

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DOUGLAS O'CONNOR, *et al.*,

No. C-13-3826 EMC

Plaintiffs,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

UBER TECHNOLOGIES, INC.,

Defendant.

(Docket No. 276)

TABLE OF CONTENTS

1

2 I. INTRODUCTION 5

3

4 II. DISCUSSION 7

5 A. Legal Standard (Class Certification) 8

6 B. Legal Standard (California’s *Borello* Test for Employment) 10

7 C. The Rule 23(a) Criteria Are Satisfied For Plaintiffs’ Tip Claim 13

8 1. Ascertainability 13

9 2. Numerosity 14

10 3. Commonality 15

11 4. Typicality And Adequacy 17

12 D. Plaintiffs Have Not Met Their Burden to Prove Adequacy With Respect to Their

13 Expense Reimbursement Claim 26

14 E. The Rule 23(b)(3) Requirement of Predominance is Satisfied 29

15 1. Whether Class Members Are Employees or Independent Contractors 30

16 a. Uber’s Control Over Driver Schedules 32

17 b. Uber’s Control Over Driver Routes or Territories 33

18 c. Pay Set Unilaterally By Uber 33

19 d. Use of Third-Party Applications 35

20 e. Star Ratings, Monitoring of Driver’s Performance and Compliance

21 With Uber’s Training “Requirements” or “Suggestions” 36

22 f. Uber’s Right to Terminate Without Cause 37

23 g. *Borello*’s Secondary Factors 41

24 i. Whether The One Performing Services is Engaged in a Distinct

25 Occupation or Business 41

26 ii. The Kind of Occupation, With Reference to Whether, in the

27 Locality, The Work is Usually Done Under The Direction of

28 the Principal or by a Specialist Without Supervision 45

1	iii.	The Skill Required in The Particular Occupation	46
2	iv.	Whether The Principal or the Worker Supplies the	
3		Instrumentalities, Tools, And The Place of Work For The	
4		Person Doing The Work	46
5	v.	The Length of Time For Which Services Are to	
6		be Performed	47
7	vi.	The Method of Payment, Whether by Time or by The Job .	49
8	vii.	Whether or Not The Work is a Part of The Regular Business of	
9		The Principal	49
10	viii.	Whether or Not The Parties Believe They Are Creating The	
11		Relationship of Employer-Employee	50
12	ix.	The Alleged Opportunity For Profit or Loss Depending on His	
13		Managerial Skill	52
14	x.	The Alleged Employee’s Investment in Equipment or	
15		Materials Required for His Task, or His employment of	
16		Helpers	53
17	xi.	Whether The Service Rendered Requires a Special Skill . .	55
18	xii.	The Degree of Permanence of The Working Relationship .	55
19	xiii.	Whether The Service Rendered is an Integral Part of The	
20		Alleged Employer’s Business	56
21	xiv.	Conclusion	56
22	2.	Plaintiffs’ Tip Claim	56
23	F.	Individualized Inquiries May Predominate For Drivers Who Did Not Opt-Out of	
24		Uber’s Most Recent Arbitration Clauses	60
25	G.	Superiority Test is Satisfied For Plaintiffs’ Tips Claim	64
26	H.	Plaintiffs’ Counsel Will Fairly And Adequately Represent The	
27		Interests of The Class	65
28	I.	The Remainder of Plaintiffs’ Motion is Denied Without Prejudice	66

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION 67

APPENDIX 67

I. INTRODUCTION

1
2 Plaintiffs Douglas O'Connor, Thomas Colopy, Matthew Manahan, and Elie Gurfinkel are
3 current or former drivers who have performed services for Defendant Uber Technologies, Inc.
4 Docket No. 330. (Second Amended Complaint) (SAC). They are prosecuting this lawsuit against
5 Uber on behalf of themselves and a putative class of approximately 160,000 other "UberBlack,
6 UberX and UberSUV drivers who have driven for Uber in the state of California at any time since
7 August 16, 2009."¹ Docket No. 276 (Class Cert. Mot.) (Mot.), Ex. 1; *see also* Docket No. 298 (Opp.
8 Br.) at 1. Plaintiffs contend that they and all 160,000 putative class members are Uber's employees,
9 as opposed to its independent contractors, and thus are eligible for various protections codified for
10 employees in the California Labor Code. *See* SAC at ¶ 21. Specifically, Plaintiffs allege that Uber
11 has uniformly failed to reimburse its drivers "for all necessary expenditures or losses incurred by the
12 employee in direct consequence of the discharge of his or her duties," in violation of California
13 Labor Code section 2802, and uniformly failed to pass on the entire amount of any tip or gratuity
14 "that is paid, given to, or left for an employee by a patron." Cal. Lab. Code § 351.

15 Pending before the Court is Plaintiffs' motion for class certification. The merits of the case
16 are not currently at issue. Rather, the Court needs to consider only two questions at this juncture;
17 whether the case can properly proceed as a class action, and, if so, how. While answering both of
18 those questions necessarily requires the Court to perform a rigorous analysis of a number of legal
19 issues, the parties correctly recognize that one threshold issue is of paramount importance to the
20 success or failure of Plaintiffs' class certification motion: as to whether drivers are Uber's
21 employees or independent contractors under California's common-law test of employment, will
22 "questions of law or fact common to class members predominate over any questions affecting only
23 individual members" of the proposed class? Fed. R. Civ. P. 23(b)(3); *see also Ayala v. Antelope*
24 *Valley Newspapers, Inc.*, 59 Cal. 4th 522, 533 (2014). That is, are the drivers' working relationships
25 with Uber sufficiently similar so that a jury can resolve the Plaintiffs' legal claims all at once? This
26

27 ¹ While O'Connor remains a plaintiff in this action, he is no longer seeking to serve as a
28 class representative. Thus, for the purpose of this motion, the Court refers to Colopy, Manahan, and
Gurfinkel collective as "Plaintiffs."

1 question is of cardinal importance because if the Plaintiffs' worker classification cannot be
2 adjudicated on a classwide basis, then it necessarily follows that Plaintiffs' actual substantive claims
3 for expense reimbursement and conversion of gratuities cannot be adjudicated on a classwide basis
4 either.

5 Uber contends that the drivers' employment classification cannot be adjudicated on a
6 classwide basis. According to Uber, both its right of control over its drivers, as well as the day-to-
7 day reality of its relationship with them, are not sufficiently uniform across the proposed class to
8 satisfy the requirements of Federal Rule of Civil Procedure 23 (hereafter Rule 23). As other courts
9 weighing certification of employment misclassification claims have recognized, however, there is
10 inherent tension between this argument and Uber's position on the merits: on one hand, Uber argues
11 that it has properly classified *every single driver* as an independent contractor; on the other, Uber
12 argues that individual issues with respect to each driver's "unique" relationship with Uber so
13 predominate that this Court (unlike, apparently, Uber itself) cannot make a classwide determination
14 of its drivers' proper job classification. *See In re Wells Fargo Home Mortgage Overtime Pay Litig.*,
15 571 F.3d 953, 957 (9th Cir. 2009) (holding that "[a]n internal policy that treats all employees alike
16 for exemption purposes suggests that the employer believes some degree of homogeneity exists
17 among the employees. This undercuts later arguments that the employees are too diverse for
18 uniform treatment"); *see also Norris-Wilson v. Delta-T Group, Inc.*, 270 F.R.D. 596, 602 (S.D. Cal.
19 2010) (explaining that "it may be that [Defendant] believes its workers are in fact independent
20 contractors for reasons unique to each individual, but it's more likely the case [Defendant] believes
21 the independent contractor classification is universally appropriate. That runs at cross-purposes with
22 the reason for objecting to class certification, which is that it's impossible to reach general
23 conclusions about the putative class as a whole") (emphasis omitted). It appears that at least one of
24 these arguments cannot be entirely accurate, and for the purposes of resolving this motion the Court
25 concludes that a number of Uber's class certification arguments are problematic.

26 For the reasons explained below, and further for the reasons stated on the record at the
27 lengthy hearing on this matter, Plaintiffs have met their burden to show that a class can be certified
28 on both the threshold employment classification question and their claim for converted tips under

1 Labor Code section 351 (hereafter, Tips Claim). Specifically, the Court will certify the following
2 class to pursue the Tips Claim under Rule 23(b)(3):

3 All UberBlack, UberX, and UberSUV drivers who have driven for
4 Uber in the state of California at any time since August 16, 2009, and
5 who (1) signed up to drive directly with Uber or an Uber subsidiary
6 under their individual name, and (2) are/were paid by Uber or an Uber
7 subsidiary directly and in their individual name, and (3) did not
8 electronically accept any contract with Uber or one of Uber's
9 subsidiaries which contain the notice and opt-out provisions
10 previously ordered by this Court (including those contracts listed in
11 the Appendix to this Order), *unless* the driver timely opted-out of that
12 contract's arbitration agreement.

13 Plaintiffs' request to certify a class under California Labor Code section 2802 is denied
14 without prejudice for the reasons stated herein, as is Plaintiffs' request to certify other possible
15 classes or subclasses of Uber drivers.

16 **II. DISCUSSION**

17 The Court assumes the reader's familiarity with the procedural and factual background of
18 this increasingly complicated litigation. *See generally O'Connor v. Uber Techs., Inc.*, -- F. Supp. 3d
19 --, 2015 WL 1069092 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, No. 13-cv-3826-EMC, 2014
20 WL 1760314 (N.D. Cal. May 2, 2014); *Mohamed v. Uber Techs., Inc.*, -- F. Supp. 3d --, 2015 WL
21 3749716 (N.D. Cal. 2015). Hence, the Court does not separately recount such details here. Instead,
22 any relevant factual or procedural details are included in the body of this Order as necessary to
23 provide context for the Court's discussion of the merits of Plaintiffs' class certification motion.

24 This Order proceeds as follows. First, the Court discusses the legal standards under Rule 23
25 that are applicable to Plaintiffs' request for class certification. Next, the Court describes the legal
26 standard that will be applied at trial to determine whether the class members are Uber's employees
27 or independent contractors under California law. For while the Court will not decide the merits of
28 Plaintiffs' case at this juncture, the Court can only be assured that the Rule 23 criteria are satisfied
by previewing the merits of Plaintiffs' claims, and, particularly, the types of proof (whether common
or individualized) that will be offered at trial.

After laying out the relevant legal standards, the Court will then apply the Rule 23(a) criteria
to the Plaintiffs' claim that they are/were Uber's employees, rather than independent contractors.

1 Because the Court concludes that the Rule 23(a) criteria are satisfied on the threshold
2 misclassification question, the Court will then further consider whether Rule 23(a) is satisfied with
3 respect to Plaintiffs’ substantive law claims. Ultimately, while the Court concludes that Plaintiffs
4 satisfy all of the Rule 23(a) criteria for their Tips Claim,² the Court is not currently convinced the
5 Plaintiffs have established adequacy with respect to their expense reimbursement claim.

6 The Court will then consider whether Plaintiffs have met their burden under Federal Rule of
7 Civil Procedure 23(b)(3) to prosecute their Tips Claim on a classwide basis. This requires that the
8 Court first determine whether the employment classification question can be resolved with reference
9 to predominately common proof. The Court concludes that the predominance requirement is
10 satisfied with respect to whether the class members are properly classified as independent
11 contractors or employees. The Court similarly concludes that class members’ substantive Tips
12 Claim can be litigated on a classwide basis because common questions predominate over
13 individualized issues. However, the Court will not certify the claims of any driver who accepted one
14 of the driver contracts listed in the Appendix to this Order, and who did not timely opt-out of an
15 arbitration clause in those contracts, because the Court finds that individualized issues as to whether
16 Uber’s more recent arbitration clauses are enforceable against class members will predominate over
17 questions common to all putative class members regarding arbitration. Finally, the Court concludes
18 its analysis by finding that a class action is a superior method for adjudicating class members’ Tips
19 Claims, and further finds that Plaintiffs’ counsel will fairly and adequately represent the interests of
20 the class.

