treating taxicab companies and TNCs differently because "[i]n a street-hail situation, a passenger is (as a general matter) more likely to be in a vulnerable position compared to a passenger who prearranges a ride" so "there is a conceivable basis for a differential approach to regulation").

Not only is the FAC deficient, but Plaintiffs' proposed Second Amended Complaint does

nothing to resolve those deficiencies. They do not allege what the problematic classification is here, or why strict security would be triggered, or that there is no conceivable rational basis for the classification. The CPUC Defendants generously infer that perhaps Plaintiffs are alleging that "the Commission created two classes of transportation companies: those that must comply with federal law, like the Plaintiffs, and those that need not, like Uber," CPUC Reply at 7, but that interpretation is flawed because California's TNC scheme does not plausibly purport to exempt any person from federal law. Even if it did, whether federal law imposes obligations on any party—be it Uber, Plaintiffs, or other TNCs and motor carriers—is independent of whatever action the CPUC has taken. Thus, invalidation of the California legislature's TNC rules would not alter the scope of federal law or regulation. Plaintiffs' alleged injury is thus not redressable. Plaintiffs both lack standing and have failed to state a claim.

Because the proposed amendment is futile, the equal protection claim is **DISMISSED** with prejudice.

5. Further Amendment Is Not Warranted For New Claims

Plaintiffs proposed three new claims for injunctive relief against the CPUC Defendants, but they are all futile so amendment is not warranted. The first proposed claim alleges Defendants violated the California Constitution, but that claim is barred by the Eleventh Amendment. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (holding that allowing a federal court to "instruct[] state officials on how to confirm their conduct to state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment"). The second claim alleges that the CPUC improperly suspended their licenses, but they were subsequently re-instated and they have not alleged any future adverse consequences. Thus, there is no injury to redress with an injunction. Third, Plaintiffs allege that the CPUC conspired with Uber to create the TNC classification to evade federal transportation laws but, as the CPUC points out, even if that is true, the California legislature subsequently passed laws ratifying the TNC classification, so any conspiratorial "taint" has been cured by legislation. Plaintiffs do not allege that the Legislature also conspired with Uber. Accordingly, amendment for the purpose of asserting these new claims against the CPUC Defendants will be **DENIED**.

In sum, all claims against the CPUC Defendants have been **DISMISSED** with prejudice. The question whether Plaintiffs should be granted leave to amend a preemption claim based on FMCA preemption of certain PUCTRA fees remains open pending supplemental briefing as ordered above.

B. Claims Against Uber Defendants

1. FMCA Claim

Plaintiffs allege that Uber is operating as a "motor carrier" under FMCA without registration in violation of Section 14707. Section 14707 provides that "[i]f a person provides transportation by motor vehicle or service in clear violation of [statutory registration requirements], a person injured by the transportation or service may bring a civil action to enforce any such section." 49 U.S.C. § 14707(a). Uber moves to dismiss on the basis that Plaintiffs' fear of prosecution is unfounded and that they therefore lack standing, and because Uber is not a "motor carrier."

a. No Standing Based on Fear of Prosecution

As explained above, Plaintiffs' fear of prosecution is not concrete or imminent. Indeed, it appears very unlikely that Uber would dispatch Plaintiffs to provide a ride that arguably falls under the FMCA's jurisdiction in light of the broad statutory and regulatory exemptions for points entirely within the same state, 49 U.S.C. § 13501, for commercial zones such as major metropolitan areas, 49 U.S.C. § 13506(b)(1)(A), 49 C.F.R. Part 372, and for incidental-to-air travel within 25-mile radius of an airport (or commercial zones contiguous thereto) when the entire trip (air *and* land) is pre-arranged, 49 C.F.R. Part 372.117(a) and Uber's RJN ISO Reply, Ex. A. Plaintiffs' FAC only alleged a single occasion in which they received a ride through Uber that involved an airport pick-up to a destination outside of the 25-mile radius—but Plaintiffs fail to allege that the destination there was also outside of an exempt commercial zone. Even assuming that it was, a single ride that *might* be covered by the FMCA out of a total of, for example, over 6,700 rides Plaintiff Mendel has provided in 4 years of driving, *see* Mendel Decl. ¶¶1-2, 6-7, merely highlights how remote the possibility is that Uber will channel a ride that could give rise to a ride arguably within the FMCA's jurisdiction, let alone one for which the FMSCA will threaten

to prosecute Plaintiffs. Moreover, if the ride clearly requires transportation in interstate commerce by crossing state boundaries, Plaintiffs can refuse. Plaintiffs' potential harm from violating the FMCA is highly speculative.

Plaintiffs ignore that Uber does not coerce them to provide rides without FMCA registration: they could avoid the problem by seeking and obtaining their own FMCA registration or simply by declining an Uber ride they know may bring them within federal jurisdiction.[5] Thus, to the extent Plaintiffs assert a fear of prosecution as the basis for standing, they fail to allege a credible, imminent harm.

b. Standing Based on Other Injuries

That does not dispose of the issue, however. Just because Plaintiffs have no credible fear of prosecution does not mean that they may not pursue a Section 14707 claim, so long as they can show they have been "injured" by Uber's violation of the statutory registration requirements. *See* 49 U.S.C. § 14707(a).

What constitutes a cognizable injury for purposes of Section 14707(a) is not clear. Most cases appear to involve plaintiffs with FMCA authorization suing competitor defendants who lacked the authorization, alleging a form of competitive injury. *See Am. Int'l Driveaway v. Alexander*, 488 F.Supp. 808 (D. Haw. 1980) (where plaintiff motor carrier "ma[de] a prima facie showing that Defendants are competing with Plaintiff to Plaintiff's injury," it had standing to bring suit against a competitor allegedly operating a motor carrier service without registration); *Nationwide Auto Transporters, Inc. v. Morgan Driveaway, Inc.*, 459 F.Supp. 981 (S.D.N.Y. 1978) ("Since [plaintiff] is authorized by virtue of the interline to conduct the operations involved here

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[5] The claim that Uber coerces them to violate safety regulations in violation of 49 C.F.R. § 390.6 fails for this reason. *See* 49 C.F.R. § 390.6(a) ("A motor carrier . . . may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of [various safety regulations]."). First, it does not apply to Plaintiffs because they do not allege they drive "commercial motor vehicles." 49 C.F.R. § 390.5 (defining "commercial motor vehicles" to be those which weigh more than 10,000 pounds, transport more than 8 passengers for compensation or 15 passengers without, or used to transport hazardous materials). Second, even if they were, the regulation only applies to "threats" or "the actual withholding of business, employment or work opportunities or the actual taking or permitting of any adverse employment action to punish a driver for refusing to engage in such operation." 49 C.F.R. § 390.6. The only coercion Plaintiffs allege is "attaching trip completion bonuses and total trip count completion bonuses," but those are incentives to drive, not coercion to do so. FAC ¶ 67.

and has provided evidence that it has been damaged by [defendant's unauthorized] activities, we believe that it has standing to sue under [the statute.]"); *Tri-State Motor Transit Co. v. H.J. Jeffries Truck Lines, Inc.*, 347 F.Supp. 864, 870 (W.D. Miss. 1972) ("There can be no question but that to some substantial extent plaintiffs have been injured by [defendant's] illegal diversion of transportation business which otherwise plaintiffs would have shared in some amount," and therefore they had standing as injured parties.). At least one court has suggested that the plaintiff *must* be a competitor with an FMCA permit to seek relief. *See Nationwide*, 459 F. Supp. at 984 (holding that a defendant seeking to counter-claim under Section 14707 could not "seek relief under this provision unless it is authorized by the ICC to conduct the operations in question").

Assuming one does not have to register under the FMCA to sue under § 14707(a), Plaintiffs allege Uber's non-compliance causes them competitive harm. According to Plaintiffs, because Uber or its drivers provide transportation services for which the FMCA requires registration and Uber or its drivers do *not* obtain that registration, their business costs are reduced, thus enabling them to charge lower fares. Those business costs include, *inter alia*, lower insurance liability limits. As a result, Uber allegedly obtains an unfair competitive advantage over Plaintiffs in their TCP business due to Uber's non-compliance with applicable laws and regulations. Although the theory seems hypothetically possible, Plaintiffs have not pled sufficient facts to support a plausible inference that they have suffered such competitive harm traceable to Uber's alleged non-compliance with the FMCA requirements in the market in which Plaintiffs participate.

As a preliminary matter, Plaintiffs concede that, in their independent TCP business, they do not provide rides that would subject them to FMCA registration requirements. Thus, Plaintiffs do not willingly compete, or seek to compete, in any market subject to the FMCA's jurisdiction (and Plaintiffs admit that they themselves lack FMCA authorization). Uber's alleged illegitimate activity, under Plaintiffs' theory, however, would only occur in markets subject to the FMCA's jurisdiction. Because Plaintiffs and Uber are competing in different markets (at least with respect to the FMCA licensing issue), Plaintiffs would have to plausibly allege that Uber's illegitimate operations in the FMCA markets allow Uber to be unfairly competitive in non-FMCA markets.

Plaintiffs have not done so in their current complaint nor have they advanced a plausible theory showing an interrelationship between the two markets at the hearing.

Plaintiffs' assertion that Uber gained an unfair competitive advantage by not registering as a motor carrier under the FMCA is highly speculative. The main consequence of FMCA registration is the payment of an application fee, minimum insurance liability limits, and required compliance with certain safety educational requirements. *See* 49 U.S.C. § 13902(a)(1)(A) (requirements for registered motor carriers); 49 U.S.C. § 13904(a)(1)-(2) (requirements for registered brokers). However, even if Uber is required to meet those requirements with respect to rides falling under the FMCA's jurisdiction, it would not have to meet them with respect to *all* of its rides in *all* markets. *See* 49 U.S.C. § 31138 (expressly stating that minimum financial responsibility requirements for transporting passengers for compensation applies when transportation occurs "between a place in a State and—(A) a place in another State; (B) another place in the same State through a place outside of that State; or (C) a place outside the United States"). The "lower costs" theory thus would appear to impact only Uber's operations in the FMCA-regulated market, not the exempt non-FMCA markets.

Even if Uber had to register as a motor carrier as a result of some interstate transportation,[6] and applied those requirements to all its rides, including those which are purely intrastate, there are many variables pertaining to costs and market conditions that would affect any net advantage in Uber's pricing material to Plaintiffs' competitive position. It would be speculative to ascribe any particular pricing advantage simply to the failure to register under the FMCA. We do not know what Uber's increased costs would be if it registered, how those increased costs would be born as between Uber and its drivers, how much, if at all, Uber's pricing of rides will be affected, and whether any change in Uber's pricing will affect Plaintiffs' business. *Cf. Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-59 (2006) (holding that plaintiffs failed to adequately allege a causal connection between reduced market prices and defendant's fraudulent activity because prices could be lowered "for any number of reasons unconnected to the asserted pattern of fraud,"

[6] Plaintiffs conceded at the hearing that Uber need not register as a "broker" under § 49 U.S.C. 13904.

such as "a cash inflow from some other source or [its conclusion] that the additional sales would justify a smaller profit margin;" the "lowering of prices in no sense required [defendant] to defraud the state tax authority"); *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 982-983 (9th Cir. 2008) (holding that county could not sue employer who hired undocumented immigrants for alleged increase in law enforcement expenditures because "the asserted causal chain . . . is quite attenuated," "would be difficult to ascertain because there are numerous alternative causes that might be the actual source or sources of the [plaintiff's] alleged harm," and the "injury would be speculative in the extreme"). Notably, Plaintiffs themselves have not registered under the FMCA; that makes Uber's purported unfair advantage even more speculative.

In short, Plaintiffs have not plausibly alleged that they would be materially disadvantaged as a result of Uber's alleged non-compliance with FMCA registration requirements.

Nothing in Plaintiffs' SAC demonstrates they can overcome this deficiency. Furthermore, Plaintiffs' FMCA claim fails on the merits, as explained below.

c. Merits

Even if Plaintiffs had plausibly alleged an "injury" that conferred them with standing, they have not plausibly alleged a "clear violation" by Uber, which is a jurisdictional pre-requisite to bringing suit under Section 14707. *See Mercury Motor*, 475 F.2d at 1093; *Tri-State Motor*, 479 F.2d at 175. First, Uber is not a "motor carrier" required to register under the statute, because the registration requirement only applies to motor carriers who "own[], rent[], or lease[]" their vehicles. *See* 49 U.S.C. § 13102(14) (a motor carrier is "a person providing motor vehicle transportation for compensation"); 49 U.S.C. § 13902(a) (registration requirement applies to "a motor carrier using self-propelled vehicles the motor carrier owns, rents, or leases"). Second, although Uber is likely a "broker," *see* 49 U.S.C. § 13102(2) (defining "broker" as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise, as selling ,providing, or arranging for, transportation by motor carrier for compensation"), not all brokers are required to register; rather, the FMCA registration requirement only applies to "a broker for transportation of property." 49 U.S.C. § 13904(a). Plaintiffs do not allege that Uber

transports property; they allege it transports people. Thus, Plaintiffs have not alleged a "clear violation" of any of the FMCA's statutory registration requirements.

The "clear violation" allegations cannot be cured by further pleading. Accordingly, Plaintiffs' Section 14707 FMCA claim against Uber is **DISMISSED** with prejudice.[7]

C. Plaintiffs' California Law Claims Premised on Lack of Operating Authority

Plaintiffs' remaining claims for breach of contract, unjust enrichment, indemnification, violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and fraud are all premised on the notion that Uber is operating as a TCP without proper authority under California law, and/or a "motor carrier" or "broker" under federal law.[8]

1. Plaintiffs' Cannot Allege Uber's Unauthorized Operations

As explained above, with respect to the FMCA, even assuming that Uber is required to register as a "motor carrier," and even assuming that Plaintiffs could allege some form of competitive harm resulting from the failure to register, Plaintiffs have not established a "clear violation" of the FMCA because Uber is neither a "broker of transportation" required to register nor a "motor carrier" using a vehicle it owns, rents, or leases which is required to register. Thus, Plaintiffs have failed to allege both that Uber is violating the FMCA and that any damages are traceable to that violation.

With respect to California's TCP and TNC framework, Plaintiffs fail because the CPUC has clearly granted Uber interim operating authority until final non-appealable rules are issued.

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[7] Plaintiffs have only sought injunctive relief under the FMCA Section 14707. They did not bring a claim for damages under Section 14704(b), which provides that "[a] carrier or broken providing transportation or service subject to jurisdiction . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broken in violation of this part." 49 U.S.C. § 14704(b).

[8] *See* FAC ¶ 184 (alleging **breach of contract** because "Uber . . . fail[s] and refus[es] to take any steps necessary to fully and completely secure California and Federal transportation operating authority . . . and such failure . . . renders Uber's transportations activities unlawful"); *id.* ¶ 191 (alleging **unjust enrichment** because Uber deducted commissions from Plaintiffs' rides arranged through Uber despite lacking "the requisite State or federal operating authority"); *id.* ¶ 194 (requesting Uber **indemnify** them from state and federal regulatory action in light of Uber's lack of operating authority); *id.* ¶¶ 197 (alleging **UCL** violation because Uber "has never had authority to operate as a transportation provider under California and Federal law"); *id.* ¶ 223 (Uber **fraudulently** represented that it was "lawfully allowed to operate a passenger transportation company").

Uber's RJN, Ex. B at 1, n. 2 and Ex. C. Though the CPUC has since adopted a final rule, the appeals process has not yet been exhausted. The interim authorization to operate remains in effect. Plaintiffs' claims premised on the allegation that Uber unlawfully operates without authorization under California law thus fail as well.

Even if the CPUC's interim authorization had since expired, the Court would likely lacks jurisdiction over Plaintiffs' claims. The California legislature has limited judicial review of CPUC actions. Section 1759 of the California Public Utilities Code provides that "[n]o court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, *or to enjoin, restrain, or interfere with the commission in the performance of its official duties*, as provided by law and the rules of court." Cal. Pub. Util. Code § 1759(a) (emphasis added). The California Supreme Court has established a test to determine whether an action is barred by § 1759. *See San Diego Gas & Elec. Co. v. Sup. Ct. ("Covalt")*, 13 Cal.4th 893, 923-35 (1996) (test requires considering (1) whether the CPUC has authority to adopt a policy on the subject, (2) whether it has exercised that authority, and, finally, (3) whether the court action "would hinder or interfere with that policy").

Recently, in *Goncharov v. Uber Tech., Inc.*, 19 Cal.App.5th 1157 (2018) the California Court of Appeals considered the scope of Section 1759 in connection with a challenge by taxicab drivers to Uber's alleged failure to comply with CPUC licensing requirements for TCPs—an argument that is nearly identical to Plaintiffs' here. When Uber sought to demur on the basis of Section 1759, the plaintiffs argued that Uber's liability as a TCP for past damages would not interfere with the CPUC's prospective regulatory authority. The Court of Appeals disagreed, holding that "[t]he CPUC's evaluation of whether Uber is a charter-party carrier and what regulations should apply" is "an express focus of the CPUC's formal Rulemaking regarding Uber and TNC's." *Id.* at 1171. Thus, "[a]ny determination regarding Uber's status would strike at the heart of this process," "would be directly related to [the CPUC's] ongoing efforts to regulate Uber and TNC's," and "[a] judicial ruling to the contrary could potentially undermine this process." *Id.*

Similarly, here, the CPUC's efforts to determine Uber's regulatory status and develop its

rules is ongoing. Although the CPUC has voted to adopt a particular set of rules, the internal appeal and review process has not yet been completed. Furthermore, the CPUC has proposed sanctions Uber must pay for its past conduct in order to bring itself into compliance. Resolution of Plaintiffs' claims would, as in *Goncharov*, require this Court "to make factual findings regarding whether Uber falls within the charter-party carrier definition and, if so, which regulations would apply to its operations," which would "directly infringe upon the CPUC's ongoing rulemaking in this area." *Id.* at 1174. Thus, this case does not fall into the limited class where Section 1759 "permits courts to entertain actions for both damages and injunctive relief against regulated entities where those actions seek to enforce, rather than challenge, obligations created by CPUC regulations." *North Star Gas Co. v. Pac. Gas & Elec. Co.*, Case No. 15-cv-02575-HSG, 2016 WL 5358590, at *13 (N.D. Cal. Sep. 26, 2016).

Accordingly, Plaintiffs' claims for breach of contract, unjust enrichment, indemnification, violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and fraud are **DISMISSED** with prejudice.

2. Alternatively, These California Claims Also Fail for Other Reasons

The aforementioned California common law and statutory claims each fail for other reasons, too, as explained briefly below.

Breach of contract: Plaintiffs assert a breach because Uber failed to obtain requisite operating authority. However, the contract terms Plaintiffs cite in their complaint do not impose such a requirement on Uber; they only impose them on drivers like Plaintiffs. *See* FAC ¶¶ 87-88 (citing terms requiring that each driver maintain "all licenses, permits, approvals and authority applicable . . . that are necessary to provide passenger transportation services to third parties in the Territory"). Thus, there is no breach alleged. The claim is dismissed with prejudice because Plaintiffs fail to show amendment would not be futile.[9]

[9] Plaintiffs' proposed Second Amended Complaint cites another provision from a 2014 agreement that states, "[f]ailure by either party to maintain all licenses and permits required by law and/or this Agreement is a material breach." SAC ¶ 339. But all this provides is that Plaintiff has the right to terminate the Agreement in case of the material breach. *See Brown v. Grimes*, 192 Cal.App.4th 265, 277 (2011) ("When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to

Unjust Enrichment: "[I]n California, there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.' [...] When a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (citations omitted). However, "[a]n action based on quasi-contract cannot lie where a valid express contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F.Supp.2d 838, 856 (N.D. Cal. 2004). As Plaintiffs allege, the contract in question here covers the subject matter of fees that Uber may deduct, so the quasi-contract claim is precluded and dismissed with prejudice.

Indemnification: Plaintiffs seek indemnification against adverse regulatory action, but they have not shown that their past temporary suspension was caused by Uber nor have they shown any credible threat of future harm caused by Uber. In any event, Plaintiffs do not allege that Uber had a contractual obligation to indemnify them. Thus, they can only proceed under a theory of equitable indemnity, which encompasses traditional equitable indemnity and implied contractual indemnity, both of which are "only available when there is a joint legal obligation between the indemnitee [Uber] and indemnitor [Plaintiffs] to the injured party [unknown here]." *Fed. Dep. Ins. Co. v. RPM Mortgage, Inc.*, Case No. 15-cv-5534-EMC, 2018 WL 1335812, at *3 (N.D. Cal. Mar. 15, 2018). Plaintiffs have not shown that they were joint tortfeasors with Uber against a third-party or that they and Uber, pursuant to a joint contract, injured a third-party. *Id.* at *3-5. Indemnification does not apply.

Fraud: Plaintiffs allege that Uber fraudulently misrepresented that it had proper operating authority and that it had paid its PUCTRA fees. They do not allege where and when these representations occurred with specificity, as required under Rule 9(b). The only harm they allege are the service fees they paid to Uber, which were deducted from Plaintiffs' earnings from Uber-arranged fares. FAC ¶ 226. Plaintiffs do not allege that they would not have driven for Uber but

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perform under the contract."). It does not establish that Plaintiffs suffer damages from the breach. Moreover, Plaintiffs admit that the provision no longer exists in subsequent, superseding versions of the agreement to which Plaintiffs agreed. SAC ¶ 340.

for the misrepresentations. The deduction of fees in and of itself is not a harm caused by the purported misrepresentation because Plaintiffs' use of the Uber app was conditioned on deduction of the fees. Thus, this claim fails because (i) the misrepresentations are not alleged with specificity under Rule 9(b) and (ii) there is no causal link between the purported misrepresentation and Plaintiffs' harm (the deducted service fees). Plaintiffs do not respond in their opposition or propose an amendment that would cure the deficiency, so the claim is dismissed with prejudice.

UCL: For the reasons previously stated, Plaintiffs fail to state a claim under either the "unlawful" or "unfair" prong of the UCL, Cal. Civ. Code § 17200, because they do not plausibly allege that Uber's conduct was otherwise unlawful for violating either the FMCA or California's TCP and TNC regulations. *See Hodson v. Mars, Inc.*, 891 F.3d 857, 865-66 (9th Cir. 2018) (to be "unfair," conduct must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition" (quotation and citation omitted)). The claim fails under the "fraudulent" prong of the UCL for the same reason Plaintiffs' fraud claim fails.]

3. Remaining California Claims

Finally, Plaintiffs also bring claims for intentional and negligent interference with contractual relations and prospective economic advantage, and for declarations that their arbitration agreement with Uber is unlawful.

Arbitration: Plaintiffs' challenge to the lawfulness of the arbitration agreement is moot. Uber is not seeking to compel arbitration of this dispute. Moreover, Plaintiffs opted out of the arbitration agreement. *See* Docket No. 45. There is no live dispute. The claim is **DISMISSED** with prejudice.