21 A. Legal Standard (Class Certification)

22 Class actions have long been an integral part of the legal landscape. And while expressly
23 authorized by Rule 23, it must be recognized that the “class action is an exception to the usual rule
24 that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart*

25
26 ² Because there is no private right of action to bring a claim under Labor Code section 351,
27 the Plaintiffs are pursuing this claim through California’s Unfair Competition Law (UCL). No party
28 has argued that this procedural detail in any way impacts the class certification analysis, and thus the
Court simply refers to the claim as the Tips Claim (or section 351 claim) without reference to the
UCL.

1 *Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). “In order to justify departure from that rule, a
2 class representative must be part of the class and possess the same interest and suffer the same injury
3 as [her fellow] class members.” *Id.* (internal quotation marks omitted).

4 Accordingly, before certifying a class, this Court “must conduct a ‘rigorous analysis’ to
5 determine whether the party seeking certification has met the prerequisites of Rule 23.” *Mazza v.*
6 *Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (citation omitted). The Supreme
7 Court has made it clear that Rule 23 “does not set forth a mere pleading standard.” *Comcast Corp.*
8 *v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rather, the party seeking certification must “affirmatively
9 demonstrate” her compliance with the requirements of both Rule 23(a) and 23(b). *See Dukes*, 131 S.
10 Ct. at 2551.

11 Rule 23(a) of the Federal Rules of Civil Procedure permits Plaintiffs to sue as representatives
12 of a class only if:

- 13 (1) the class is so numerous that joinder of all members is
14 impracticable;
- 15 (2) there are questions of law or fact common to the class;
- 16 (3) the claims or defenses of the representative parties are typical of
17 the claims or defenses of the class; and
- 18 (4) the representative parties will fairly and adequately protect the
19 interests of the class.

19 Fed. R. Civ. P. 23(a)(1)-(4). The purpose of these Rule 23(a) requirements is largely to “ensure[]
20 that the named plaintiffs are appropriate representatives of the class whose claims they wish to
21 litigate,” and to “effectively limit the class claims to those fairly encompassed by the named
22 plaintiff’s claims.” *Dukes*, 131 S. Ct. at 2550 (internal quotation marks and citations omitted).

23 If each of the Rule 23(a) requirements are satisfied, the purported class must also satisfy one
24 of the three prongs of Rule 23(b). Here Plaintiffs seek certification under Rule 23(b)(3) which
25 provides:

- 26 (3) the court finds that the questions of law or fact common to class
27 members predominate over any questions affecting only individual
28 members, and that a class action is superior to other available methods
for fairly and efficiently adjudicating the controversy.

1 As noted previously, the underlying merits of the case, while admittedly relevant at the class
2 certification stage, should not overly cloud the Court’s certification analysis – the only question
3 presently before the Court is whether the requirements of Rule 23 are met. *See Comcast Corp.*, 133
4 S. Ct. at 1432. The fact that certain elements of proof may favor the defendant on the merits does
5 not negate class certification; the issue is whether the proof is amenable to class treatment.
6 Moreover, “[n]either the possibility that a plaintiff will be unable to prove his allegations, nor the
7 possibility that the later course of the suit might unforeseeably prove the original decision to certify
8 the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule.”
9 *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Indeed, even “after a certification order is
10 entered, the judge remains free to modify it in the light of subsequent developments in the
11 litigation.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). Ultimately, whether or not to
12 certify a class is within the discretion of the Court. *United Steel, Paper & Forestry, Rubber, Mfg.*
13 *Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO CLC v. ConocoPhillips Co.*, 593 F.3d
14 802, 810 (9th Cir. 2010); *see also Levy v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013).

15 B. Legal Standard (California’s Borello Test For Employment)

16 This Court has previously written at length about the common-law test of employment in
17 California. *See O’Connor*, 2015 WL 1069092, at *4-6 (N.D. Cal. 2015). Applying that test at the
18 summary judgment stage, the Court determined that because Uber drivers “render service to Uber,”
19 they are Uber’s presumptive employees as a matter of law. *Id.* at *9. Thus, the Plaintiffs have
20 proved their prima facie case, although the ultimate question of their employment status will need to
21 be decided by a jury. *Id.* at *10-12. The burden will be on Uber at trial to “disprove an employment
22 relationship.” *Id.* at *10.

23 For the purpose of determining whether a presumptive employer can rebut a prima facie
24 showing of employment, the California Supreme Court’s seminal opinion in *Borello* “enumerated a
25 number of indicia of an employment relationship.” *Narayan v. EGL, Inc.*, 616 F.3d 895, 901 (9th
26 Cir. 2010). The “most significant consideration” is the putative employer’s “right to control work
27 details.” *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations (Borello)*, 48 Cal. 3d 341, 350
28 (1989) (internal quotation marks omitted). Formulated somewhat differently, the “principal test of

1 an employment relationship is whether the person to whom service is rendered has the right to
2 control the manner and means of accomplishing the result desired.” *Alexander v. FedEx Ground*
3 *Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (quoting *Borello*, 48 Cal. 3d at 350). The
4 putative employer’s right of control need not extend to every possible detail of the work. *See*
5 *Narayan*, 616 F.3d at 904 (explaining that a truck driver’s “ability to determine a driving route is
6 ‘simply a freedom inherent in the nature of the work and not determinative of the employment
7 relation’”) (quoting *Toyota Motor Sales U.S.A., Inc. v. Super. Ct.*, 220 Cal. App. 3d 864, 876
8 (1990)). Rather, the relevant question is whether the presumptive employer retains “all *necessary*
9 control” over the worker’s performance. *Borello*, 48 Cal. 3d at 357 (emphasis in original).

10 Critically for the purposes of this motion, the Supreme Court has further stressed that the
11 pertinent question under California’s right-of-control test is “not how much control a hirer [actually]
12 *exercises*, but how much control the hirer retains the *right* to exercise.” *Ayala*, 59 Cal. 4th at 533
13 (emphases in original) (citation omitted). Or, as the Supreme Court stated the issue nearly a century
14 ago, “[i]t is not a question of interference, or non-interference, not a question of whether there have
15 been suggestions, or even orders, as to the conduct of the work; but a question of the right to act, as
16 distinguished from the act itself or the failure to act.” *Id.* (quoting *Hillen v. Indus. Accident*
17 *Comm’n.*, 199 Cal. 577, 581-82 (1926)); *see also Air Couriers Int’l v. Emp’t Dev. Dep’t*, 150 Cal.
18 App. 4th 923, 933 (2007) (explaining that if the employer has the authority to exercise control,
19 “whether or not that right is exercised with respect to all details, an employer-employee relationship
20 exists”) (quoting *Empire Star Mines Co. v. Cal. Emp’t Comm’n.*, 28 Cal. 2d 33, 43 (1946))).

21 No one consideration “is dispositive when analyzing employee/independent contractor
22 status” under the *Borello* test. *O’Connor*, 2015 WL 1069092, at *5. Indeed, as this Court
23 previously explained, the case law clearly indicates that the ultimate outcome of the classification
24 inquiry turns on the specific details of the service relationship under consideration, rather than a
25 mechanical checking-off of various factors. *See id.* at *5-6; *see also Alexander*, 765 F.3d at 989.
26 For instance, in some cases an independent contractor relationship has been found where, among
27 many other considerations, there is evidence that the putative employer did not control its hirees’
28 work hours. *See, e.g., Mission Ins. Co. v. Workers’ Comp. App. Bd.*, 123 Cal. App. 3d 211, 216

1 (1981). But other cases have found that on the whole, a service relationship was one of employment
2 even where the hiree had full control over his or her own work schedule. *See Air Couriers Int'l*, 150
3 Cal. App. 4th at 926; *see also O'Connor*, 2015 WL 1069092, at *5-6.

4 Still, while no one factor is dispositive, some factors are considered to be more important in
5 ascertaining the extent of the putative employer's right to control. For example, when evaluating the
6 extent of a presumptive employer's right to control, the Supreme Court has stressed that an
7 employer's "right to discharge at will, without cause" is "strong evidence in support of an
8 employment relationship." *Borello*, 48 Cal. 3d at 350 (citations omitted); *see also Ayala*, 59 Cal. 4th
9 at 531 (characterizing the right to discharge without cause as "[p]erhaps the strongest evidence of
10 the right to control"); *Narayan*, 616 F.3d at 900 (characterizing the right to discharge at will as the
11 "most important" factor for determining whether an employment relationship exists). This is
12 because the "power of the principal to terminate the services of the agent" without cause "gives him
13 the means of controlling the agent's activities." *Ayala*, 59 Cal. 4th at 531 (citations omitted). The
14 "worker's corresponding right to leave is similarly relevant: 'An employee may quit, but an
15 independent contractor is legally obligated to complete his contract.'" *Id.* at 531 n. 2 (quoting
16 *Perguica v. Indus. Accident Comm'n*, 29 Cal. 2d 857 (1947)).

17 The putative employer's right to control work details, while the primary factor, is not the
18 only relevant consideration under *Borello*, however, and the control test cannot be "applied rigidly
19 and in isolation." *Borello*, 48 Cal. 3d at 350. Thus, the Supreme Court has also embraced a number
20 of "secondary indicia" that may be relevant to the employee/independent contractor determination.

21 *Id.* These additional factors include:

22 (a) whether the one performing services is engaged in a distinct
23 occupation or business; (b) the kind of occupation, with reference to
24 whether, in the locality, the work is usually done under the direction of
25 the principal or by a specialist without supervision; (c) the skill
26 required in the particular occupation; (d) whether the principal or the
27 worker supplies the instrumentalities, tools, and the place of work for
28 the person doing the work; (e) the length of time for which the
services are to be performed; (f) the method of payment, whether by
the time or by the job; (g) whether or not the work is a part of the
regular business of the principal; and (h) whether or not the parties
believe they are creating the relationship of employer-employee.

1 *Id.* at 351. *Borello* also “approvingly cited” five additional factors (some overlapping or closely
 2 related to those outlined immediately above), taken from the federal test of employment under the
 3 Fair Labor Standards Act (FLSA), that may help shed light on a putative employee’s proper job
 4 classification. *Narayan*, 616 F.3d at 900. These additional factors are:

5 (i) the alleged employee’s opportunity for profit or loss depending on
 6 his managerial skill; (j) the alleged employee’s investment in
 7 equipment or materials required for his task, or his employment of
 8 helpers; (k) whether the service rendered requires a special skill; (l)
 9 the degree of permanence of the working relationship; and (m)
 10 whether the service rendered is an integral part of the alleged
 11 employer’s business.

12 *Borello*, 48 Cal. 3d at 355 (citing *Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir.
 13 1979)). While the Supreme Court has explained that each of the above “secondary indicia” are
 14 helpful in determining a putative employee’s job status, as noted above, “the considerations in the
 15 multi-factor test are not of uniform significance.” *Ayala*, 59 Cal. 4th at 539. “Some, such as the
 16 hirer’s right to fire at will and the basic level of skill called for by the job, are often of inordinate
 17 importance,” while “[o]thers, such as the ‘ownership of the instrumentalities and tools’ of the job,
 18 may be of only evidential value relevant to support an inference that the hiree is, or is not, subject to
 19 the hirer’s direction and control.” *Id.* (internal quotation marks, citations, and modifications
 20 omitted). Finally, it is clear that the “label placed by the parties on their relationship is not
 21 dispositive, and subterfuges are not countenanced.” *Alexander*, 765 F.3d at 989 (quoting *Borello*, 48
 22 Cal. 3d at 349) (internal modifications omitted).

23 C. The Rule 23(a) Criteria Are Satisfied For Plaintiffs’ Tips Claim

24 1. Ascertainability

25 Before analyzing numerosity under Rule 23(a)(1), courts typically require a showing that the
 26 class to be certified is ascertainable. *See Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 121-22
 27 (N.D. Cal. 2014); 7A Charles Alan Wright *et al.*, Federal Practice and Procedure § 1760 at 142-47
 28 (3d ed. 2005). To be ascertainable, the definition of the class must be “definite enough so that it is
 administratively feasible for the court to ascertain whether an individual is a member” before trial,
 and by reference to “objective criteria.” *Daniel F.*, 305 F.R.D. at 122 (citations omitted); *see also*

1 *Newton v. Am. Debt Servs., Inc.*, No. 11-cv-3228-EMC, 2015 WL 3614197, at *5-6 (N.D. Cal. June
 2 9, 2015) (discussing ascertainability requirement). Put differently, the Court must ensure that the
 3 class is precisely and objectively defined because defining the class with the requisite precision
 4 allows the Court to identify “the persons (1) entitled to relief, (2) bound by a final judgment, and (3)
 5 entitled under Rule 23(c)(2) to the ‘best notice practicable’ in a Rule 23(b)(3) action.” *Daniel F.*
 6 *305 F.R.D.* at 121 (quoting *Manual for Complex Litigation, Fourth* § 21.222 (2004)).

7 Membership in the class being certified here³ is objectively ascertainable from Uber’s
 8 business records. Uber does not dispute that it maintains business records with respect to each of its
 9 drivers, nor is there any dispute that those records will reveal: (1) whether the driver signed up with
 10 Uber or an Uber subsidiary using his individual (as opposed to a fictional/corporate) name, (2) is
 11 paid directly by Uber or an Uber subsidiary with payments made to the driver in his individual (as
 12 opposed to a fictional/corporate) name, (3) whether the driver electronically accepted a certain
 13 contract with either Uber or one of Uber’s subsidiaries, and (4) whether a driver timely opted-out of
 14 arbitration. *See, e.g.*, Docket No. 299 (Evangelis Decl.), Ex. 3 (chart recognizing the difference
 15 between those drivers who are “direct partners with Uber” versus those who work with third-party
 16 companies that partner with Uber); Case No. 14-cv-5200-EMC, Docket. No. 28-2 (Colman Decl.) at
 17 ¶¶ 7-14. Thus, the ascertainability requirement is satisfied here.

18 2. Numerosity

19 A plaintiff satisfies the numerosity requirement if “the class is so large that joinder of all
 20 members is impracticable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (citation
 21 omitted). While no court has set the precise number of class members that are needed to satisfy the
 22 numerosity requirement, there is general recognition that Rule 23(a)(1) is *at least* satisfied when the
 23 proposed class contains one hundred or more members. *See, e.g., Wang v. Chinese Daily News*, 231

25 ³ Again, the class being certified is defined as follows: All UberBlack, UberX, and
 26 UberSUV drivers who have driven for Uber in the state of California at any time since August 16,
 27 2009, and who (1) signed up to drive directly with Uber or an Uber subsidiary under their individual
 28 name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and
 (3) did not electronically accept any contract with Uber or one of Uber’s subsidiaries that is listed in
 the Appendix to this Order, *unless* the driver timely opted-out of that contract’s arbitration
 agreement.

1 F.R.D. 602, 607 (C.D. Cal. 2005) (recognizing there is a presumption of numerosity where the
2 proposed class contains one hundred or more members), *reversed on other grounds by* 737 F.3d 538
3 (9th Cir. 2013); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1998) (finding a
4 proposed class of forty members sufficient to satisfy numerosity). While the Court does not
5 currently know the exact number of class members in the certified class, the Court has no doubt that
6 at least one hundred of the roughly 160,000 individuals who drove for Uber in California since
7 August 2009 will meet the class definition here. Notably, neither party has even suggested that
8 numerosity is not satisfied here. And there is sufficient evidence in the record to suggest that the
9 class being certified will number at least into the hundreds. For instance, in other litigation, Uber
10 has alleged that “several hundred” drivers have opted out of the arbitration agreements listed in the
11 Appendix, and further claimed that at least 269 drivers have opted-out of its earlier 2013 contracts.
12 *See Yucesoy v. Uber Techs., Inc.*, No. 15-cv-262-EMC, Docket No. 107 at 7 n.5; *Gillette v. Uber*
13 *Techs., Inc.*, No. 14-cv-5241-EMC, 2015 WL 4481706, at *4 (N.D. Cal. Jul. 22, 2015) (Uber’s
14 counsel alleged that “roughly 270 drivers” successfully opted-out of earlier versions of arbitration
15 provision). Thus, the Court finds that the numerosity requirement is satisfied.

16 3. Commonality

17 In order to satisfy Rule 23(a)(2)’s commonality requirement, a plaintiff must “affirmatively
18 demonstrate” that their claims depend upon at least one common contention the truth or falsity of
19 which “will resolve an issue that is central to the validity” of each one of the class members’ “claims
20 in one stroke.” *Dukes*, 131 S. Ct. at 2551. That is, the lawsuit must call upon the court or jury to
21 decide at least one factual or legal question that will generate a common answer “apt to drive the
22 resolution of the litigation.” *Id.*; *see also id.* at 2556 (holding that “even a single common question”
23 will suffice to satisfy Rule 23(a)) (citation and internal modifications omitted).

24 Despite Uber’s argument to the contrary, there are numerous legally significant questions in
25 this litigation that will have answers common to each class member that are apt to drive the
26 resolution of the litigation. Most notably, the common legal issue of whether all class members
27 should be classified as employees or independent contractors is one whose answer would not only be
28 “apt to drive the resolution of the litigation,” but could in fact be outcome determinative. *See Guifu*

1 *Li v. A Perfect Franchise, Inc.*, No. 10-cv-1189-LHK, 2011 WL 4635198, at *7 (N.D. Cal. Oct. 5,
2 2011) (Koh, J.). As Judge Koh properly noted when certifying a class action alleging worker
3 misclassification under California law, if, “for example, Plaintiffs have been properly classified as
4 independent contractors, the Court need not consider the additional claims that Plaintiffs have
5 raised.” *Id.* (certifying Rule 23(b)(3) class of massage therapists who had been classified as
6 independent contractors by their putative employer, and who sought relief under various provisions
7 of California Labor Code, including for converted gratuities under Labor Code section 351). Should
8 the jury determine that the class members here are not Uber’s employees, this class action will have
9 reached its end. Should the jury determine they are Uber’s employees, as discussed in greater detail
10 below, they are likely to be entitled to relief as a class at least with respect to the California Tips
11 law.

12 Indeed, given the threshold and determinative nature of the employment classification
13 question, it should come as no surprise that district courts “throughout this circuit have found that
14 commonality is met when the proposed class of plaintiffs asserts that class members were
15 improperly classified as independent contractors instead of employees.” *Giufu Li*, 2011 WL
16 4635198, at *7 (collecting cases); *see also Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 606
17 (N.D. Cal. 2014) (finding commonality established solely because “Plaintiffs assert there is a
18 threshold issue as to all of their claims, namely, whether they are independent contractors or
19 employees of Exel”); *Bowerman v. Field Asset Servs., Inc. (Bowerman II)*, No. 13-cv-0057, 2015
20 WL 1321883, at *14 (N.D. Cal. Mar. 24, 2015) (Orrick, J.) (“Commonality is satisfied here. The
21 key legal issue underlying this case is whether putative class members were misclassified under
22 California law as independent contractors instead of employees [T]his is a common question
23 that is capable of resolution for the class.”); *Norris-Wilson*, 270 F.R.D. at 604 (holding “that whether
24 workers are properly classified as employees or independent contractors is, by itself, a factual and
25 legal issue that satisfies Rule 23(a)”).

26 To be sure, it may be argued that the commonality requirement of Rule 23(a) must be
27 examined at a level of greater specificity, and not rest solely on the general legal question of whether
28 Uber’s drivers are employees or independent contractors. Indeed, the Supreme Court has recognized

1 that Rule 23(a)(2)'s commonality requirement is "subsumed under, or superseded by, the more
2 stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other
3 questions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). Thus, the Court notes that
4 its predominance analysis, conducted below, is also relevant to its determination that Rule 23(a)(2)'s
5 "rigorous" commonality standard is met here. *Dukes*, 131 S. Ct. at 2551. That discussion of
6 predominance examines in greater detail whether the specific factors which inform the *Borello*
7 analysis are susceptible to common and classwide proof. As noted in that discussion, the worker
8 classification claim presents a common issue capable of classwide adjudication because all (or
9 nearly all) of the individual elements of the *Borello* test themselves raise common questions which
10 will have common answers. Thus, even if the authorities stated above did not establish the
11 commonality requirement of Rule 23(a) is met by the overarching common question of driver status
12 as employee or independent contractor, commonality at a more specific level is satisfied here for the
13 reasons discussed in the predominance analysis below.

14 Furthermore, the class claims here raise numerous other common questions that will have
15 common answers apt to drive the resolution of the litigation. For instance, to prevail on their Tips
16 Claim, Plaintiff will be required to show that Uber included a tip or gratuity in the fares it charged to
17 its riders, but that Uber never paid these tips to its drivers. Thus, one common question important to
18 resolving Uber's liability for the Tips Claim on a classwide basis is whether Uber ever actually
19 remitted tips to its drivers. Importantly, Uber has stipulated that "[a] tip has never been part of the
20 calculation of fares for either UberBlack or UberX in California," and thus admits that a common
21 question has a common (and conceded) answer that will help establish Uber's potential classwide
22 liability for Tips Law violations: Uber has never paid gratuities to any of its drivers. *See* Docket
23 No. 313-16 at 33:22-24. Rule 23(a)(2)'s commonality requirement is therefore satisfied for this
24 reason as well.

25 4. Typicality And Adequacy

26 Rule 23(a)(3) requires that "the [legal] claims or defenses of the representative parties [be]
27 typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Representative claims are
28 "typical" if they are "reasonably co-extensive with those of absent class members; they need not be

1 substantially identical.” *Hanlon*, 150 F.3d at 1020. Thus, the “test of typicality is whether other
2 members have the same or similar injury, whether the action is based on conduct which is not unique
3 to the named plaintiffs, and whether other class members have been injured by the same course of
4 conduct.” *Bowerman II*, 2015 WL 1321883, at *15 (quoting *Hanon v. Dataproducts Corp.*, 976
5 F.2d 497, 508 (9th Cir. 1992)). Moreover, courts may evaluate whether a named plaintiff is typical
6 by determining whether she is “subject to unique defenses which threaten to become the focus of the
7 litigation.” *Id.* (citation omitted). “Class certification should not be granted if there is a danger that
8 absent class members will suffer if their representative is preoccupied with defenses unique to
9 [her].” *Id.* (internal modification and citation omitted).

10 Rule 23(a)(4) imposes a closely related requirement to typicality – namely that the putative
11 class representative must “fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
12 23(a)(4). A named plaintiff satisfies the adequacy test if the individual has no conflicts of interest
13 with other class members and if the named plaintiff will prosecute the action vigorously on behalf of
14 the class. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

15 As other courts and commentators have noted, the typicality and adequacy inquiries tend to
16 significantly overlap. *See, e.g.*, Newberg on Class Actions § 3:32 (5th ed. 2015) (“Due to the related
17 nature of the two requirements and the frequency with which they are challenged on the same
18 grounds, many courts address the typicality and adequacy requirements in a single inquiry.”).⁴ For
19 instance, a named plaintiff who is subject to unique defenses (*i.e.*, may not satisfy typicality) may
20 also have a conflict of interest with her fellow class members (*i.e.*, be an inadequate class
21 representative). In light of this overlap, and because Uber and the parties largely treat the two issues
22 together in their briefs, the Court will do the same when analyzing the representative Plaintiffs’
23 ability to represent their fellow class members (as the class is defined above) with respect to their
24 Tips Claims. The Court evaluates the Plaintiffs’ adequacy to pursue expense reimbursement claims
25 under California Labor Code section 2802 in the next section.