Intentional and negligent interference with contract: Plaintiffs' intentional interference claim appears to be based on Uber's interference "with the CPUC Regulatory, contractual relations between Plaintiffs' Overton and Mendel and its employees, clients, and suppliers [sic]." FAC ¶ 205. The asserted theory is somewhat unintelligible but the Court construes this as claiming that Uber interfered either with Plaintiffs' contractual relations with the CPUC, or with Plaintiffs' clients. However, the pleadings are vague and conclusory and it is not clear whether a contract even exists, what Uber specifically did to interfere with the contract(s), and whether there

has been any harm to Plaintiffs. Furthermore, there is no such thing as a "negligent interference with contract" claim under California law. *See Cisco Sys., Inc. v. STMicroelectronics, Inc.*, 77 F. Supp. 3d 887, 899 (N.D. Cal. 2014) ("[I]n California there is no cause of action for negligent interference with contractual relations."). Plaintiffs have not proposed a cure in their proposed SAC to these deficiencies. Accordingly, the claims are **DISMISSED** with prejudice.

Intentional and negligent interference with prospective economic advantage: Similarly, Plaintiffs allege that Uber acted "to induce Plaintiffs' Overton and Mendel existing CPUC Regulators, employees, clients, prospective clients, and suppliers to sever, and the CPUC to suspend Plaintiffs' TCP authority and their present and prospective business relationships with regulators and clients." FAC ¶¶ 213, 218. Once again, the underlying theory of interference is unclear. To the extent Plaintiffs allege that Uber induced the CPUC to temporarily suspend their TCP licenses for failure to pay PUCTRA fees, Plaintiffs do not plausibly allege that Uber played any role whatsoever in the CPUC's enforcement action against Plaintiffs. To the extent Plaintiffs allege that Uber has interfered with Plaintiffs' relationship with their clients/passengers, they have not specifically pled how that happened. Plaintiffs have not proposed a cure in their proposed SAC. Thus, these claims are also **DISMISSED** with prejudice.

4. Further Amendment Is Not Warranted

Plaintiffs' proposed Second Amended Complaint also includes additional claims under 42 U.S.C. § 1983 against the Uber defendants for violating the commerce clause and 14th Amendment, but the claims would not be viable so amendment is futile. *See Deutsch v. Turner Corp.*, 324 F.3d 692, 718 (9th Cir. 2003) (district court does not abuse discretion when dismissing a claim without leave to amend where doing so would be futile). Plaintiffs do not allege that Uber deprived their rights "under color of state law," as required to allege a Section 1983 claim. *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003). Private parties are not state actors, except in limited circumstances that do not apply here. *See, e.g., Brunette v. Humane Soc. of Ventura Cty.*, 294 F.3d 1205, 1210 (9th Cir. 2002) (private party may be deemed to have engaged in state action if it is a willful participant in joint action with the government; if the government has insinuated itself into a position of interdependence with it; and if it performs functions traditionally and

exclusively reserved to the states); *Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 300–301, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (state action may be found where private entity is controlled by an agency of the state, when its activity results from the state's exercise of coercive power, when the state provides encouragement, or when government is "entwined" in the entity's policies, management, or control). Uber's mere compliance with the TNC program does not constitute state action.

IV. CONCLUSION

For the reasons stated above, Plaintiffs' First Amended Complaint is **DISMISSED** with prejudice. Leave to amend is **DENIED** because amendment would be futile, as confirmed by Plaintiffs' proposed SAC.

This order disposes of Docket Nos. 51 and 59. The Clerk shall enter judgment for the Uber Defendants and CPUC Defendants.

IT IS SO ORDERED.

Dated: August 3, 2018

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 20 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DOUGLAS O'CONNOR; et al.,

Plaintiffs-Appellees,

v.

UBER TECHNOLOGIES, INC.,

Defendant-Appellee,

v.

S. PATRICK MENDEL,

Movant-Appellant.

No. 19-17073

D.C. No. 3:13-cv-03826-EMC
Northern District of California,
San Francisco

ORDER

Before: THOMAS, Chief Judge, and BERZON and BRESS, Circuit Judges.

A review of the record and the response to the motion for summary affirmance indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, the motion for summary affirmance (Docket Entry No. 6) is granted. We summarily affirm the district court's September 13, 2019 order.

AFFIRMED.

LAB/MOATT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS O'CONNOR, et al.,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 13-cv-03826-EMC

ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL AND PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Docket Nos. 954, 935

Plaintiffs brought two lawsuits against Defendant Uber Technologies, Inc., alleging that Uber misclassifies its drivers as independent contractors rather than as employees. *See O'Connor v. Uber Techs., Inc.*, Case No. 13-cv-3826-EMC, Docket No. 330 ¶ 3; *Yucesoy v. Uber Techs., Inc.*, Case No. 15-cv-262-EMC, Docket No. 292 ¶ 2. Five years of contentious litigation ensued. The parties eventually entered into an agreement to settle both suits, and on March 29, 2019, the Court granted preliminary approval to the parties' class action settlement. *O'Connor*, Docket No. 930 ("Prelim. Approval Order"); *Yucesoy*, Docket No. 332.

For the reasons stated on the record and as explained below, the Court now **GRANTS** Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement and Release and **GRANTS** Plaintiffs' Motion for Attorneys' Fees. *O'Connor*, Docket No. 954 ("Mot.") & Docket No. 935 ("MAF"); *Yucesoy*, Docket No. 347 & Docket No. 335.[1] Due and adequate notice of the Settlement Agreement having been given to the Settlement Class; the Court having carefully considered all papers filed and proceedings held herein, including the objections to the proposed Settlement Agreement and/or request for attorneys' fees, the Memoranda of Points and Authorities

[1] All subsequent docket citations are to the *O'Connor* docket, unless otherwise indicated.

in Support of the Motions and all associated Declarations, the Settlement Agreement, the arguments of counsel, and the record in this case; the Court otherwise being fully informed; and good cause appearing therefore, the Court hereby enters the following order.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Settlement Agreement

The Settlement Agreement covers "all Drivers in California and Massachusetts who have used the Uber App at any time since August 16, 2009, up to and including February 28, 2019, and who have validly opted out of arbitration or for whom Uber has no record of acceptance of an arbitration agreement. Excluded from the Settlement Class are (i) all Persons who are directors, officers, and agents of Uber or its subsidiaries and affiliated companies or are designated by Uber as employees of Uber or its subsidiaries and affiliated companies; (ii) Persons who timely and properly excluded themselves from the Settlement Class as provided in this Settlement Agreement (*see* Exhibit C to the Supplemental Hathaway Declaration in support of Final Approval); and (iii) the Court, the Court's immediate family, and Court staff." Docket No. 926 ("Sett. Agmt.") ¶ 96.

Although the *O'Connor* and *Yucesoy* cases were limited to claims based on expense reimbursement and tips, the Settlement Agreement contains an expansive release provision, requiring Class Members to release "any and all" claims "based on or reasonably related to the claims asserted in" *O'Connor* and *Yucesoy*, Sett. Agmt. ¶ 98, while also requiring the Plaintiffs to file amended complaints expanding the causes of action to include all claims related to the alleged misclassification of drivers as independent contractors. *See id.*, Exhs. A, B. However, unlike the First Proposed Settlement, this Settlement Agreement does not include any PAGA claims and would not release any PAGA claims. Motion for Preliminary Approval ("MPA") at 2 n.2; Docket No. 915. Nor does the Settlement Agreement purport to resolve the key underlying dispute whether Uber drivers are employees or independent contractors.

In exchange for Class Members' release of their claims, the Settlement provides monetary and non-monetary consideration. The monetary component of the Settlement is a $20 million non-reversionary fund. Sett. Agmt. ¶ 95. From the fund, $5 million will be deducted for attorneys' fees, approximately $311,092 will be awarded for attorneys' out-of-pocket expenses

related to the litigation, $300,000 will be awarded for costs of claims administration, and $40,000 will be ordered as incentive awards[2] for the Settlement Class representatives. *Id.* ¶¶ 79, 125, 126. The remainder—an estimated $14,348,900—will be distributed to Class Members who timely submit claims. *Id.* ¶ 130. Each claimant's share will be calculated in proportion with the number of miles he or she drove for Uber, based on "relevant records that Uber is able to identify following a good-faith inquiry." *Id.* ¶ 135. Plaintiffs' counsel estimates that Class Members who drove 0–1,000 miles will receive approximately $360, those who drove 10,000 miles will receive $4,000, and those who drove 100,000 miles will receive $36,000. Docket No. 916 ("Liss-Riordan Decl.") ¶¶ 21 n.2, 22 n.4. The average settlement share for each claiming Class Member, after attorneys' fees are deducted, will be approximately $2,206. *Id.* ¶ 20. The Court, in granting preliminary approval of the proposed settlement, found this Plan of Allocation—outlining the monetary recovery, on a pro rata basis, to all members of the Settlement Class who file a timely claim—to be fair and reasonable. Prelim. Approval Order at 23–24.

After an initial distribution is made to drivers whose claims are approved by the Settlement Administrator, a second distribution of uncashed checks will be made to claimants who cashed their initial checks, in proportion to their on-trip mileage. Sett. Agmt. ¶ 142; Docket No. 927. Any funds remaining after the second distribution will be distributed to two *cy pres* beneficiaries: Legal Aid at Work, for unclaimed funds in the California settlement pool, and Greater Boston Legal Services, for unclaimed funds in the Massachusetts settlement pool. *Id.*

Uber has also agreed to provide non-monetary relief in the form of three modifications to its business practices. First, Uber will maintain a comprehensive, written policy governing the deactivation of drivers' accounts that will be easily accessible online. Sett. Agmt. ¶ 127(a)(ii). Second, the deactivation policy will provide several new safeguards to drivers. *Id.* ¶¶ 127(a)(i)–(iv), 127(b). Third, except in the case of deactivations stemming from a number of "excluded matters" (safety issues, physical altercations, discrimination, fraud, sexual misconduct, harassment, or illegal conduct), drivers whose accounts are deactivated will have the opportunity

[2] The term "Incentive Awards" as used here is to be given the same meaning as the term "Enhancement Payments" as used in the Settlement Agreement. *See* Docket No. 916-1 ¶ 62.

to take a "quality course" and be "eligible for consideration for reactivation" upon completion of the course. *Id.* ¶ 127(c). These policy modifications shall expire upon either two years after Final Approval, or "changes to any applicable statute, regulation, or other law that Uber reasonably believes would require a modification to any of the provisions," whichever is earlier. *Id.* ¶ 128. Thus, the modifications will remain in effect for at most two years.

B. Updates Since Preliminary Approval

On April 19, 2019, Plaintiffs filed a Fifth Amended Complaint, as required by the Settlement Agreement. Docket No. 932 ("FiAC"); Sett. Agmt., Exhs. A, B. The Fifth Amended Complaint adds (1) claims pertaining to unjust enrichment, conversion, and fraud, based upon Uber's failure to remit to drivers the entire gratuity paid by customers or tips they might have otherwise received; (2) claims pertaining to various violations of the California Labor Code "stemming from [drivers'] misclassification as independent contractors"; and (3) claims pertaining to violations of the federal Fair Labor Standards Act. FiAC ¶ 3–6. Seventeen claims were added in total. *Id.* at 9–19.

On April 19, 2019, the Settlement Administrator "emailed the Court-approved Long Form Notice . . . to the . . . email addresses provided by Uber for the 14,085 Settlement Class Members." Docket No. 954-1 ("Hathaway Decl.") ¶ 5. Each email contained a unique ID number, password, and personalized link that would take Class Members to a "claim portal where they could file a Claim Form." *Id.* The Settlement Administrator also set up a website "where a person could view the Short Form Notice," as well as a toll-free number to "answer frequently asked questions." *Id.* ¶ 5, 13–14.