26 _____
27 ⁴ As will be discussed below, the typicality and commonality requirements also tend to
28 merge together in certain ways. *See* Newberg on Class Actions § 3:31 (5th ed. 2015) (explaining
that “[b]oth commonality and typicality measure the degree of interrelatedness between the claims in
a class action”).

1 Uber principally argues that the named Plaintiffs’ claims are atypical of their fellow class
2 members’ because there is “no typical Uber driver.” Opp. Br. at 35. For instance, Uber argues that
3 “Plaintiffs, who were onboarded in San Francisco, Los Angeles, and San Diego, are not typical of
4 drivers from other cities, or even of drivers in their own cities who were ‘onboarded’ at different
5 points in time or by different people.” Opp. Br. at 36. Uber also argues that the representative
6 Plaintiffs are not typical of fellow class members with respect to certain secondary elements of the
7 common law *Borello* test. For example, Uber notes that none of the named Plaintiffs ever operated
8 their own distinct transportation company, while other Uber drivers (but, importantly, no class
9 members) have operated distinct transportation companies which contract with Uber directly.⁵ *Id.* at
10 37; *see also* Uber’s Demonstrative Hearing Slides at 4. This argument fails for at least two reasons.

11 First, to the extent that Uber’s “no typical Uber driver” contention is focused on legally
12 relevant differences between drivers under the *Borello* test (*e.g.*, whether or not they operate a
13 distinct transportation business), the argument is really a commonality or predominance argument
14 masquerading as a typicality argument: If *legally material* differences between class members are
15 so substantial that the predominance or commonality tests cannot be satisfied, then the typicality test
16 likely cannot be satisfied either. As discussed below, however, the Court finds that the
17 predominance test *is* satisfied with respect to the specific class defined above because there are *not*
18 significant material legal differences between the claims and defenses of the class members and
19 those of the named Plaintiffs. *See* Section II.E, *infra*.

20 As for the remainder of Uber’s “no typical driver” argument, it fails because Uber focuses on
21 *legally irrelevant* differences between the named Plaintiffs and class members. Rule 23(a)(3)’s test
22 of typicality is not whether there are *any* differences between the representative plaintiffs and the
23 class members they seek to represent. For example, the named Plaintiffs may all be left-handed and
24 drive Hondas, while numerous class members are right-handed and drive Toyotas. But these
25 differences do not demonstrate that the named Plaintiffs are not typical class representatives under
26

27 ⁵ As discussed below, the class as defined excludes all drivers who operated or drove for a
28 distinct transportation businesses that contracted to perform services for Uber, thereby eliminating
any class variance on this *Borello* factor.

1 Rule 23.⁶ Instead, the typicality requirement simply measures whether the named Plaintiffs' *legal*
 2 *claims* all arise from essentially the same conduct underlying their fellow class members' claims and
 3 whether the named Plaintiffs and their fellow class members suffered the same legal injury. As one
 4 district court noted in rejecting an argument similar to Uber's with respect to typicality:

5 'The test of typicality is whether other members have the same or
 6 similar injury, whether the action is based on conduct which is not
 7 unique to the named plaintiffs, and whether other class members have
 8 been injured by the same course of conduct.' The entire class alleges
 9 an identical injury, namely that they were wrongfully classified as
 10 independent contractors by DTG and, as a result, denied a panoply of
 11 work-related benefits that are afforded to employees under California
 12 labor laws. The injuries alleged – a denial of various benefits – and
 13 the alleged source of those injuries – a sinister classification by an
 14 employer attempting to evade its obligations under labor laws – are the
 15 same for all members of the putative class. DTG has no real rebuttal
 16 to this. The typicality requirement is therefore satisfied.

12 *Norris-Wilson*, 270 F.R.D. at 605 (quoting *Hanon*, 976 F.2d at 508). Indeed, as with commonality,
 13 typicality is almost universally found in employment cases like this one where the representative
 14 class plaintiffs allege that they, along with every other member of the class, were wrongfully
 15 misclassified as independent contractors rather than an employees. *See, e.g., Giufu Li*, 2011 WL
 16 4635198, at *8 ("The typicality requirement is met here because Plaintiffs have alleged an identical
 17 injury, namely that the proposed class members were improperly classified as independent
 18 contractors and as a result they were denied a host of work-related benefits provided by California
 19 labor laws."); *Bowerman II*, 2015 WL 1321883, at *15 (holding typicality was satisfied because the
 20 named plaintiffs' "claims arise from the same conduct that provides the basis for all class members'
 21 claims – namely, FAS's alleged misclassification of vendors as independent contractors and
 22

23 _____
 24 ⁶ For instance, Uber seems to argue that a driver who received in-person training could not
 25 represent a person who watched training videos online because their experiences with Uber are
 26 somehow not typical of each other. But if the *form* of training received is in no way material to the
 27 merits of the case, then a difference between class members on this factor cannot destroy (or even
 28 impact) typicality. *See Bowerman II*, 2015 WL 1321883, at *15 ("test of typicality is whether other
 members have the same or similar injury, whether the action is based on conduct which is not unique
 to the named plaintiffs, and whether other class members have been injured by the same course of
 conduct.") (citation omitted). As discussed below, it is not the precise content or style of training
 that informs the *Borello* analysis; rather, it is Uber's right to control that training and to monitor
 drivers' compliance with its "rules" or "suggestions." For the reasons discussed below, that right to
 control is common with respect to class members, and hence typicality is met here.

1 consequent failure to pay overtime wages and indemnify costs”); *Breeden v. Benchmark Lending*
2 *Group, Inc.*, 229 F.R.D. 623, 629 (N.D. Cal. 2005) (typicality met where class representatives’
3 misclassification claims are “precisely the same as the claims of the other class members”); *Dalton*
4 *v. Lee Publ’ns Inc.*, 270 F.R.D. 555, 560 (S.D. Cal. 2010) (explaining that the class representatives
5 “performed nearly identical work as the class members. They were all classified as independent
6 contractors, not employees. They have allegedly suffered damages similar to the class members in
7 the form of unpaid wages and improper deductions and expenses, among other things. The named
8 plaintiffs’ claims are therefore typical of the class”).

9 Uber’s next typicality argument fares no better. Uber claims that named Plaintiff Manahan is
10 subject to a unique defense because he “conceded” at his deposition that he “fraudulently
11 manipulated Uber’s driver referral program,” thereby wrongfully obtaining \$25,000 from Uber.
12 Opp. Br. at 33. In a footnote, Uber then argues that “Manahan’s fraudulent conduct . . . exposes him
13 to a unique counterclaim for breach of contract and a unique affirmative defense of unclean hands.”
14 *Id.* at 33 n.21. This argument is flawed for a multitude of reasons. First, Uber has not actually
15 pleaded a counterclaim for breach of contract against Manahan, despite the fact that his deposition
16 was completed over a year ago. Docket No. 300 (Lipshutz Decl.), Ex. B. (Manahan Depo).
17 Moreover, Manahan’s deposition testimony is far less damning than Uber’s brief implies. At best,
18 Manahan testified that on one occasion he requested multiple rides from a Lyft driver whom he had
19 referred to drive for Uber so that the driver would meet his necessary ride quota, and the two of
20 them would thereby receive their respective referral bonuses from Uber.⁷ *See* Manahan Depo. Tr. at
21 276:6-288:1. While Manahan paid Uber (and thus his referred driver) for the rides he booked,
22 Manahan did not actually ride in the car with the driver. *Id.* at 286:1-13. Even if this activity could
23 constitute fraud, which Uber has not nearly established (and Manahan denies), there appears to be no
24 evidence in the record that Manahan engaged in such activity more than once. Thus, Manahan is not
25 likely subject to a “unique defense” that will “become the focus of the litigation.” *Hanon*, 976 F.2d

26 _____
27 ⁷ Apparently, Uber was paying referral bonuses to existing Uber drivers, like Manahan, who
28 successfully recruited Lyft drivers to drive for Uber. Both the referred driver and the referee would
receive a bonus as long as the new driver completed a minimum number of rides (*e.g.*, 20) for Uber
within a certain period of time. *See* Manahan Depo. Tr. at 282:3-13.

1 at 508; *see also Yucesoy v. Uber Techs., Inc.*, No. 15-cv-262-EMC, 2015 WL 4571547, at *3 (N.D.
2 Cal. Jul. 28, 2015) (recognizing that “the general rule . . . is that unrelated unethical or even criminal
3 conduct is not sufficient to support a finding of inadequacy”) (citation omitted).

4 Of course, while Uber likely cannot prove that Manahan actually committed fraud, it could
5 conceivably use Manahan’s deposition testimony about the referral program to attack his credibility
6 should he testify at trial. Indeed, Uber argues that both Manahan and Gurfinkel⁸ have
7 “demonstrated a severe lack of credibility and trustworthiness regarding the material issues of this
8 case and their relationships with Uber.” Opp. Br. at 33. As this Court has previously recognized,
9 “credibility may be a relevant consideration with respect to the adequacy analysis,” because “an
10 untrustworthy plaintiff could reduce the likelihood of prevailing on the class claims.” *Harris v.*
11 *Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (citations and internal quotations
12 omitted). “That being said, credibility problems do not automatically render a proposed class
13 representative inadequate.” *Id.* (internal modifications, quotation marks, and citations omitted).
14 Rather, “[o]nly when attacks on the credibility of the representative party are so sharp as to
15 jeopardize the interests of absent class members should such attacks render a putative class
16 representative inadequate.” *Id.* (citation omitted). Thus, a finding of inadequacy based on the
17 representative plaintiff’s credibility problems is only appropriate where the representative’s
18 credibility is seriously “questioned on issues directly relevant to the litigation or there are confirmed
19 examples of dishonesty, such as a criminal conviction for fraud.” *Id.* (citation omitted).

20 None of the named Plaintiffs’ putative credibility problems are sufficiently severe so as to
21 undermine their ability to serve as class representatives. For instance, Uber states that Colopy
22 provided “contradictory responses” in discovery; however, the Court reviewed the cited discovery
23 responses and found no contradiction at all. Other claimed credibility problems also appear
24 relatively minor. For instance, in a request for admission (RFA), Manahan denied that “UBER has
25

26 ⁸ Uber also argued that Colopy would be an inadequate class representative. This point is
27 not currently ripe. Because Colopy drove for independent transportation companies rather than
28 Uber directly as an individual, he is not a member of the certified class and similarly cannot
represent members of that class. Whether he might be an adequate representative of a subclass
Plaintiffs may seek to certify as discussed below is not an issue currently before the Court.

1 not established any schedule for when YOU must use the UBER APP,” but later testified at his
2 deposition that while Uber “encourag[ed] me to work busier times,” Uber had never actually “set
3 [his] schedule.” Manahan Depo. Tr. at 308:20-309:1. This and other apparent contradictions
4 between Manahan’s and Gurfinkel’s RFA responses and their later deposition testimony are not
5 sufficiently serious to support a finding of inadequacy.

6 Uber additionally argues that Gurfinkel is an inadequate class representative because he
7 testified at his November 2014 deposition that he does not “have any understanding as to what [his]
8 responsibilities would be to the extent this case were to be certified as a class,” did not know the
9 name of the presiding judge, did not know precisely who the other named plaintiffs are, nor knew
10 what motions had been filed to that point in this case. *See* Lipshutz Decl., Ex. D (Gurfinkel Depo.)
11 at 33:11-17, 143:1-22. But a putative class representative will only be deemed inadequate “if she is
12 *startlingly* unfamiliar with the case,” and specifically lacks a “general understanding of the claims
13 asserted.” *See Richie v. Blue Shield of Cal.*, No. 13-cv-2693-EMC, 2014 WL 6982943, at *18 (N.D.
14 Cal. Dec. 9, 2014) (emphasis added) (citations omitted). Thus in *Richie*, this Court found a class
15 representative inadequate because the putative representative could not “articulate the basic harm on
16 which she has filed suit to recover.” *Id.* at *19. Here, however, Gurfinkel was able to articulate the
17 basic elements of his claim, testifying that the claims alleged in this lawsuit involve “an employer-
18 employee relationship” and the request for payment of tips.⁹ Gurfinkel Depo. Tr. at 144:2-22. Nor
19 has Uber shown that Gurfinkel’s purported ignorance at his deposition nearly a year ago has
20 persisted to the present day.