In total, 2,034 of the emailed class notices were returned as undeliverable. *Id.* ¶ 6. On May 10, 2019, the System Administrator "mailed paper copies of the Class Notice to the 1,898 Settlement Class Members whose emails had been returned as undeliverable and for whom mailing addresses could be identified. *Id.* Of those paper notices, 324 were returned by the Post Office as undeliverable. *Id.* That same month, Uber informed the Settlement Administrator that there were 1,622 "additional drivers who were not part of the Initial Class Information who the Parties agreed met the definition of a Settlement Class Member and needed to be issued Class

Notice." *Id.* ¶ 6 n.3. Over the course of May and June, the Settlement Administrator emailed the same Class Notice to the newly identified drivers as had been sent to the drivers identified in the Initial Class Information (and "successfully mailed paper Reminder Notices to all 158" of the newly identified drivers whose emails were returned as undeliverable). *Id.* The Settlement Administrator notes that "[a]s of July 22, 2019, Class Notices were ultimately returned undeliverable for 618 of the 15,710 recipient Settlement Class Members. Therefore, total deliverability of Class Notices to Settlement Class Members was over 96%." *Id.* ¶ 7.

Following these initial efforts, the Settlement Administrator sent a reminder notice by email on June 11, 2019 and again on June 24, 2019, to all those members of the Settlement Class who had not yet submitted claims. *Id.* ¶¶ 8–9. The Administrator then sent additional weekly email reminders on July 2, July 10, July 19, July 26, August 2, and August 9, 2019. *Id.* ¶ 10; Docket No. 957-1 ("Supp. Hathaway Decl.") ¶ 4. On July 8, 2019, the Settlement Administrator sent a mailed reminder notice to all those members of the Settlement Class who had not yet submitted claims and whose shares were estimated to be at least $100. Hathaway Decl. ¶ 11. The Administrator also sent mailed reminders to the members of the Settlement Class who requested their reminder notice be re-sent or whose initial reminder notice was returned by the Post Office with a forwarding address on July 26, 2019, August 2, 2019, August 9, 2019, and August 16, 2019. Supp. Hathaway Decl. ¶ 4. Proof that email and postal mail notice complied with the Preliminary Approval Order has been filed with the Court. Hathaway Dec., Exhs. A, B.

Class Members were directed to file claims by August 17, 2019, and as of August 23, 2019, the Settlement Administrator had "received 5,627 timely Claim Forms . . . accounting for 67.3% of the settlement fund (assuming 100% participation)." Supp. Hathaway Decl. ¶ 3. Class Members who "wished to exclude themselves from the Settlement were required to submit a request for exclusion" by June 18, 2019, and as of August 23, 2019, the Settlement Administrator had received three such requests, although one of the parties requesting exclusion subsequently asked to withdraw his request for exclusion.[3] *Id.* ¶ 8. The Settlement Administrator also received

[3] For the Class Members identified by Uber in May and issued their Class Notices on June 11, 2019, they had until August 10, 2019 to submit *requests for exclusion*. Hathaway Decl. ¶ 6 n.3.

four untimely requests for exclusion from three parties. *Id.* ¶ 9. The Court has reviewed Exhibit C to the Supplemental Declaration of Katherine Hathaway, filed on August 27, 2019, and approves Exhibit C thereto as the complete list of all Persons who have submitted timely requests for exclusion from the Settlement Class. Class Members who "wished to object to the Settlement were required to send a written objection, including the specific reason for the objection" by June 18, 2019. Hathaway Decl. ¶ 17. A total of four objections from three parties—discussed in greater detail below—have been filed.[4] Supp. Hathaway Decl. ¶ 11. The Court notes that despite an extensive and robust class notice program, only three members of the Settlement Class have objected; thus, it finds that the response to the proposed Settlement has been considerably positive.

The Court finds that the notice plan as performed by the Parties—including the form, content, and method of dissemination of notice to members of the Settlement Class, as well as the procedures followed for locating (when necessary) current postal addresses for members of the Settlement Class for notice purposes and sending multiple reminder notices—(i) constituted the best practicable notice; (ii) was reasonably calculated, under the circumstances, to apprise members of the Settlement Class of the pendency of the Action and of their right to exclude themselves or object to the Settlement and to appear at the Fairness Hearing; (iii) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv) met all applicable requirements of Federal Rule of Civil Procedure 23 and due process, and any other applicable rules or law. Specifically, the notice complies with Fed. R. Civ. P. 23(c)(2)(B), which requires that class notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

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[4] For the Class Members identified by Uber in May and issued their Class Notices on June 11, 2019, they had until August 10, 2019 to submit *objections*. Hathaway Decl. ¶ 6 n.3.

II. MOTION FOR FINAL APPROVAL

A. Class Certification

When presented with a motion for final approval of a class action settlement, a court first evaluates whether certification of the Settlement Class is appropriate under Federal Rule of Civil Procedure 23(a) and (b). Rule 23(a) provides that a class action can be maintained if four requirements are met: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* Fed. R. Civ. 23(a)(1)–(4). As relevant here, settlement certification of a Rule 23(b)(3) class requires that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members" and that (2) "a class action [be] superior to any other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

The Court analyzed these factors in its Preliminary Approval Order and there is no reason to disturb its earlier conclusions. The requirements of Rule 23(a) and (b)(3) were satisfied then and they remain so now. *See* Prelim. Approval Order at 8–11. The only question pertaining to class certification that arose after the issuance of the Preliminary Approval Order was the identification and addition of 1,625 drivers by Uber; the Court asked the parties about these drivers at the August 29, 2019 hearing, and was assured by both parties that they had simply been identified as qualifying drivers through subsequent rounds of record checks by Uber; there is nothing that suggests the addition of these drivers would alter the Courts' commonality and typicality analysis of the Class and its representatives. Accordingly, the Court confirms its previous certification of the Settlement Class.

B. Final Approval

A class action may only be settled with court approval. Fed. R. Civ. P. 23(e). Where, as here, the proposed settlement will bind class members (by, *e.g.*, releasing their claims), the court must find that the settlement agreement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This standard balances the public policy favoring settlement of complex class action litigation, *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008), with the due process interests of absent class members, *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)).

In making its fairness assessment, courts typically consider: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (citation omitted). Furthermore, Rule 23(e)(2) of the Federal Rules of Civil Procedure now lists the factors to be considered in settlement approval, if the proposal will bind class members. Fed. R. Civ. P 23 (e)(2). Those factors are "whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." *Id.*

The Court assessed nearly all of these factors in its Order granting preliminary approval and found that they counseled in favor of approval. *See* Prelim. Approval Order at 8–10, 11–20. There are no government participants in this case. Thus, only the reaction of the class and the terms of the award of attorneys' fees (discussed *infra*) remain pertinent for final approval.

C. Response of the Class

As of August 23, 2019, a total of four objections to the final settlement had been filed by three parties. *See* Docket Nos. 948, 951, 952, and 959. Two of those objections pertained to what objectors perceived as excessive attorneys' fees. *See* Docket No. 948, 951. Three perceived the proposed settlement as vague, unclear, or confusing, especially with respect to drivers' ability to understand precisely how much money they could expect to receive from the settlement. *See* Docket Nos. 948, 951, and 959. One driver raised an objection based on when he first received

notice of the deadline to opt out of the settlement, alleging that it was after the opt-out deadline. *See* Docket No. 952. Additionally, objectors called the Court's attention to alleged harms they had suffered while working for Uber Technologies, concerns that Uber Technologies is operating and will continue to operate in violation of federal transportation and antitrust laws and California labor laws, and frustration with the fact that the settlement does not resolve the key issue of whether drivers are properly classified as independent contractors or employees. *See* Docket Nos. 948, 951, 952, and 959.

For the reasons outlined below, the Court finds the attorneys' fees requested in this case to be fair and reasonable; as a result, the Court overrules the objections pertaining to attorneys' fees. At the final approval hearing on August 29, 2019, the Court asked the parties to clarify why one of the objectors might have received initial notice of the opt-out deadline after that deadline had already passed, and the parties informed the Court that their records indicated that the objecting party had been sent notices prior to the one he believed to be his first notice. Whether he actually received those earlier notices or why he might not have received them were not questions that the parties could answer with certainty. For the reasons discussed above, the Court finds that the notice provided in this case was reasonable and sufficient to notify to all persons entitled to receive it; accordingly, the Court overrules the objection pertaining to inadequate notice.

At the final approval hearing on August 29, 2019, the Court also reviewed with the parties the language used to explain the awards drivers could expect to receive as a result of the settlement. The Court also heard from Mr. S. Patrick Mendel, who had objected to the Settlement Agreement on the grounds that—among other things—the notice provided to class members provided insufficient information about the precise financial award each driver could expect to receive. After hearing from Mr. Mendel, the Court—together with counsel for both parties—reviewed the estimated financial awards drivers could expect to receive depending on what percentage of the Settlement Fund was ultimately claimed by Class Members. While the Court acknowledges that drivers might have appreciated a precise prediction of exactly how much they would receive from the settlement, the Court found that such a prediction was neither possible, nor necessary to provide Class Members with adequate notice. The class notice did give class

members ranges of possible settlement values depending upon miles driven. The Court overrules the objections pertaining to the lack of clarity regarding precise settlement award amounts. Finally, to the extent that objectors raised issues pertaining to alleged harms they had suffered while working for Uber, concerns that Uber Technologies is operating in violation of state and federal laws, and the fact that the settlement does not resolve the key issue of whether drivers are properly classified as independent contractors or employees, the Court finds those objections to be outside the scope of the Settlement Agreement. The settlement does not preclude future and other actions seeking to adjudicate these issues going forward.

Relatedly, the Settlement Administrator received only three requests to opt out of the Settlement Agreement, although one of the parties requesting exclusion subsequently asked to withdraw his exclusion. Supp. Hathaway Decl. ¶ 8. That request was granted; thus, the total number of parties opting out of the Settlement was two. Supp. Hathaway Decl., Exh. C. Notably, none of the objectors opted out of the Settlement. This number of opt-outs represents less than 1% (less than even .1%) of the total Settlement Class. Such a low opt-out rate suggests the support of Class Members and counsels in favor of approval. *See Nat'l Coal. of Associations of 7-Eleven Franchisees v. Southland Corp.*, 210 F.3d 384 (9th Cir. 2000) (finding that a .6% opt-out rate suggests "that the settlement was a favorable one"). As Plaintiff's counsel suggests, the fact that some Class Members did exercise the right to opt out of the settlement "indicates that the class members read the notice and understood the settlement, such that they were able to make an informed decision whether to participate." *Larsen v. Trader Joe's Co.*, No. 11-CV-05188-WHO, 2014 WL 3404531, at *5 (N.D. Cal. July 11, 2014); *see* Mot. at 11.

In sum, the final approval factors indicate that the Settlement Agreement is fair, reasonable, and adequate. The Courts specifically finds that the Settlement Agreement is in the best interests of the Named Plaintiffs and members of the Settlement Class and is consistent and in compliance with all requirements of due process and federal law. As noted above, the Court found that the Settlement is fair, reasonable, and adequate, the result of arm's-length negotiations between experienced counsel representing the interests of the Named Plaintiffs, members of the Settlement Class, and the Defendants, and is not the product of collusion, fraud, or tortious

conduct. The Court further finds that the Parties have evidenced full compliance with the Court's Preliminary Approval Order and other Orders relating to this Settlement. The class reaction has been overwhelmingly favorable.

The Court **GRANTS** the Motion for Final Approval of Class Action Settlement Agreement and Release and grants final approval to the Settlement and to the Plan of Allocation. The Settlement Agreement is hereby incorporated into this Court's Final Approval Order ("Order and Final Judgment"), and all terms used herein shall have the same meanings set forth in the Settlement Agreement. The Court finds, under Fed. R. Civ. P. 54(b), that there is no just reason for delay in entering final judgment and directs that this Judgment shall be final and entered forthwith.