21 Finally, Uber vigorously argues that the named Plaintiffs are neither adequate nor typical of
22 the putative class members they seek to represent because they “seek a remedy – an employment

23
24
25 ⁹ Admittedly in the deposition excerpts provided by Uber, Gurfinkel apparently did not
26 specifically identify the expense reimbursement claim being prosecuted by Plaintiffs under Labor
27 Code section 2802. But unlike in *Richie*, Gurfinkel was never asked directly whether he was
28 bringing a reimbursement claim, and thus there is no proof that Gurfinkel would have “disavowed
any intent to pursue a claim for mileage reimbursement” had he been asked. *Richie*, 2014 WL
6982943, at *19. Moreover, it is at least reasonably plausible that a lay person like Gurfinkel could
believe that his answer that he was seeking to be declared an employee of Uber would also
adequately describe his rights and remedies as an employee under the Labor Code, which includes
expense reimbursement under section 2802.

1 relationship with Uber – that irreconcilably conflicts with the interests of countless drivers”
2 Opp. Br. at 30; *see also id.* at 3 (arguing that “Plaintiffs are taking positions directly contrary to the
3 desires of many of the very people they claim to represent – who do not want to be employees and
4 view Uber as having liberated them from traditional employment”). The Court rejects this
5 argument. First, while Uber claims that “countless drivers” hail the firm as a “liberator” from
6 traditional employment, Uber has only submitted evidence of the beliefs of a small fraction of its
7 California drivers: 400 out of 160,000 (*i.e.*, 0.25%). Notably, even out of these 400 declarations,
8 Uber identified only about 150 where the driver actually stated that she prefers to remain an
9 independent contractor. *See* Evangelis Decl., Ex. 10 (chart listing roughly 150 “Drivers Who Want
10 To Be Treated As Independent Contractors With Uber”). There is simply no basis in the record
11 supporting Uber’s claim that some innumerable legion of drivers prefer to remain independent
12 contractors rather than become employees.

13 Moreover, not only are the expressed views of these 400 drivers a statistically insignificant
14 sample of the views of their fellow drivers and class members, there is nothing to suggest (and Uber
15 does not contend) that these 400 drivers were randomly selected and constitute a representative
16 sample of the driver population.¹⁰ Nor is there evidence that the responses of these drivers were free
17 from the taint of biased questions. Nothing suggests, for instance, that they were told that were the
18 Plaintiffs to prevail, they might be entitled to thousands of dollars.¹¹

19 More fundamentally, the views expressed have little probative value to the question at hand.
20 As the Court noted at the hearing on Plaintiffs’ motion, it has doubts that most Uber drivers or

21 _____
22 ¹⁰ Indeed, a significant percentage of the 400 declarations submitted by Uber appear to be
23 from drivers who likely will not be members of the certified class. *See, e.g.*, Evangelis Decl., Ex. 3
24 (listing numerous declarants who did not partner directly with Uber); Ex. 6 (listing numerous
25 declarants who own their own transportation services company). Thus, it is safe to assume that of
the roughly 150 declarations submitted by individuals who would prefer to remain independent
contractors, a significant number of these individuals will similarly not be actual class members.

26 ¹¹ Uber submitted a copy of the scripts its attorneys used to solicit these declarations.
Docket No. 319-3. The scripts only suggest generically that class members might be entitled to
restitution of tips or reimbursement of certain expenses – no possible dollar figure is mentioned.
27 Moreover, Uber did not submit evidence of what it told drivers once they agreed to be interviewed
28 for the purpose of submitting a declaration. Rather, the very end of the script reads “Ok, *let’s begin*
the interview” The Court has no idea what Uber’s attorneys actually told the drivers during
their interviews.

1 declarants correctly understand the pertinent legal differences between being an employee and an
2 independent contractor, or the potential consequences of this lawsuit. *See, e.g.*, Docket No. 336
3 (Oral Arg. Tr.) at 16:19-17:25. Indeed, Plaintiffs submitted five counter-declarations from drivers
4 who had previously provided declarations for Uber that indicate that the declarants did not
5 understand when they provided their initial declarations that they would be entitled to expense
6 reimbursement or other employee-only benefits if the Plaintiffs prevail on their claims here. *See,*
7 *e.g.*, Docket No. 314-1 (Beltran Decl). at ¶¶ 5-7. Furthermore, the Court’s independent review of
8 the 400 declarations seems to indicate that most (if not all) Uber drivers who reported a desire to
9 remain independent contractors are operating under the assumption that they would lose all
10 “flexibility” in their working relationship with Uber if they are reclassified as employees. *See Oral*
11 *Arg. Tr.* at 16:19-17:25. But Uber has not definitely established that all (or even much) of this
12 “flexibility” would necessarily be lost, nor has Uber even established that a victory for Plaintiffs in
13 this lawsuit would require Uber to use “less flexible” work schedules going forward. *See Smith v.*
14 *Cardinal Logistics Mgmt. Corp.*, No. 07-cv-2104-SC, 2008 WL 4156364, at *7 (N.D. Cal. Sept. 5,
15 2008) (“Plaintiffs, however, are not seeking to outlaw the employment relationship of an
16 independent contractor. Rather, Plaintiffs are alleging that the current system, as operated by
17 Cardinal, violates California law by attempting to label Cardinal delivery drivers as independent
18 contractors when such drivers are employees as a matter of law. Even if Plaintiffs were to
19 eventually prevail on this claim, there would be nothing to stop Cardinal, at that point, from
20 employing actual independent contractors, so long as such an arrangement complied with California
21 law.”). Indeed, even if Uber loses this case, it will be free to restructure its relationship with its
22 drivers in such a way that the drivers would actually be *bona fide* independent contractors.

23 Furthermore, even if Uber *had* demonstrated some real tension between the goals of the class
24 representatives and some statistically significant percentage of the class members, courts have
25 refused to find inadequacy on these grounds. As one district judge correctly explained, “the
26 conflicts that Rule 23(a) is concerned about are conflicts between the class representatives and other
27 members of the putative class, not between those who do and don’t think a lawsuit is a good idea in
28 the first place. Just because potential class members disagree with the spirit of an action doesn’t

1 mean it shouldn't be certified. It will almost always be the case that some putative class members
 2 are happy with things as they are." *Norris-Wilson*, 270 F.R.D. at 606 (citations omitted); *see also*
 3 *Guifu Li*, 2011 WL 4635198, at *9 (holding that the fact that "some potential class members may
 4 prefer their current employment situation[] is not sufficient to defeat adequacy"); *Smith*, 2008 WL
 5 4156364, at *7. Indeed, as Judge Conti correctly explained in *Smith*, where putative employees seek
 6 to invoke the protections afforded under California labor laws, the Court "must be mindful" of the
 7 fact that "the protections conferred by [these laws] have a public purpose beyond the private
 8 interests of the workers themselves." *Smith*, 2008 WL 4156364, at *7 (quoting *Borello*, 48 Cal. 3d
 9 at 358); *see also* Department of Labor Administrator's Interpretation No. 2015-1, 2015 WL
 10 4449086, at *1 (July 15, 2015) (noting as a public policy matter that "[m]isclassification also results
 11 in lower tax revenues for government and an uneven playing field for employers who properly
 12 classify their workers"). "It would be antithetical" to the public interest embodied in California's
 13 Labor Code to permit a statistically insignificant portion of Uber's workforce "to frustrate the
 14 attempt by others to assert rights under California labor law solely because [they] are satisfied with
 15 their current jobs." *Smith*, 2008 WL 4156364, at *7. Moreover, if there really are class members
 16 who truly object to the goals of this lawsuit, they are always free to opt-out of this class action. *See*
 17 *Dalton*, 270 F.R.D. at 560-61.

18 In conclusion, the Court finds that Manahan's and Gurfinkel's Tips Claims are typical of
 19 their fellow class members' claims, and that both representative Plaintiffs are adequate class
 20 representatives.

21 D. Plaintiffs Have Not Met Their Burden to Prove Adequacy With Respect to Their Expense
 22 Reimbursement Claim

23 By contrast, Plaintiffs have not demonstrated that they are adequate class representatives
 24 with respect to their expense reimbursement claim under Labor Code section 2802. That provision
 25 provides, as relevant here, that:

26 An employer shall indemnify his or her employee for all *necessary*
 27 expenditures or losses incurred by the employee in *direct consequence*
 28 of the discharge of his or her duties

1 Cal. Lab. Code § 2802(a) (emphases added). As this Court has previously recognized, expense
2 reimbursement claims under section 2802 can sometimes be problematic to certify as class actions
3 because “there may be substantial variance as to what kind of expenses were even incurred by [the
4 putative employees] in the first place.” *Harris*, 753 F. Supp. 2d at 1022; *see also Giufu Li*, 2011 WL
5 4635198, at *14 (denying certification of section 2802 claim where plaintiffs did not narrow their
6 “claim to any specific expenses or category of expenses, and as a result, Plaintiffs claim
7 reimbursement over a wide and divergent range of items”). Moreover, depending on the case, it
8 may be challenging to determine on a classwide basis whether a particular expense (or type of
9 expense) was “necessary” or incurred in “direct consequence” of the employee’s duties. *See Harris*,
10 753 F. Supp. 2d at 1022; *Giufu Li*, 2011 WL 4635198, at *14 (holding that it would be difficult to
11 determine on a class wide basis whether massage therapists’ expenses for various items like
12 uniforms, sheets, oil, paper, and flyer fees were “necessary” or incurred in “direct consequence” of
13 their duties).

14 That is not to say, of course, that a class action can never be certified under section 2802.
15 The opposite is clearly true. *See, e.g., Dalton*, 270 F.R.D. at 563-64 (certifying Rule 23 class action
16 that included expense reimbursement claim under section 2802); *Stuart v. Radioshack Corp.*, No.
17 07-cv-4499-EMC, 2009 WL 281941 (N.D. Cal. Feb. 5, 2009) (same); *Shepard v. Lowe’s HIW, Inc.*,
18 No. 12-cv-3893-JSW, 2013 WL 4488802 (N.D. Cal. Aug. 19, 2013) (same). But certification of
19 such claims typically requires the Plaintiff to identify “specific expenses or categor[ies] of expenses”
20 that were incurred uniformly (or are calculable based on a common formula) on a classwide basis,
21 and that the answers to section 2802’s “necessity” and “direct consequence” inquiries will similarly
22 be subject to common proof across the class. *See Giufu Li*, 2011 WL 4635198, at *14

23 Plaintiffs seemed to suggest in their papers, and again at the hearing, that the “main thing
24 that we’re seeking” is reimbursement for vehicle operating expenses, such as gas, maintenance and
25 wear and tear. *See Oral Arg. Tr.* at 92:24-25. And Plaintiffs further suggested that the Court could
26 utilize the Internal Revenue Service’s (IRS) mileage reimbursement rate to easily determine
27
28

1 damages on a classwide basis for their section 2802 claim.¹² Such a class might be certifiable –
2 indeed, this Court has previously certified a class action on behalf of drivers who sought
3 reimbursement of vehicle operation expenses using the IRS reimbursement rate as the common
4 damages model. *Stuart*, 2009 WL 281941, at *18; *see also Dalton*, 270 F.R.D. at 564 (certifying
5 class action on behalf of newspaper delivery drivers where damages would be determined on
6 classwide basis using IRS standard mileage allowance); *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42
7 Cal. 4th 554, 569 (2007) (explaining that the IRS reimbursement rate is considered a generally
8 permissible measure of vehicle operation expense for purposes of Labor Code section 2802).
9 However, when the named plaintiffs seek to waive other elements of damage on behalf of the class
10 in order to facilitate class certification, the Court must determine whether representation is adequate.
11 In particular, the Court must examine, *inter alia*, the relative magnitude of the damage elements
12 sought to be waived; where elements of damages for the class sought to be waived are substantial,
13 questions may be raised about the adequacy of representation. *See Tasion Commc’n, Inc. v. Ubiquiti*
14 *Networks, Inc.*, -- F.R.D. --, 2015 WL 4734935, at *10 (N.D. Cal. 2015) (finding an “adequacy
15 problem” where “[p]laintiffs have failed to give any real explanation as to why they are willing to
16 abandon other kinds of compensable damages” where the value of the forgone damages is “likely to
17 exceed by many times” the measure of damages the plaintiffs actually sought); *Drimmer v. WD-40*
18 *Co.*, No. 06-cv-900 W(AJB), 2007 WL 2456003, at *5 (S.D. Cal. Aug. 24, 2007) (“A class
19 representative is not an adequate representative when the class representative abandons particular
20 remedies to the detriment of the class.”); *Thompson v. Am. Tobacco Co., Inc.*, 189 F.R.D. 544, 550
21 (D. Minn. 1999).

22 Plaintiffs here did not make any attempt to demonstrate that the monetary value of the other
23 types of expenses that they had previously sought to recover for absent class members in this
24 litigation, and now would be waiving in order to obtain class certification (*e.g.*, water bottles, gum
25

26 ¹² The IRS mileage reimbursement rate is calculated by the IRS “based on an annual study
27 of the fixed and variable costs of operating an automobile, including depreciation, insurance, repairs,
28 tires, maintenance, gas and oil.” *See* <http://www.irs.gov/uac/Newsroom/New-Standard-Mileage-Rates-Now-Available;-Business-Rate-to-Rise-in-2015>, last accessed August 18, 2015.

1 and mints for passengers, clothing, etc...),¹³ were not so substantial so as to create a conflict of
2 interest between the class representatives and class members. That is, Plaintiffs have not
3 demonstrated (or even tried to demonstrate) that it is in the best interests of the absent class members
4 to waive their claims for reimbursement of all their actual expenses (including actual vehicle
5 operation expenses) that are not captured by the IRS mileage rate formula.

6 To be clear, the Court does not conclude that Plaintiffs could not make such a showing. For
7 instance, Plaintiffs could submit an expert report or other evidence that shows that absent class
8 members will be well served receiving the IRS mileage rate rather than receiving their actual
9 damages. On the current record, however, the Plaintiffs have not provided the Court with sufficient
10 information for it to be reasonably assured that what Plaintiffs purport to be giving up on behalf of
11 the class members they seek to represent is not of such value to absent class members that the
12 interests of those class members would be at odds with those of the named Plaintiffs. Thus,
13 Plaintiffs have not established adequacy with respect to their expense reimbursement claim, and the
14 claim cannot be certified at this time.

15 E. The Rule 23(b)(3) Requirement of Predominance is Satisfied

16 Having satisfied the Rule 23(a) criteria for their Tips Claim, the Plaintiffs must next
17 demonstrate that the proposed class claim meets the requirements of Rule 23(b)(3), which tasks the
18 Court with determining whether common questions of law and fact predominate over individualized
19

20 ¹³ While it is somewhat unclear, it is possible that the Plaintiffs are not willing to waive
21 recovery of all other types of expenses not encompassed in the IRS mileage rate. *See* Oral Arg. Tr.
22 at 93:1-24. If that is the case, however, the Plaintiffs did not even begin to explain *how* the Court
23 could certify such a class (or classes). Indeed, a significant flaw pervades many aspects of
24 Plaintiffs' class certification papers: Rather than providing detailed proposals of how this Court
25 might certify or try different class claims from the one Plaintiffs asked to be certified, Plaintiffs
26 simply state without explanation that the Court could "use subclasses" or "employ" certain trial
27 management techniques. That is, Plaintiffs put the burden on this Court to figure out precisely what
28 claims (or portions of claims) might be certifiable. That is not an acceptable practice. The Court,
facing a motion for class certification, must determine the nature of this proof and whether it is
amenable to class treatment in adjudicating the motion, rather than deferring the question until trial.
Nor does Plaintiff's trial plan, even if relevant, submitted for the first time at the hearing, cure this
deficiency. First, the plan was untimely – Plaintiffs' motion for class certification was filed in April
2015. *That* was the time to submit detailed trial proposals and define possible subclasses, not on the
day of the hearing. Moreover, Plaintiff's trial plan is still not sufficiently detailed regarding how or
why this Court should engage in the types of subclassing or employ the various trial procedures
Plaintiffs suggest.

1 issues, and whether class adjudication is superior to individual litigation of the Plaintiffs' claims.
 2 Fed. R. Civ. P. 23(b)(3) (providing a court may certify a (b)(3) class if it "finds that the questions of
 3 law or fact common to the class members predominate over any questions affecting only individual
 4 members, and that a class action is superior to other available methods for fairly and efficiently
 5 adjudicating the controversy"). "The predominance test of Rule 23(b)(3) is 'far more demanding'
 6 than the commonality test under Rule 23(a)(2)." *Villalpando*, 303 F.R.D. at 607 (quoting *Amchem*
 7 *Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997)). Only where "common questions present a
 8 significant aspect of the case and they can be resolved for all members of the class in a single
 9 adjudication [is] there clear justification for handling the dispute on a representative rather than
 10 individual basis." *Hanlon*, 150 F.3d at 1022 (citations omitted); *see also Edwards v. First Am.*
 11 *Corp.*, -- F. 3d. --, 2015 WL 4999329, at *7 (9th Cir. Aug. 24, 2015).

12 Here, the Court must actually perform the predominance analysis twice. First, the Court
 13 considers whether common questions predominate over individualized issues with respect to the
 14 employment misclassification claim. "If they do not, then the inquiry ends there and class
 15 certification should be denied." *Giufu Li*, 2011 WL 4635198, at *12. "If, however, common
 16 questions predominate the classification inquiry," the Court then considers Plaintiffs' individual
 17 substantive claim "to determine whether [it] also pass[es] the predominance test." *Id.*; *see also*
 18 *Norris-Wilson*, 270 F.R.D. at 606 (following same analytical protocol); *Villalpando*, 303 F.R.D. at
 19 608 (same); *Soto v. Diakon Logistics (Del.), Inc.*, No. 08-cv-33-L(WMC), 2013 WL 4500693, at *8
 20 (S.D. Cal. Aug. 21, 2013) (same).

21 1. Whether Class Members Are Employees or Independent Contractors

22 The question of whether class members are employees or independent contractors under
 23 California law turns on the application of the common-law test from *Borello*.¹⁴ As discussed above,
 24 the *Borello* analysis proceeds in roughly two stages. First, the fact-finder considers "the putative

25
 26
 27 ¹⁴ Plaintiffs suggest that this Court could apply an alternate test of employment under the
 28 California Supreme Court's decision in *Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010). Reply Br. at
 1 n.1. The Court declines to do so at this juncture absent more definitive guidance from the
 California Supreme Court or Ninth Circuit indicating that the *Borello* test should not apply here.

1 employer’s right to control work details.” *Borello*, 48 Cal. 3d at 350. Then the fact-finder considers
2 the various “secondary indicia” enumerated by the Supreme Court. *Id.*

3 Recently, the California Supreme Court issued an comprehensive opinion clarifying what
4 putative class plaintiffs must show to demonstrate that the *Borello* test can be adjudicated on a
5 classwide basis. *Ayala*, 59 Cal. 4th 522. While the *Ayala* Court was considering the issue under
6 California’s state-law class action rules, the predominance requirement discussed at length in *Ayala*
7 appears essentially identical to the predominance requirement under Rule 23(b)(3). *Compare Ayala*,
8 59 Cal. 4th at 530, 532-33 with Fed. R. Civ. P. 23(b)(3). Indeed, the California Supreme Court has
9 “stated that in determining whether a class action proponent has demonstrated a predominance of
10 common issues and manageability of the class, ‘we may look to the procedures governing federal
11 class actions under rule 23 of the Federal Rules of Civil Procedure for guidance.’” *Lockheed Martin*
12 *Corp. v. Super. Ct.*, 29 Cal. 4th 1096, 1121 (2003) (quoting *Washington Mutual Bank, FA v.*
13 *Superior Court*, 24 Cal. 4th 906, 922 (2001)); *see also Green v. Obledo*, 29 Cal. 3d 126, 145-46
14 (1981) (explaining that it is “well established that in the absence of relevant state precedents our trial
15 courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil
16 Procedure for conducting class actions”) (citations omitted). Thus, while *Ayala*’s considered
17 discourse on the application of the predominance requirement in misclassification cases is not
18 binding on this Court, it is persuasive authority that has been followed carefully by other federal
19 courts. *See, e.g., Villalpando*, 303 F.R.D. at 608; *Bowerman II*, 2015 WL 1321883 at *9.

20 As the Supreme Court explained in *Ayala*, when evaluating predominance with respect to
21 California’s common-law test of employment, the court “must determine whether the elements
22 necessary to establish liability [here, employee status] are susceptible to common proof or, if not,
23 whether there are ways to manage effectively proof of any elements that may require individualized
24 evidence.” *Ayala*, 59 Cal. 4th at 533 (alteration in original). “Consequently, at the certification
25 stage, the relevant inquiry is not what degree of control [Uber actually] retained over the manner and
26 means” of its drivers’ performance. *Id.* While under *Borello*, the question as to the extent of the
27 employer’s right to control (as distinct from actual control) is one which goes to the merits (*see*
28 *Alexander*, 765 F.3d at 989; *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-03 (9th Cir.

1 2014)), the question currently before the Court on class certification is “one step further removed: Is
 2 [Uber]’s right of control over its [drivers], *whether great or small, sufficiently uniform to permit*
 3 *classwide assessment?*” *Ayala*, 59 Cal. 4th at 533 (emphasis added). Put differently, “is there a
 4 common way to show that [Uber] possessed essentially the same legal right of control with respect
 5 to each of its [drivers]?” *Id.* Or, viewing the issue from the flip side of the same coin, did Uber’s
 6 right to control its drivers “vary substantially, such that it might subject some [drivers] to extensive
 7 control as to how they [performed], . . . while as to others it had few rights and could not have
 8 directed their manner of [performance] even had it wanted, with no common proof able to capture
 9 these differences.” *Id.* at 533-34. Thus, “[f]or class certification under the common law test, the key
 10 question is whether there is evidence a hirer possessed different *rights* to control with regard to its
 11 various hirees, such that individual mini-trials would be required.” *Id.* at 536 (emphasis in original);
 12 *see also Villalpando*, 303 F.R.D. at 608-09; *Bowerman II*, 2015 WL 1321883, at *9.