III. MOTION FOR ATTORNEYS' FEES

A. Fees and Costs

The Court confirms its previous appointment of the law firm of Lichten & Liss-Riordan, P.C. as Class Counsel. On May 14, 2019, Plaintiffs filed a Motion for Attorneys' Fees. Docket No. 935 ("MAF"). Plaintiffs seek "$5 million in attorneys' fees and costs, which is consistent with the Ninth Circuit's 'benchmark' award of 25% of the common fund." MAF at 1. They contend that "Plaintiffs' fees [had they charged fees up front] were approximately $6 million, and their expenses came to approximately $311,000." MAF at 15.

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method" in awarding attorneys' fees. *Bluetooth Headset*, 654 F.3d at 942 (citation omitted). "Because the benefit to the class is easily quantified in common-fund settlements," courts may "award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Id.* "Applying this calculation method, courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award." *Id.* Furthermore, courts have approved attorneys' fees where the fees were "fair and reasonable in light of the results achieved, the risks of litigation, the skill required and the quality of work, the contingent nature of the fee [and] the burdens carried by class counsel, and the awards made in similar cases." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864

(9th Cir. 2012) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir.2002)).

Of these factors, the first—the results obtained for the class—is the "most critical." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, Plaintiff's counsel succeeded in securing favorable results for the Settlement Class. Although the Ninth Circuit's decertification of the original class significantly reduced the number of Class Members who could recover in this case, 15,710 Class Members remained eligible for relief, and 5,627 have filed timely Claim Forms. *See* MAF at 6; Supp. Hathaway Decl. ¶ 3. Plaintiff's counsel estimates that—among these 5,627 claimants—the average payment will be "$2,206, which is many times higher than settlements of similar claims." MAF at 6. Plaintiff's counsel also notes that the settlement conditions secure "programmatic non-monetary relief that is valuable to the class and will improve working conditions for Uber drivers going forward." *Id.* These are meaningful results.

The second factor, the risk of litigation, also supports granting the requested fee. As discussed in the Court's Preliminary Approval Order, Plaintiffs would have had "to overcome significant hurdles were they to proceed to trial." *See* Prelim. Approval Order at 13–17. As Plaintiff's counsel notes, the typical risks of complex, class action litigation were present in this case: "Class certification, arbitration provisions, a decision on the merits, and potential appeals are all issues that can result in no recovery whatsoever to class members or class counsel." MAF at 7. However, Plaintiffs faced unique risks as well. Some of those unique risks ultimately came to pass—*e.g.*, the Ninth Circuit's finding that Uber's arbitration provision was enforceable—while others persist even at these final stages—*e.g.*, the contours and applicability of the California Supreme Court's decision in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018) and any legislative responses to it. Taken together, these examples illustrate that the risk of litigation was significant in this case.

The third factor, the skill required and the quality of work, also favor granting the requested fee. In discussing this factor, Plaintiff's counsel describes their skill and experience in general terms. Plaintiff's counsel noted that the Settlement Class was represented by "highly experienced counsel who focus on wage-hour class actions, with a particular specialty in cases involving independent contractor misclassification, tips, and arbitration clauses." MAF at 11.

Lead Plaintiff's counsel noted that she has prosecuted "many dozens" of wage and hour cases, including class actions, and has "obtained significant first-of-their-kind victories in cases challenging independent contractor misclassification in a variety of industries." *Id.* at 11–12. She has received a great deal of press and many accolades. *Id.* Given the results reached in this complex case and the evidence presented by Plaintiff's counsel, it appears that the third factor tilts in favor of granting the requested fee.

The fourth factor, the contingent nature of the fee and the burdens carried by class counsel, also points in favor of approval. As Plaintiff's counsel notes, as with "virtually all work handled by Plaintiffs' counsel's firm, counsel accepted this case on a fully contingent arrangement, with no payment up front, and have borne the expenses, costs, and risks associated with litigating this case." MAF at 7. In addition, "counsel have litigated this case for six years and have achieved significant benefits for Settlement Class Members." *Id.* at 4. Plaintiff's counsel also notes that "virtually all work handled by Plaintiffs' counsel's firm" is conducted on a contingent-fee basis, which means that "[s]ometimes fees and expenses are recovered; other times, nothing is recovered." *Id.* at 7. Such an approach "permit[s] clients to obtain attorneys without having to pay hourly fees" which in turn "provides critical access to the courts for people who otherwise would be unable to find competent counsel to represent them." *Id.* at 8.

The fifth factor, the awards made in similar cases, supports approving a fee request of 25% of the settlement fund. As a general matter, in common fund class settlements "fees awards range from 20 percent to 30 percent of the fund created." *Paul Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). Generally, "[u]nder the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in [the Ninth Circuit], the benchmark percentage is 25%." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). Thus, the award appears to be in line with attorneys' fees in other cases.

Finally, the Court should conduct a lodestar cross-check to assess the fairness of the fee request. Plaintiffs seek "$5 million in attorneys' fees and costs." MAF at 1. Plaintiff's counsel contends that "Plaintiffs' fees were approximately $6 million, and their expenses came to approximately $311,000." *Id.* at 15. Plaintiff's counsel admits "that Attorney Liss-Riordan (as

well as the firm's paralegal staff) have not kept contemporaneous billing records" and counsel explained that "she has focused her energies on litigating and has not kept records of her time, but that she has spent a substantial proportion of the last three years to this litigation, as this Court is well aware." *Id.* at 16 n.15. Thus, Plaintiffs "submitted contemporaneous time records for the associate attorneys and local counsel who have worked on this case, as well as declarations attesting to the estimated number of hours that the firm's paralegal staff and lead counsel Shannon Liss-Riordan have spent on this litigation." *Id.* at 16. Plaintiff's counsel represents to the Court that they have spent 12,221 hours on the case, at hourly rates ranging between $225 to $850. *Id.* at 16–17. The total amount of fees that would have been billed on the case was $5,940,625. While counsel who fails to keep contemporaneous records runs the substantial risk of denial or discounting of fee awards, the Court is familiar with the unusually lengthy course of this litigation and finds the lodestar claim credible. *Id.* at 17. Given the lodestar, the multiplier in this case actually appears to be negative, and as a result, the lodestar cross-check counsels in favor of granting the fee request.

The Court finds that Class Counsel have adequately represented the Settlement Class for purposes of entering into and implementing the Settlement and hereby **AWARDS** to Class Counsel attorneys' fees in the amount of $5,000,000 to be paid exclusively from the Settlement Amount, as defined in the Settlement Agreement. The Court further **AWARDS** Class Counsel $311,091.67 in additional out-of-pocket costs.

B. Incentive Award

The Court confirms its previous appointment of the following people as Representatives of the Settlement Class: Matthew Manahan, Elie Gurfinkel, Pedro Sanchez, Mohktar Talha, Aaron Dulles, and Antonio Oliveira. The Court finds that these Class Representatives have adequately represented the Settlement Class for purposes of entering into and implementing the Settlement.

The Ninth Circuit has explained that incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). An

incentive award must be "reasonable," and the Court "must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)) (alterations in original).

Plaintiffs request $7,500 incentive awards for Plaintiffs Matthew Manahan, Elie Gurfinkel, Pedro Sanchez, and Mohktar Talha, as well as $5,000 incentive awards for Plaintiffs Aaron Dulles and Antonio Oliveira. MAF at 1. This represents a total of $40,000 in incentive awards. Mot. at 5. The difference in the size of the awards stems from the fact that "Plaintiffs Dulles and Oliveira . . . joined the case a year ago," whereas "[P]laintiffs Gurfinkel, Manahan, Talha, and Sanchez . . . have been a part of the *O'Connor* and *Yucesoy* cases for many years." *Id.* at 23. Furthermore, Plaintiffs Gurfinkel, Manahan, Talha, and Sanchez all spent over 10 hours doing work on the case, while Plaintiffs Dulles and Oliveira each spent 6 hours. *See* Declarations in Support of Motion for Attorney Fees; Docket No. 937–42. Plaintiffs contend "[t]hese awards are reasonable and well within the range of approved incentive payments in class action litigation." Mot at 1. As the Court noted in its Preliminary Approval Order, an incentive award of $5,000 is considered "presumptively reasonable" in this District, but courts have approved higher awards where class representatives can make a strong showing on one or more of the *Staton* factors. *See Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012).

Plaintiffs' counsel notes that the Named Plaintiffs "have spent these long years assisting counsel in advancing the class's claims" and that all "have had their names on the publicly-filed pleadings in this case." MAF at 23–24. They were each "active in helping to assist the attorneys in this case, provide documents and information, and spread the word about the case and Uber's arbitration clause among their fellow drivers." *Id.* at 24. They sat for depositions and they responded to multiple rounds of document requests, interrogatories, and requests for admission. *Id.* Further, it is alleged that the high-profile nature of this case may create challenges for the

Named Plaintiffs in seeking future employment, particularly in the gig-economy, where potential employers will likely see the Named Plaintiffs' names associated with this litigation. As a result, Plaintiff's counsel contends that the incentive awards are reasonable, and this Court likewise concludes that they are fair and reasonable. Thus, the Court **ORDERS** that the aforementioned Incentive Awards be paid pursuant to the Settlement Agreement.

C. Claims Administrator

The Court confirms its previous appointment of Epiq as the Settlement Administrator and finds that it has so far fulfilled its duties under the Settlement. The Court **ORDERS** that $300,000 be paid from the Settlement Amount to the Settlement Administrator for unreimbursed expenses relating to notice and administration of the Settlement with the understanding that the Settlement Administrator will be allowed to collect any additional administration fees and expenses over that amount from unclaimed funds, prior to any payment being made to the designated *cy pres* recipients.

IV. MISCELLANEOUS

In addition to the Court's order outlined above, the Court also orders as follows:

Pursuant to this Order and Final Judgment, with respect to the Released Parties, Settlement Class Members' Released Claims, as defined in Paragraph 98 of the Settlement Agreement (which definition is incorporated herein by reference), are hereby dismissed with prejudice and without costs.

Pursuant to this Order and Final Judgment, with respect to the Released Parties, Named Plaintiffs' General Released Claims, as defined in Paragraph 76 of the Settlement Agreement (which definition is incorporated herein by reference), are hereby dismissed with prejudice and without costs.

Pursuant to this Order and Final Judgment, with respect to the Released Parties, Authorized Claimants' Released Claims, as defined in Paragraph 49 of the Settlement Agreement (which definition is incorporated herein by reference), are hereby dismissed with prejudice and without costs.

As of the Effective Date, the Named Plaintiffs, all members of the Settlement Class who

have not been excluded from the Settlement Class as provided in the Opt-Out List approved by the Court, and their heirs, estates, trustees, executors, administrators, principals, beneficiaries, representatives, agents, assigns, and successors, and/or anyone claiming through them or acting or purporting to act for them or on their behalf, regardless of whether they have received actual notice of the proposed Settlement, have conclusively compromised, settled, discharged, and released Named Plaintiffs' General Released Claims (in the case of the Named Plaintiffs), Settlement Class Members' Released Claims (in the case of the Settlement Class Members), and Authorized Claimants' Released Claims (in the case of Authorized Claimants) against Defendants and the Released Parties, and are bound by the provisions of this Agreement.

The Settlement Agreement and this Order are binding on, and have res judicata and preclusive effect in, all pending and future lawsuits or other proceedings: (i) that encompass the Named Plaintiffs' General Released Claims and that are maintained by or on behalf of the Named Plaintiffs and/or their heirs, estates, trustees, executors, administrators, principals, beneficiaries, representatives, agents, assigns, and successors, and/or anyone claiming through them or acting or purporting to act for them or on their behalf, and (ii) that encompass the Settlement Class Members' Released Claims and Authorized Claimants' Released Claims and that are maintained by or on behalf of any Settlement Class Member who has not been excluded from the Settlement Class as provided in the Opt-Out List approved by this Order and/or his or her heirs, estates, trustees, executors, administrators, principals, beneficiaries, representatives, agents, assigns, and successors, and/or anyone claiming through them or acting or purporting to act for them or on their behalf, regardless of whether the Settlement Class Member previously initiated or subsequently initiates individual litigation or other proceedings encompassed by the Settlement Class Members' Released Claims, and even if such Settlement Class Member never received actual notice of the Action or this proposed Settlement.

The Settlement Agreement and this Order permanently bar and enjoin the Named Plaintiffs, and all other Settlement Class Members who have not been excluded from the Settlement Class as provided in the Opt-Out List approved by the Court, from (i) filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any

other lawsuit or administrative, regulatory, arbitration, or other proceeding in any jurisdiction based on the Named Plaintiffs' General Released Claims (in the case of the Named Plaintiffs), the Settlement Class Members' Released Claims (in the case of the Settlement Class Members), and Authorized Claimants' Released Claims (in the case of the Authorized Claimants) and (ii) organizing Settlement Class Members or Authorized Claimants into a separate group, class, or subclass for purposes of pursuing as a purported class action any lawsuit or administrative, regulatory, arbitration, or other proceeding (including by seeking to amend a pending complaint to include class allegations, or seeking class certification in a pending action) based on the Settlement Class Members' Released Claims or Authorized Claimants' Released Claims.

Except as explicitly provided in the Settlement Agreement, and/or as necessary for Defendants to enforce this Order, neither the Settlement (approved or not approved) nor any exhibit, document, or instrument delivered thereunder, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of the Settlement, nor any proceedings taken pursuant thereto, shall be admissible in this or any other proceeding for any purpose, including as evidence, a presumption, concession, or an admission by any Party of liability or non-liability or of the certifiability or non-certifiability of a litigation class, or of any misrepresentation or omission in any statement or written document approved or made by any Party. Without limitation of the foregoing, nothing contained in the Settlement (approved or not approved) nor any exhibit, document, or instrument delivered thereunder, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of the Settlement, nor any proceedings taken pursuant thereto, shall be given any form of res judicata, collateral estoppel, or judicial estoppel effect against Defendants or the other Released Parties in any administrative or judicial forum or proceeding. Notwithstanding the foregoing, reference may be made to the Agreement and the Settlement provided for therein in such proceedings as may be necessary to effectuate the provisions of the Settlement Agreement and Order, as further set forth in the Settlement Agreement.

Nothing in this settlement shall bar claims or causes of action arising out of Defendants' conduct occurring after the effective date of the releases herein, including any future litigation

concerning the classification status of drivers.

The Parties, without further approval from the Court, may agree to and adopt such amendments, modifications, and expansions of this Agreement, including all Exhibits hereto, as: (i) shall be consistent in all material respects with this Order and (ii) do not limit the rights of Settlement Class Members.

Without affecting the finality of this Judgment, the Court reserves jurisdiction over the Named Plaintiffs, the Settlement Class, and Defendants as to all matters concerning the administration, consummation, and enforcement of the Settlement Agreement.

This order disposes of Docket Nos. 954 and 935.

IT IS SO ORDERED.

Dated: September 13, 2019

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

S. PATRICK MENDEL,

Plaintiff-Appellant,

v.

ELAINE L. CHAO, in her official capacity as U.S. Secretary of Transportation; et al.,

Defendants-Appellees.

No. 19-17380

D.C. No. 4:19-cv-03244-JST
Northern District of California, Oakland

ORDER

Before: PAEZ, M. SMITH, and N.R. SMITH, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the orders challenged in the appeal are not final or appealable. *See* 28 U.S.C. § 1291; *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (dismissal of complaint with leave to amend is not appealable); *see also United States v. Washington*, 573 F.2d 1121, 1122 (9th Cir. 1978) (order denying motion to disqualify judge is not final or appealable); *Silberkleit v. Kantrowitz*, 713 F.2d 433, 434 (9th Cir. 1983) (order granting or denying a stay of proceedings is not generally a final decision appealable under 28 U.S.C. § 1291). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED.

DA/Pro Se

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

S. PATRICK MENDEL,

Plaintiff,

v.

ELAINE CHAO, et al.,

Defendants.

Case No. 19-cv-03244-JST

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY

Re: ECF No. 73

Before the Court is pro se Plaintiff S. Patrick Mendel's motion to disqualify the undersigned judge for cause. ECF No. 73. The Court will deny the motion.

I. BACKGROUND

On June 7, 2019, Plaintiff S. Patrick Mendel filed a complaint against 31 defendants for alleged illegal conduct in connection with rideshare services provided by Uber and Lyft. ECF No. 1; ECF No. 6 at 16-17. On August 12, 2019 Judge Jeffrey S. White recused himself from this case and requested that this case be reassigned. ECF No. 43. Shortly thereafter, the case was randomly reassigned to Judge Jon S. Tigar, the undersigned. ECF No. 45.

On September 20, 2019, Mendel moved to disqualify the undersigned on the basis that he "was appointed in violation of the appointments clause of the U.S. Constitution." ECF No. 73 at 6. Mendel grounds his argument in the assertion that President Barack Obama, who appointed the undersigned, was a "constitutionally unqualified presidential officer." *Id.* at 7-8. In particular, Mendel contends that Obama was an illegitimate president because he "had dual citizenship at birth" and, therefore, did not satisfy the Constitution's natural born citizen requirement. *Id.* at 11-12, 19. Plaintiff asks the Court to "assign the case to a judicial officer who was appointed by a constitutionally qualified President." *Id.* at 6.

Mendel further claims that Judge White's recusal was improper and that the Court's "'random [case] assignment protocol' has deprived Plaintiff of his right to a constitutionally appointed federal judicial officer." ECF No. 73 at 6.

Defendants Uber Technologies, Inc.; Rasier-CA, LLC; Uber USA, LLC; Portier, LLC; Travis Kalanick; Garrett Camp; and Ryan Graves oppose Mendel's motion. ECF No. 82. Mendel has filed a reply. ECF No. 93.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

III. LEGAL STANDARD

"The grounds for disqualification of federal judges are controlled by 28 U.S.C. § 144 and § 455." *Steshenko v. McKay,* No. 09-CV-05543-RS (RMW), 2015 WL 13673844, at *1 (N.D. Cal. Feb. 24, 2015); *see Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (noting Section 144 and Section 455 as authorities governing disqualification); *United States v. Conforte*, 624 F.2d 869, 880–81 (9th Cir. 1980) (identifying Section 144 and Section 455 as the legal standards for disqualification); 13D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3541 (3d ed. 2019) (citing Section 144 and Section 455 as two of the three federal disqualification statutes (the third statute prohibits judges from presiding over an appeal resulting from a case the judge tried)).

Section 144 requires a party to file an affidavit showing "that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. Section 455 requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and in other specified circumstances which raise concerns regarding personal bias or prejudice, 28 U.S.C. § 455(b).

"In this circuit, the test for disqualification [under Section 455(a)] is 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *Steshenko*, 2015 WL 13673844, at *1 (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 714 (9th Cir. 1990)). By contrast, disqualification under either Section 144 or Section 455(b)(1) "is required only if the judge's bias or prejudice (a) is

directed against a party; (b) stems from an extrajudicial source; and (c) casts doubt on his or her impartiality." *Steshenko,* 2015 WL 13673844, at *1.

IV. DISCUSSION

Although Mendel titles his motion as a motion for disqualification, he neither invokes Section 144 or Section 455 nor makes any argument that the undersigned has a personal bias or prejudice. *See* ECF No. 73. Instead, he asserts that the undersigned should be disqualified because he was appointed "in violation of the appointments clause of the U.S. Constitution." ECF No. 73 at 2, 6, 22. The Court, therefore, construes Mendel's motion as seeking removal of a sitting judge.

As other courts have already recognized, Plaintiff's claim is frivolous. *Grinols v. Electoral Coll.*, No. 2:12-CV-02997-MCE, 2013 WL 2294885, at *14 n.13 (E.D. Cal. May 23, 2013) ("Plaintiffs' challenge to President Obama's eligibility for office is frivolous, and has been a tremendous drain on the Court's time and resources."), aff'd, 622 F. App'x 624 (9th Cir. 2015); *Berg v. Obama*, 574 F. Supp. 2d 509, 521 (E.D. Pa. 2008) ("Plaintiff's attempt to use these statutes to gain standing to pursue his Natural Born Citizen Clause claim are frivolous and not worthy of discussion."), aff'd, 586 F.3d 234 (3d Cir. 2009).

Additionally, claims regarding the removal of a sitting judge raise a nonjusticiable political question. Political questions arise when the Constitution textually commits the issue raised in the claim "to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Here, the Constitution textually commits the issue of judicial removal to Congress. Article II, Section 4 provides that the process for removing "all civil Officers of the United States" is impeachment. U.S. Const. art. II, § 4. "Federal judges are 'civil officers' within the meaning of this clause." *United States v. Claiborne*, 727 F.2d 842, 845 n.3 (9th Cir. 1984) (citing *Shurtleff v. United States*, 189 U.S. 311, 316 (1903)); *id.* at 845 ("[F]ederal judges are appointed for life terms, subject only to removal by impeachment."). Article I, Section 2 and Section 3 provide that Congress presides over impeachment proceedings. U.S. Const. art. I, § 2, cl. 5 (The House of Representatives "shall have the sole Power of Impeachment."); U.S. Const. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). The Supreme Court has held that the

Constitution's impeachment provisions give the power to impeach only to Congress. *Nixon v. United States*, 506 U.S. 224, 230-31 (1993) ("[T]he word 'sole' [in Article I, Section 2 and Section 3] is of considerable significance" and indicates that the judiciary does not "have any role to play in impeachments."). Therefore, the Constitution gives Congress the power to remove a federal judge, and the issue of judicial removal is a political question the Court may not resolve.

In either event, Mendel's motion fails to identify any basis for the undersigned to disqualify himself from this case.

CONCLUSION

For the aforementioned reasons, the Court denies Plaintiff's motion for disqualification.

IT IS SO ORDERED.

Dated: October 25, 2019

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

APPENDIX D

APPENDIX D – CONSTITUTIONAL PROVISIONS

United State Constitution, Article II, Section 1, Clause 5

"No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States."

United State Constitution, Article II, Section 2, Clause 2

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

United States Constitution, Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added]

APPENDIX E

APPENDIX E

APPENDIX E – Federal Statutes and Regulations Involved

9 U.S.C. §1 "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. [Emphasis added]

15 U.S.C. §1 - Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

49 U.S.C. §13102

§13102(2) Broker

(2) BROKER.—
The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

§13102(14) Motor Carrier

(14) MOTOR CARRIER.—
The term "motor carrier" means a person providing motor vehicle transportation for compensation.