13 a. Uber’s Control Over Driver Schedules

14 Whether a putative employer has the power to dictate its hirees’s work schedule is highly
 15 relevant to the right of control test. *See, e.g., Alexander*, 765 F.3d at 989-990; *Arnold v. Mutual of*
 16 *Omaha Ins. Co.*, 202 Cal. App. 4th 580, 589 (2011). Here, both parties agree that Uber does not
 17 control any of its drivers’s schedules – all Uber drivers are free to work as much or as little as they
 18 like so long as UberBlack drivers give at least one ride every thirty days, and UberX drivers give at
 19 least one ride every 180 days. *See Evangelis Decl*, Ex. 46; *see also Opp. Br.* at 23 (“*All drivers*
 20 *decide, based on their own preferences and availability, when and how much to work.*”) (emphasis
 21 added); Docket No. 319-3 (Uber Attorney Script) (internal document prepared by Uber’s lawyers
 22 confirms that “Uber *never* sets drivers’ schedules, [and] *never* requires them to log into the Uber
 23 App for any minimum amount of time”) (emphases added); Docket No. 301 (McCrary Report) at ¶¶
 24 120-122.¹⁵ Uber does not address this point in its papers, simply noting that “evidence that Uber

25
 26 ¹⁵ Uber’s expert, Professor Justin McCrary, goes on at length about how some Uber drivers
 27 drive only part-time while others drive full-time, etc. What the Professor does not acknowledge,
 28 however, is that this is irrelevant for the class-certification analysis under *Borello*. The relevant
 question is Uber’s *right* to control its drivers’ schedules. Because it uniformly has no such control,
 it is not surprising that there are significant differences between class members with respect to the
 actual number of hours they spend driving for Uber.

1 does not control drivers' schedules might weigh heavily in favor of a finding of independent
2 contractor status." Opp. Br. at 19. But while Uber is correct that this factor will likely weigh in its
3 favor on the merits, the fact that Uber admits that it exercises a *uniform* amount of control over its
4 drivers' work schedules (*i.e.*, none) benefits Plaintiffs at the class certification stage because it
5 proves that this factor can be adjudicated on a classwide basis.

6 b. Uber's Control Over Driver Routes or Territories

7 Uber similarly does not dispute that it uniformly exercises no control over where its drivers
8 work or what routes they take. *See* McCrary Report at ¶¶ 119-127; Uber Attorney Script (admitting
9 that Uber "never assigns [drivers] a territory"); Docket No. 210-4 (Uber SJ. Mot.) at 20 (arguing that
10 it is "undisputed that" Uber "did not assign [Plaintiffs] a territory"). While this fact may support
11 Uber's position on the merits, it supports Plaintiffs' position at class certification because this factor
12 can be adjudicated on a classwide basis.

13 c. Pay Set Unilaterally by Uber

14 As a number of courts have recognized, bona fide independent contractors typically have the
15 power to set their own compensation or at least "negotiate for higher rates." *Ruiz*, 754 F.3d at 1101.
16 By contrast, where the putative employer maintains a unilateral right to control the hiree's "salary,"
17 this supports a finding of employee status. *See id.*

18 Here, Uber argues that some of its drivers have negotiated to receive higher fares from Uber,
19 but this is false. As discussed in this Court's summary judgment order, the evidence is clear that
20 Uber sets its drivers' pay without any input or negotiation from the drivers. *O'Connor*, 2015 WL
21 1069092, at *7; *see also* Docket No. 313-5 (Coleman Depo.) at 165:2-21 (Uber 30(b)(6) deponent
22 testified that he is "not aware of any negotiations that may have happened" between Uber and its
23 drivers regarding prices); *id.* at 168:3-7 ("Uber sets the prices that are offered to riders and offered to
24 drivers as well. It's certainly within either of their rights to use the system or not use the system to
25 get connected with one another."). Indeed, Uber's own expert recognizes that "Uber is at liberty to
26 charge the referral rate it deems appropriate." McCrary Report at ¶ 169. Uber's arguments to the
27 contrary, therefore, are wholly without merit.

28

1 Uber suggests that it “uses ‘surge pricing’ as a form of negotiation to bid up compensation
2 and entice drivers to log in and accept ride requests.” Opp. Br. at 24. Even if true, this is not
3 evidence that Uber does not unilaterally maintain the right to control its drivers’ compensation, or
4 that drivers can actually negotiate over their compensation with Uber. The evidence is undisputed
5 that, as with its “normal fares,” the “surge pricing” fare is unilaterally set by Uber, not by individual
6 drivers – there is no “negotiation” between Uber and Uber drivers over fares. If Uber wants to raise
7 prices, it raises prices. If Uber wants to lower prices, it lowers prices. Put simply, it is Uber that
8 sets the price, and drivers either accept Uber’s offered piece rate or do not. *See* McCrary Report at ¶
9 140 (Uber’s expert notes that *all* drivers “earn money piece rate when they take driving jobs”).

10 Uber’s alternative suggestion similarly misses the mark. Uber suggests that drivers have the
11 power to negotiate their own fares *with riders* because they can turn off the Uber application before
12 a ride is complete. As Professor McCrary put it, quoting from one of Uber’s 400 driver declarations,
13 certain Uber drivers may be “‘very soft-hearted and [] will give people a few miles for free. I will
14 turn off the app and let them have a few free miles if I’ve enjoyed the conversation and we’ve had a
15 nice time.’” McCrary Report at ¶ 143. Of course, Uber does not submit proof to indicate how many
16 of its drivers are “very soft-hearted,” or how many regularly turn off the meter early as some sort of
17 price negotiation.¹⁶ In any event, to suggest that Uber drivers’ alleged right to turn off the meter
18 before a ride is over – which right, by the way, Uber seems to admit is uniformly possessed by *all*
19 Uber drivers – is proof of the drivers’ power to negotiate their compensation with Uber is incorrect:
20 The fact that an Uber driver can theoretically negotiate with *her passenger* to accept a lower fare
21 than that passenger would otherwise be charged says nothing about that driver’s power to negotiate
22 fares with her putative employer – Uber.¹⁷ There can simply be no dispute that Uber does not let any

23 _____
24 ¹⁶ Exhibit 15 to the Evangelis Declaration lists certain declarants who have “accepted less
25 than the maximum fare,” but most of these drivers stated that they have turned off the meter early
26 once or a handful of times, and most stated that they did so because they had made a “mistake,” such
as taking a wrong turn, and thus the fare amount otherwise would have been too high.

27 ¹⁷ Uber also seems to suggest that drivers negotiate their fares with Uber because Uber
28 allows them to request “fare adjustments (*e.g.*, to reflect multiple stops on a route).” Opp. Br. at 24.
Even assuming this is true, Uber does not argue that it permits some drivers to request fare
adjustments while prohibiting others from doing so (*i.e.*, exercises a different right of control over
different drivers). Thus Uber’s argument is not well-taken at the class certification stage.

1 of its drivers negotiate their compensation – fares are unilaterally determined by Uber. *See also*
 2 Opp. Br. at 24 (admitting that Uber does not allow drivers to charge more than the “maximum [fare]
 3 set by the App”). Uber’s uniform and unilateral right to control its drivers’ compensation is
 4 important common proof that bears directly on the class members’ work status.

5 d. Use of Third-Party Applications

6 Uber claims in its opposition brief that “Uber does not limit drivers’ ability to seek and
 7 obtain employment with third-party employers” Opp. Br. at 7. Indeed, in the script Uber’s
 8 attorneys used to solicit driver declarations, Uber admitted that it “*never* restricts [drivers] from
 9 engaging in another occupation or business, and *never* restricts them from simultaneous use of other
 10 apps like Lyft and Sidecar.”¹⁸ Uber Attorney Script at 1 (emphases added). If true, this would
 11 support an independent-contractor determination on the merits. *See, e.g., Ali v. U.S.A. Cab Ltd.*, 176
 12 Cal. App. 4th 1333, 1349 (2009) (recognizing that a putative employee’s right to work for other
 13 firms is indicative of an independent contractor relationship). For the purposes of class certification,
 14 however, what is relevant is that Uber acknowledges that it retains the exact same right of control
 15 over all of its drivers with respect to their ability to work for other companies like Lyft and Sidecar –
 16 none. Thus, this factor can easily be adjudicated on a classwide basis.

19 ¹⁸ In passing, Uber suggested that certain of its contracts purport to forbid drivers from using
 20 the Uber application and competitor applications “simultaneously.” Opp. Br. at 6. This is hard to
 21 square with Uber’s own contentions elsewhere that it “*never* restricts [drivers] from simultaneous
 22 use of other apps like Lyft and Sidecar.” Uber Attorney Script at 1. Indeed, Uber argued in its
 23 earlier summary judgment motion that it is “undisputed that, consistent with [their contracts],
 24 Defendants . . . did not restrict [named Plaintiffs] from using other similar lead generation services
 25 simultaneously with the Uber App, and did not restrict them from engaging in any other occupation
 26 or business.” Uber SJ. Mot. at 20. Notably, at least two of the named Plaintiffs (Manahan and
 27 Gurfinkel) whose claims were at issue at the summary judgment stage were bound to versions of
 28 Uber’s contracts that Uber now tries to suggest actually *did* “restrict them from using other similar
 lead generation services simultaneously.” *Id.*; *see also id.* at 1 (“Transportation providers may use
 the Uber App as much or as little as they like, while continuing to service their regular clients or
 passengers acquired from any other source – including from competing services like Sidecar and
 Lyft”) (emphasis omitted). Uber cannot have it both ways. The Court finds that [there is no
 evidence] that Uber has actually maintained or exercised a right to control its drivers to prevent them
 from driving for other third-party transportation providers. Rather, as Uber itself has repeatedly
 argued, Uber uniformly maintains no control over whether its drivers can use competing
 applications. Although there were some contracts which prohibit “simultaneous use” of competitor
 applications, Uber has presented no evidence that Uber has ever enforced these provisions.

e. Star Ratings, Monitoring of Driver's Performance And Compliance With Uber's Training "Requirements" or "Suggestions"

The evidence shows that Uber provides its drivers with various training materials when they first sign up to become drivers during a process Uber calls "onboarding." Uber admits that *all* drivers "must attend" some onboarding training "before they begin to use the Uber App," Opp. Br. at 5, but claims that the content of these training sessions has varied considerably from city to city and over time. Thus, Uber claims that determining what "suggestions" it has given its drivers regarding how to perform well as an Uber driver cannot be manageably analyzed on a classwide basis. This argument misses the point, however. As the California Supreme Court has made clear, whether Uber "varied in how it exercised control does not answer whether there were variations in its underlying *right* to exercise that control" *Ayala*, 59 Cal. 4th at 534 (emphasis in original). The fact that some Uber drivers in 2009 may have been trained to drive with their radio set to NPR or smooth jazz, while in 2013 others were told (or, as Uber prefers, "suggested") to drive with their radio off or set to a classical music station, does not determine whether Uber uniformly maintained the right and power to actually monitor and enforce its drivers' compliance with whatever "requirements" or "suggestions" Uber gave, regardless of their precise content. *See, e.g.*, Docket No. 223-6 (undated Uber SF Onboarding Script including statements such as "[m]ake sure the radio is off or on soft jazz or NPR," and "You should NOT contact the client for any reason AFTER the trip, except for lost items"); Docket No. 223-20 (undated Uber training materials stating, among other things, "no papers in visor," "front seat forward," "rims are spotless," and telling drivers not to "forget to shower"). In any event, there is evidence in the record of Uber promulgating some consistent and significant rules that have applied to all drivers throughout the class period. *See, e.g.*, Docket No. 223-13 at 8 (Uber prohibits "client solicitation" or otherwise asking an Uber "client to become a client of your private car service business").

Uber's right to control its drivers' actual performance can be evaluated on a common basis by considering Uber's uniform ability to monitor that performance. Uber does not dispute that it collects extensive performance data regarding *all* of its drivers, and asks riders to rank *all* drivers' performance after each ride on a one-to-five scale. *See, e.g.*, Coleman Decl., Ex. K at § 11.2

1 (contract providing Uber the right to “collect, use, and share precise geo-location data” of its drivers
2 for the “analytical, marketing and commercial purposes of Uber”); *id.* at § 4.3.3 (contract providing
3 that “Uber utilizes a five-star rating system designed to allow the Users of its Software to provide
4 feedback on the level of service provided” by its drivers and stating that “there is a minimum star-
5 rating Drivers must maintain to continue receiving access” to the Uber application). Uber does not
6 claim that only some of its drivers are subject to such monitoring while others are not – rather, *all*
7 Uber drivers are subject to being monitored via star ratings and Uber’s application data. Such
8 evidence of employee monitoring is relevant to the “right to control” inquiry, *see Alexander*, 765
9 F.3d at 990, and the fact that Uber has a uniform right to monitor its drivers’ performance supports
10 adjudicating the misclassification question on a classwide basis. *Ayala*, 59 Cal. 4th at 536.