§13102(23) Transportation

(23) TRANSPORTATION.—The term "transportation" includes—
(A)a motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and
(B) services related to that movement, including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. §13506(b)

(b)EXEMPT UNLESS OTHERWISE NECESSARY.—Except to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over—
(1)transportation provided entirely in a municipality, in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except—
(A) when the transportation is under common control, management, or arrangement for a continuous carriage or shipment to or from a place outside the municipality, municipalities, or zone; or
(B) that in transporting passengers over a route between a place in a State and a place in another State, or between a place in a State and another place in the same State through another State, the transportation is exempt from jurisdiction under this part only if the motor carrier operating the motor vehicle also is lawfully providing intrastate transportation of passengers over the entire route under the laws of each State through which the route runs;
(2) transportation by motor vehicle provided casually, occasionally, or reciprocally but not as a regular occupation or business, except when a broker or other person sells or offers for sale passenger transportation provided by a person authorized to transport passengers by motor vehicle under an application pending, or registration issued, under this part; or
(3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

49 U.S.C. §13703 Certain collective activities; exemption from antitrust laws

(a) AGREEMENTS.—
(1) AUTHORITY TO ENTER.—A motor carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into an agreement with one or more such carriers to establish—
(A) through routes and joint rates;
(B) rates for the transportation of household goods;
(C) classifications;
(D) mileage guides;
(E) rules;
(F) divisions;
(G) rate adjustments of general application based on industry average carrier costs (so long as there is no discussion of individual markets or particular single-line rates); or
(H) procedures for joint consideration, initiation, or establishment of matters described in subparagraphs (A) through (G).
(2) SUBMISSION OF AGREEMENT TO BOARD; APPROVAL.—
An agreement entered into under paragraph (1) may be submitted by any carrier or carriers that are parties to such agreement to the Board for approval and may be approved by the Board only if it finds that such agreement is in the public interest.
(3) CONDITIONS.—
The Board may require compliance with reasonable conditions consistent with this part to assure that the agreement furthers the transportation policy set forth in section 13101.
(4) INDEPENDENTLY ESTABLISHED RATES.—
Any carrier which is a party to an agreement under paragraph (1) is not, and may not be, precluded from independently establishing its own rates, classification, and mileages or from adopting and using a noncollectively made classification or mileage guide.

49 U.S.C. §13901 Requirements for Registration

(a)IN GENERAL.—
A person may provide transportation as a motor carrier subject to jurisdiction under subchapter I of chapter 135 or service as a freight forwarder subject to jurisdiction under subchapter III of such chapter, or service as a broker for transportation subject to jurisdiction under subchapter I of such

chapter only if the person is registered under this chapter to provide such transportation or service.

49 U.S.C. §13902 Registration of Motor Carriers

(a) MOTOR CARRIER GENERALLY.—
(1)IN GENERAL.—Except as otherwise provided in this section, the Secretary of Transportation shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 as a motor carrier using self-propelled vehicles the motor carrier owns, rents, or leases only if the Secretary determines that the person—
(A)is willing and able to comply with—
(i) this part and the applicable regulations of the Secretary and the Board;
(ii) any safety regulations imposed by the Secretary;
(iii) the duties of employers and employees established by the Secretary under section 31135;
(iv) the safety fitness requirements established by the Secretary under section 31144;
(v) the accessibility requirements established by the Secretary under subpart H of part 37 of title 49, Code of Federal Regulations (or successor regulations), for transportation provided by an over-the-road bus; and
(vi) the minimum financial responsibility requirements established by the Secretary under sections 13906, 31138, and 31139;
49 U.S.C. §13902(i)

(i)REGISTRATION AS FREIGHT FORWARDER OR BROKER REQUIRED.—A motor carrier registered under this chapter—
(1) may only provide transportation of property with—
(A) self-propelled motor vehicles owned or leased by the motor carrier; or

(B) interchanges under regulations issued by the Secretary if the originating carrier—
(i) physically transports the cargo at some point; and
(ii) retains liability for the cargo and for payment of interchanged carriers; and
(2) may not arrange transportation except as described in paragraph (1) unless the motor carrier has obtained a separate registration as a freight forwarder or broker for transportation under section 13903 or 13904, as applicable.

49 U.S.C. §13904 Registration of Brokers

(a) IN GENERAL.—The Secretary shall register, subject to section 13906(b), a person to be a broker for transportation of property subject to jurisdiction under subchapter I of chapter 135, if the Secretary determines that the person—
(1) has sufficient experience to qualify the person to act as a broker for transportation; and
(2) is fit, willing, and able to be a broker for transportation and to comply with this part and applicable regulations of the Secretary.
(b)DURATION.—
A registration issued under subsection (a) shall only remain in effect while the broker for transportation is in compliance with section 13906(b).
(c) EXPERIENCE OR TRAINING REQUIREMENTS.—Each broker shall employ, as an officer, an individual who—
(1) has at least 3 years of relevant experience; or
(2) provides the Secretary with satisfactory evidence of the individual's knowledge of related rules, regulations, and industry practices.

(d)REGISTRATION AS MOTOR CARRIER REQUIRED.—
(1) IN GENERAL.—
A broker for transportation may not provide transportation as a motor carrier unless the broker has registered separately under this chapter to provide transportation as a motor carrier.

(2) LIMITATION.—
This subsection does not apply to a motor carrier registered under this chapter or to an employee or agent of the motor carrier to the extent the transportation is to be provided entirely by the motor carrier, with other registered motor carriers, or with rail or water carriers.
(e) REGULATION TO PROTECT MOTOR CARRIERS AND SHIPPERS.—
Regulations of the Secretary applicable to brokers registered under this section shall provide for the protection of motor carriers and shippers by motor vehicle.

(f) BOND AND INSURANCE.—
The Secretary may impose on brokers for motor carriers of passengers such requirements for bonds or insurance or both as the Secretary determines are needed to protect passengers and carriers dealing with such brokers.

(g) UPDATE OF REGISTRATION.—
The Secretary shall require a broker to update its registration under this section not later than 30 days after a change in the broker's address, other contact information, officers, process agent, or other essential information, as determined by the Secretary.

49 U.S.C. §14501 Federal authority over intrastate transportation

49 U.S.C. §14501(d) **PRE-ARRANGED GROUND TRANSPORTATION.—**

(1) IN GENERAL.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law requiring a license or fee on account of the fact that a motor vehicle is providing pre-arranged ground transportation service if the motor carrier providing such service—
(A) meets all applicable registration requirements under chapter 139 for the interstate transportation of passengers;

(B) meets all applicable vehicle and intrastate passenger licensing requirements of the State or States in which the motor carrier is domiciled or registered to do business; and
(C) is providing such service pursuant to a contract for—
(i) transportation by the motor carrier from one State, including intermediate stops, to a destination in another State; or
(ii) transportation by the motor carrier from one State, including intermediate stops in another State, to a destination in the original State.
(2) INTERMEDIATE STOP DEFINED.—
In this section, the term "intermediate stop", with respect to transportation by a motor carrier, means a pause in the transportation in order for one or more passengers to engage in personal or business activity, but only if the driver providing the transportation to such passenger or passengers does not, before resuming the transportation of such passenger (or at least 1 of such passengers), provide transportation to any other person not included among the passengers being transported when the pause began.

(3)MATTERS NOT COVERED.—Nothing in this subsection shall be construed—

(A) as subjecting taxicab service to regulation under chapter 135 or section 31138;

(B) as prohibiting or restricting an airport, train, or bus terminal operator from contracting to provide preferential access or facilities to one or more providers of pre-arranged ground transportation service; and

(C) as restricting the right of any State or political subdivision of a State to require, in a nondiscriminatory manner, that any individual operating a vehicle providing prearranged ground transportation service originating in the State or political subdivision have submitted to pre-licensing drug testing or a criminal background investigation of the records of the State in which the operator is domiciled, by the State or political subdivision by which the operator is licensed to provide such

service, or by the motor carrier providing such service, as a condition of providing such service.

49 U.S.C. §14505 State tax

A State or political subdivision thereof may not collect or levy a tax, fee, head charge, or other charge on—
(1) a passenger traveling in interstate commerce by motor carrier;
(2) the transportation of a passenger traveling in interstate commerce by motor carrier;
(3) the sale of passenger transportation in interstate commerce by motor carrier; or
(4) the gross receipts derived from such transportation.
(Added Pub. L. 104–88, title I, § 103, Dec. 29, 1995, 109 Stat. 904.)

49 U.S.C. §14707 Private enforcement of registration requirement

(a) IN GENERAL.—
If a person provides transportation by motor vehicle or service in clear violation of section 13901–13904 or 13906, a person injured by the transportation or service may bring a civil action to enforce any such section. In a civil action under this subsection, trial is in the judicial district in which the person who violated that section operates.

(b) PROCEDURE.—
A copy of the complaint in a civil action under subsection (a) shall be served on the Secretary and a certificate of service must appear in the complaint filed with the court. The Secretary may intervene in a civil action under subsection (a). The Secretary may notify the district court in which the action is pending that the Secretary intends to consider the matter that is the subject of the complaint in a proceeding before the Secretary. When that notice is filed, the court shall stay further action pending disposition of the proceeding before the Secretary.

(c) ATTORNEY'S FEES.—
In a civil action under subsection (a), the court may determine the amount of and award a reasonable attorney's fee to the prevailing party. That fee is in addition to costs allowable under the Federal Rules of Civil Procedure.

49 U.S.C. §14901 General civil penalties

(a)REPORTING AND RECORDKEEPING.—A person required to make a report to the Secretary or the Board, answer a question, or make, prepare, or preserve a record under this part concerning transportation subject to jurisdiction under subchapter I or III of chapter 135 or transportation by a foreign carrier registered under section 13902, or an officer, agent, or employee of that person that—
(1) does not make the report;
(2) does not specifically, completely, and truthfully answer the question;
(3) does not make, prepare, or preserve the record in the form and manner prescribed;
(4) does not comply with section 13901; or
(5) does not comply with section 13902(c);
is liable to the United States for a civil penalty of not less than $1,000 for each violation and for each additional day the violation continues; except that, in the case of a person or an officer, agent, or employee of such person, that does not comply with section 13901 or section 13902(c) of this title, the amount of the civil penalty shall not be less than $10,000 for each violation, or $25,000 for each violation relating to providing transportation of passengers. [Emphasis added]

49 CFR § 350.201 What conditions must a State meet to qualify for MCSAP Funds?

To qualify for MCSAP Funds, each State must:

(a) Assume responsibility for improving motor carrier safety by adopting and enforcing State safety laws and regulations, standards, and orders that are compatible with Federal regulations, the FMCSRs (49 CFR parts 390-397) and the HMRs (49 CFR parts 107 (subparts F and G only), 171-173, 177, 178 and 180), and standards, and orders of the Federal Government, except as may be determined by the Administrator to be inapplicable to a State enforcement program.

(b) Implement performance-based activities, including deployment and maintenance of technology to enhance the efficiency and effectiveness of CMV safety programs.

(c) Designate a Lead State Agency responsible for administering the CVSP throughout the State.

(d) Give satisfactory assurances that the Lead State Agency has or will have the legal authority, resources, and qualified personnel necessary to enforce the FMCSRs and HMRs or compatible State laws or regulations, standards and orders in the CVSP.

(e) Give satisfactory assurances that the State will devote adequate resources to the administration of the CVSP including the enforcement of the FMCSRs, HMRs, or compatible State laws, regulations, standards, and orders throughout the State.

(f) Provide that the total expenditure of amounts of the Lead State Agency responsible for administering the Plan will be maintained at a level of effort each fiscal year in accordance with 49 CFR 350.301.

(g) Provide a right of entry (or other method a State may use that is adequate to obtain necessary information) and inspection to carry out the CVSP.

(h) Provide that all reports required in the CVSP under this section be available to FMCSA upon request.

(i) Provide that the Lead State Agency adopt the reporting standards and use the forms for recordkeeping, inspections, and investigations that FMCSA prescribes.

(j) Require all registrants of CMVs to demonstrate their knowledge of applicable FMCSRs, HMRs, or compatible State laws or regulations, standards, and orders.

(k) Grant maximum reciprocity for inspections conducted under the North American Inspection Standards through the use of a nationally accepted system that allows ready identification of previously inspected CMVs.

(l) Ensure that activities described in 49 CFR 350.309, if financed through MCSAP funds, will not diminish the effectiveness of the development and implementation of the programs to improve motor carrier, CMV, and driver safety.

(m) Ensure that the Lead State Agency will coordinate the CVSP, data collection and information systems, with the State highway safety improvement program under 23 U.S.C. 148(c).

(n) Ensure participation in appropriate FMCSA information technology and data systems and other information systems by all appropriate jurisdictions receiving funding under this section.

(o) Ensure information is exchanged with other States in a timely manner.

(p) Provide satisfactory assurances that the State will undertake efforts that will emphasize and improve enforcement of State and local traffic laws and regulations related to CMV safety.

(q) Provide satisfactory assurances that the State will address activities in support of the national program elements listed in § 350.109, including the following three activities:

(1) Activities aimed at removing impaired CMV drivers from the highways through adequate enforcement of regulations on the use of alcohol and controlled substances and by ensuring ready roadside access to alcohol detection and measuring equipment.

(2) Activities aimed at providing training to MCSAP personnel to recognize drivers impaired by alcohol or controlled substances.

(3) Activities related to criminal interdiction, including human trafficking, when conducted with an appropriate CMV inspection, and appropriate strategies for carrying out those interdiction activities, including interdiction activities that affect the transportation of controlled substances (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) and listed in part 1308 of title 21, Code of Federal Regulations) by any occupant of a CMV.

(r) Establish and dedicate sufficient resources to a program to ensure that accurate, complete, and timely motor carrier safety data are collected and reported, and to ensure the State's participation in a national motor carrier safety data correction system prescribed by FMCSA.

(s)

(1) Provide that the State will enforce registration (*i.e.,* operating authority) requirements under 49 U.S.C. 13902 and 31134, and 49 CFR 392.9a by prohibiting the operation of (*i.e.,* placing out of service) any vehicle discovered to be operating without the required operating authority or beyond the scope of the motor carrier's operating authority.

(2) Ensure that the State will cooperate in the enforcement of financial responsibility requirements under 49 U.S.C. 13906, 31138, 31139, and 49 CFR part 387.

(t) Ensure consistent, effective, and reasonable sanctions.

(u) Ensure that roadside inspections will be conducted at locations that are adequate to protect the safety of drivers and enforcement personnel.

(v) Provide that the State will include in the training manual for the licensing examination to drive a CMV and the training manual for the licensing examination to drive a non-CMV information on best practices for driving safely in the vicinity of non-CMVs and CMVs.

(w) Provide that the State will conduct comprehensive and highly visible traffic enforcement and CMV safety inspection programs in high-risk locations and corridors.

(x) Except in the case of an imminent or obvious safety hazard, ensure that an inspection of a vehicle transporting passengers for a motor carrier of passengers is conducted at a bus station, terminal, border crossing, maintenance facility, destination, or other location where a motor carrier may make a planned stop (excluding a weigh station).

(y) Ensure that it transmits to roadside inspectors the notice of each Federal exemption under 49 U.S.C. 31315(b) and 49 CFR 390.23 and 390.25 provided to

the State by FMCSA, including the name of the person granted the exemption and any terms and conditions that apply to the exemption.

(z) Except for a territory of the United States, conduct new entrant safety audits of interstate and, at the State's discretion, intrastate new entrant motor carriers under 49 U.S.C. 31144(g). The State must verify the quality of the work conducted by a third party authorized to conduct new entrant safety audits under 49 U.S.C. 31144(g) on its behalf and the State remains solely responsible for the management and oversight of the activities.

(aa) Agree to fully participate in performance and registration information systems management under 49 U.S.C. 31106(b) not later than October 1, 2020, by complying with the conditions for participation under paragraph (3) of that section, or demonstrate to the FMCSA an alternative approach for identifying and immobilizing a motor carrier with serious safety deficiencies in a manner that provides an equivalent level of safety.

(bb) In the case of a State that shares a land border with another country, conduct a border CMV safety program focusing on international commerce that includes enforcement and related projects or forfeit all funds based on border-related activities.

(cc) Comply with the requirements of the innovative technology deployment program in 49 U.S.C. 31102(l)(3) if the State funds operation and maintenance costs associated with innovative technology deployment with its MCSAP funding.

49 CFR §372.101 Casual, occasional, or reciprocal transportation of passengers for compensation when such transportation is sold or arranged by anyone for compensation.

The partial exemption from regulation under the provisions of 49 U.S.C. subtitle IV, part B of the casual, occasional, and reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in 49 U.S.C. 13506(b) be, and it is hereby, removed to the extent necessary to make applicable all provisions of 49 U.S.C. subtitle IV, part B to such transportation when sold or offered for sale, or provided or procured or furnished or arranged for, by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for compensation or as a regular occupation or business.

APPENDIX F

APPENDIX F – California Codes Involved

California Public Utilities Code 421

(a) The commission shall annually determine a fee to be paid by every passenger stage corporation, charter-party carrier of passengers, pipeline corporation, for-hire vessel operator, common carrier vessel operator, railroad corporation, and commercial air operator, and every other common carrier and related business subject to the jurisdiction of the commission, except as otherwise provided in Article 3 (commencing with Section 431) of this chapter and Chapter 6 (commencing with Section 5001) of Division 2.

(b) The annual fee shall be established to produce a total amount equal to the amount established in the authorized commission budget for the same year, including adjustments appropriated by the Legislature and an appropriate reserve, to regulate common carriers and related businesses, less the amount to be paid from special accounts or funds pursuant to Section 403, reimbursements, federal funds, other revenues, and unencumbered funds from the preceding year.

5430. Notwithstanding any other provision of this chapter, this article shall apply to transportation network companies.

(Added by Stats. 2014, Ch. 389, Sec. 1. (AB 2293) Effective January 1, 2015.)

5431. For purposes of this article, the following terms have the following meanings:

(a) "Participating driver" or "driver" means any person who uses a vehicle in connection with a transportation network company's online-enabled application or platform to connect with passengers.

(b) "Personal vehicle" means a vehicle that is used by a participating driver to provide prearranged transportation services for compensation that meets all of the following requirements:

(1) Has a passenger capacity of eight persons or less, including the driver.

(2) Is owned, leased, rented for a term that does not exceed 30 days, or otherwise authorized for use by the participating driver.

(3) Meets all inspection and other safety requirements imposed by the commission.

(4) Is not a taxicab or limousine.

(c) "Transportation network company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.

(d) "Transportation network company insurance" means a liability insurance policy that specifically covers liabilities arising from a driver's use of a vehicle in connection with a transportation network company's online-enabled application or platform.

(e) "Zero-emission vehicle" has the same meaning as in Section 44258 of the Health and Safety Code.

(Amended by Stats. 2018, Ch. 369, Sec. 3. (SB 1014) Effective January 1, 2019.)

5437.

A transportation network company shall not disclose to a third party any personally identifiable information of a transportation network company passenger unless one of the following applies:

(1) The customer knowingly consents.

(2) Pursuant to a legal obligation.

(3) The disclosure is to the commission in order to investigate a complaint filed with the commission against a transportation network company or a participating driver and the commission treats the information under confidentiality protections.

(Added by Stats. 2014, Ch. 389, Sec. 1. (AB 2293) Effective January 1, 2015.)

5440.

The Legislature makes the following findings and declarations:

(a) The commission has initiated regulation of transportation network companies as a new category of charter-party carriers and continues to develop appropriate regulations for this new service.

(b) Given the rapidly evolving transportation network company service, it is the intent of the Legislature to continue ongoing oversight of the commission's

regulation of these services in order to enact legislation to adjust commission authority and impose specific requirements or prohibitions as deemed necessary as these services evolve.

(c) It is the intent of the Legislature that the commission initiate regulation of charter-party carriers in accordance with Section 5440.5 to ensure that transportation network company services do not discriminate against persons with disabilities, including those who use nonfolding mobility devices.

(d) Technology application-based ride hailing services, such as those services provided by transportation network companies (TNC), have impacted the lives of many people by reducing transportation barriers that limited access to jobs, health care, and society. However, more can be done to enable increased access to on-demand transportation services for people with disabilities, especially for persons using nonfolding motorized wheelchairs.

(e) The availability of transportation services, especially on-demand transportation service, can improve economic competitiveness and quality of life. Many individuals fulfill their transportation needs through vehicle ownership, public transit, carpooling, or walking and biking. However, transportation network companies or other application-based ride hailing services enable alternative, on-demand access to transportation.

(f) There exists a lack of wheelchair accessible vehicles (WAVs) available via TNC online-enabled applications or platforms throughout California. In comparison to standard vehicles available via TNC technology applications, WAVs have higher purchase prices, higher operating and maintenance costs, higher fuel costs, and higher liability insurance, and require additional time to serve riders who use nonfolding motorized wheelchairs.

(g) It is the intent of the Legislature that California be a national leader in the deployment and adoption of on-demand transportation options for persons with disabilities.

(h) It is the policy of the state to encourage collaboration among stakeholders and to promote partnerships to harness the expertise and strengths of all to serve the public interest.

(i) The Legislature further finds that adoption of services in communities that were previously underserved may take time, and requires robust dialogue, educational outreach, and partnerships to build trust in the new services.

(j) It is the intent of the Legislature that wheelchair users who need WAVs have prompt access to TNC services, and for the commission to facilitate greater adoption of wheelchair accessible vehicles on transportation network companies' online-enabled applications or platforms.

(Amended by Stats. 2018, Ch. 701, Sec. 3. (SB 1376) Effective January 1, 2019.)

5441.

The Legislature does not intend, and nothing in this article shall be construed, to prohibit the commission from exercising its rulemaking authority in a manner consistent with this article, or to prohibit enforcement activities related to transportation network companies.

5445.1

A transportation network company shall provide all of the following information to a passenger on its online-enabled application or platform at the time the passenger is matched with a transportation network company driver:

(a) The transportation network company driver's first name and a picture of the driver.

(b) An image of the make and model of the transportation network company driver's vehicle.

(c) The license plate number of the transportation network company driver's vehicle.

(Added by Stats. 2018, Ch. 286, Sec. 1. (AB 2986) Effective January 1, 2019.)

5446.

(a) Notwithstanding any other law, the City and County of San Francisco may impose a tax on each ride originating in the City and County of San Francisco provided by a participating driver in an amount not to exceed the following:

(1) One and one-half percent of net rider fares for a shared ride in which, prior to commencement of the ride, a passenger requests through the transportation network company's online-enabled application or platform to share the ride with one or more passengers and each passenger is charged a fare that is calculated, in whole or in part, based on the passenger's request to share all or part of the ride

with one or more passengers, regardless of whether the passenger actually shares all or part of the ride.

(2) Three and one-quarter percent of the net rider fare for a ride other than a ride described in paragraph (1).

(b) Notwithstanding any other law, the City and County of San Francisco may impose a tax on each ride originating in the City and County of San Francisco provided by an autonomous vehicle, whether facilitated by a transportation network company or any other person, in an amount not to exceed the following:

(1) One and one-half percent of net rider fares for a shared ride in which, prior to commencement of the ride, a passenger requests to share the ride with one or more passengers and each passenger is charged a fare that is calculated, in whole or in part, based on the passenger's request to share all or part of the ride with one or more passengers, regardless of whether the passenger actually shares all or part of the ride.

(2) Three and one-quarter percent of the net rider fare for a ride other than a ride described in paragraph (1).

(c) Notwithstanding subdivisions (a) and (b), the City and County of San Francisco may set a lower tax rate for net rider fares for a ride originating in the City and County of San Francisco provided by a zero-emission vehicle to further incentivize deployment of zero-emission vehicles.

(d) For purposes of this section, "net rider fare" means all charges for a ride, including, but not limited to, charges based on time or distance, or both, and excluding any additional charges such as taxes, airport or venue fees, or fees imposed by the commission.

(e) Moneys collected by the City and County of San Francisco pursuant to this section shall be dedicated to fund transportation operations and infrastructure within the City and County of San Francisco.

(f) A tax imposed pursuant to this section shall be subject to applicable voter approval requirements imposed by law.

(g) A tax imposed pursuant to this section shall expire no later than November 5, 2045.

(Added by Stats. 2018, Ch. 644, Sec. 2. (AB 1184) Effective January 1, 2019.)