11 There can be no dispute – Uber maintains a uniform ability to monitor certain aspects of its
12 drivers’ performance, principally through the star rating system and other rider feedback provided to
13 Uber through the application, and the evidence further shows that Uber actually uses this
14 information to reprimand or terminate drivers who do not meet Uber’s standards. *See, e.g.*, Docket
15 No. 238-2, Ex. 23 (Uber spreadsheet listing drivers who received performance warnings or were
16 deactivated from the Uber application because of low star ratings or as a result of other complaints
17 Uber received from riders through the application); Docket No. 238-5, Ex. 27 (email from Uber
18 terminating driver, and explaining that Uber makes its termination decision “based heavily on
19 feedback from our customers. Unfortunately, with a rating of 4.1 stars, your account is in the
20 bottom 5% of our active drivers, and with a number of outstanding client issues we had no choice
21 but to deactivate [your account]”); Docket No. 223-24 (email from Uber threatening driver with
22 termination for accepting cash tips). Thus, common evidence probative of Uber’s right to monitor
23 and control driver’s performance weighs in favor of class certification.

24 f. Uber’s Right to Terminate Without Cause

25 As noted above, a putative employer’s right to discharge a hiree at will, without cause, is
26 “[p]erhaps the strongest evidence of the right to control.” *Ayala*, 59 Cal. 4th at 531. Here, Plaintiffs
27 contend that Uber has uniformly retained the right to discharge all of its drivers at will, citing
28 provisions in Uber’s contracts with its drivers that purport to give Uber that very right. To the

1 extent that Uber has uniformly retained a right to discharge its drivers at will in its standardized
 2 form contracts, this factor weighs heavily in favor of class certification. *See Ayala*, 59 Cal. 4th at
 3 534 (explaining evidentiary importance of form employment contracts); *Villalpando*, 303 F.R.D. at
 4 608 (recognizing that “uniform contracts are a significant focus of the ‘right to control’ inquiry”)
 5 (citing *Alexander*, 765 F.3d at 989-94 and *Ruiz*, 754 F.3d at 1102).

6 Uber argues that Plaintiffs cannot manageably show that Uber retained a uniform right to
 7 terminate its drivers at will for at least two reasons. First, Uber argues that there are simply too
 8 many contracts – seventeen different versions in all – that could have possibly governed the
 9 relationship between Uber and the class members. *See Opp. Br.* at 14. More importantly, however,
 10 Uber claims that the various provisions of these 17 agreements changed materially over time. For
 11 instance, Uber claims that in eight of the seventeen contracts, the parties “reserve a *mutual* right to
 12 terminate for both Uber and the driver,”¹⁹ while in “other agreements” Uber solely “reserve[s] a right
 13 to terminate for specific misconduct and require[s] a minimum amount of notice,” while “[s]till
 14 others provide Uber a unilateral right to terminate at will.” *Opp. Br.* at 16 (emphasis in original).
 15 Uber’s characterization of its contracts with its drivers is inaccurate.

16 Of the seventeen contracts, fifteen have been promulgated since 2013. Careful review of
 17 these contracts shows that *each one* contains an at-will termination clause, although the precise
 18 language employed is somewhat different between some of the contracts. For instance, the July
 19 2013 Software License and Online Services Agreement provides that “[t]his Transportation
 20 Company Agreement shall commence on the date this Agreement is accepted, for an indefinite
 21 period of time, unless terminated by either party by written notice with due observance of a notice

22
 23 ¹⁹ Uber argues that contracts which provide a *mutual* right to terminate at will are “evidence
 24 of an independent-contractor” relationship and thus are somehow distinguishable from contracts that
 25 only provide the employer with a right to terminate at will, which contracts would indicate an
 26 employment arrangement. Uber is incorrect. The driver’s right to terminate at will is indicative of
 27 employee status. The California Supreme Court in *Ayala* recognized that a bona fide independent
 28 contractor cannot terminate the agreement at will – if he was truly a *contractor* he would have to
 finish out his contract or pay damages to Uber for early termination. *Ayala*, 59 Cal. 4th at 531 n.2.
 Thus, the fact that some Uber agreements expressly provide that a driver has the right to quit at will,
 while others are silent on this issue does not suggest there is any real variation in driver’s rights.
 There is no contractual provision restricting a driver’s right to quit or imposing any penalty therefor.
 Uber has presented no evidence that it has ever sought contract damages from a driver who stopped
 driving for Uber, or that it has even contemplated doing so.

1 period of seven (7) calendar days.” Coleman Decl., Ex. D at § 9.1; *see also id.* at Ex. H at §
 2 9.1(same language in December 2013 version of contract); *Id.*, Ex. K at § 9.1 (same language in
 3 June 21, 2014, version of contract); *id.*, Ex. P at § 12.2 (November 2014 Rasier agreement providing
 4 that either party may terminate “without cause at any time upon seven (7) days prior written
 5 notice”); *id.*, Ex. Q at § 12.2 (same language in April 2015 Uber agreement). Similarly, various
 6 Rasier “Transportation Provider Service Agreements” provide that the contract may be terminated
 7 “[b]y either party without cause upon thirty (30) days’ prior written notice to the other party.” *Id.*,
 8 Ex. C at 10; *see also id.*, Ex. F at 9 (same); *id.*, Ex. G at 9 (same); *id.*, Ex. J at 9 (same); *id.*, Ex. M at
 9 10 (same). Thus, for eleven of the seventeen potential contracts, Uber clearly retained a uniform
 10 right to unilaterally terminate its drivers without cause, the only difference being whether Uber was
 11 required to give seven or thirty days notice of its unilateral termination decision.²⁰

12 Uber similarly retained a unilateral termination right in its four “driver addenda.” Three of
 13 these driver addenda provide that “Uber reserves the right, at all times and at Uber’s *sole discretion*,
 14 to reclaim, prohibit, suspend, limit or otherwise restrict the Subcontractor from accessing or using
 15 the Driver App or the Device if the Transportation Company or its Drivers fail to maintain the
 16 standards of appearance and service required by the users of the Uber Software.” Colman Decl., Ex.
 17 E at § 2.1 (emphasis added); *id.*, Ex. I at § 2.1 (same); *id.*, Ex. L at at § 2.1 (same). And the fourth
 18 driver addendum similarly provides Uber the right to unilaterally terminate drivers without cause,
 19 providing that a “[d]river may be deactivated or otherwise restricted from accessing or using” the
 20 Uber application for any “reason at the reasonable discretion of Uber.” *Id.*, Ex. O at at § 2.3. Put
 21 simply, the driver addenda permit Uber – in either its “sole” or “reasonable” (but either way
 22 unreviewable) discretion – to terminate a driver with no notice whatsoever.

23 At bottom then, fifteen of the seventeen potentially applicable contracts in this case (and *all*
 24 of the contracts issued to drivers from roughly February 2013 onwards) contain express language
 25 that provides Uber with a right to terminate *any* and *all* drivers without cause. The only variation
 26 between the contracts is immaterial under the “right-of-control” test – whether Uber can fire its

27
 28 ²⁰ Uber does not argue or cite any authority indicating that this difference is somehow material to the employment classification question under either *Borello* or *Ayala*. It is not.

1 drivers at will without notice, with only seven days notice, or with thirty days notice. *See Shepard*,
2 2013 WL 4488802, at *4 (noting that while there were “minor differences among the contracts for
3 the types of installers and . . . [provisions which] changed over time, the variations do not effect the
4 issue of Defendant’s right to control”) (citation and internal quotation marks omitted). And even if
5 these differences were somehow potentially material, Plaintiffs have presented evidence that Uber
6 does not in practice differentiate between contracts in terminating drivers. *See* Docket No. 313
7 (Liss-Riordan Decl.), Ex. 3 (Graves Depo.) at 185:25-186:8 (testimony of Uber’s former CEO that
8 he is not aware of Uber having any method to ascertain which of its seventeen contracts applies to a
9 given driver in order to determine “whether or not that driver can be deactivated in Uber’s
10 discretion”). The fifteen contracts the Court has discussed are therefore probative common proof
11 that Uber has maintained a uniform right to unilaterally terminate its drivers without cause
12 throughout much of the class period.

13 This leaves for consideration only the two additional contracts that were in place between
14 Uber and its drivers until early 2013. *See* Colman Decl., at Exs. A and B. Uber notes that these
15 contracts are entirely silent as to whether Uber had the right to unilaterally terminate its drivers. *See*
16 Evangelis Decl., Ex. 53 (conceding that these contracts do not say one way or another whether Uber
17 could terminate a driver without cause). This is not helpful to Uber, however, because California
18 law is clear that there is a “statutory presumption of at-will employment” where an agreement is
19 otherwise silent as to whether the employer can only terminate with cause. *See Guz v. Bechtel Nat.*
20 *Inc.*, 24 Cal. 4th 317, 335 (2000) (describing California’s statutory presumption); Cal. Lab. Code §
21 2922 (“An employment, having no specified term, may be terminated at the will of either party on
22 notice to the other.”). Neither of Uber’s pre-2013 contracts contain a for-cause termination
23 requirement, and neither have a “specified term.” *See* Colman Decl., at Exs. A and B. Thus, Uber
24 retained a uniform right to terminate all of its drivers at will under these contracts as well.²¹

25
26 ²¹ Other evidence in the record supports the Court’s conclusion that Uber has always
27 maintained a uniform right to fire its drivers without cause. For instance, as noted above, Uber’s
28 former CEO testified that he is unaware of any system that would permit Uber to determine what its
contractual duties are vis-à-vis termination with respect to any individual driver. Graves Depo. at
185:25-186:8. Moreover, Plaintiffs have submitted evidence that indicates Uber has actually
exercised its right to terminate at will. *See, e.g., O’Connor*, 2015 WL 1069092, at *7 (citing

1 In sum, all seventeen of Uber’s contracts provide Uber with the right to unilaterally terminate
 2 its drivers without cause. This common proof will allow this important factor in the *Borello* test to
 3 be analyzed on a classwide basis without individualized inquires. Thus, this factor weighs heavily
 4 in favor of class certification.

5 g. *Borello’s Secondary Factors*

6 Uber also argues that analysis of the *Borello* secondary factors is not possible on a classwide
 7 basis. Uber is wrong. In fact, it appears every single *Borello* secondary factor can be adjudicated on
 8 a classwide basis using common proof.

9 i. *Whether The One Performing Services is Engaged in a Distinct*
 10 *Occupation or Business*

11 Uber strenuously argues that a class cannot be certified here because the very first *Borello*
 12 factor is not subject to resolution with common proof across the class. Uber’s argument is correct
 13 up to a point. The Plaintiffs’ original proposed “mega-class” of all Uber drivers who have ever
 14 driven for Uber since 2009 likely cannot be certified because, as Uber persuasively argues, there
 15 would be tremendous (and likely material) variance between those class members who held
 16 themselves out as a distinct business – or contracted to drive for Uber indirectly through a distinct
 17 third-party business that had itself contracted with Uber to provide driving services – and those who
 18 did not.²² For instance, Uber rightly argues that putative class member Mark Forester and named
 19 Plaintiffs Manahan and Gurfinkel are very differently situated with respect to the first *Borello* factor.
 20 While Manahan and Gurfinkel signed up to be UberX drivers directly with Uber, are paid directly by
 21 Uber for their services, and do not hold themselves out as distinct business entities, Forester is a
 22 driver and part owner of a formally incorporated transportation company that has hired 34

23 _____
 24 evidence); Docket No. 238-3; Docket No. 238-5; Docket No. 238-2. Uber, by contrast, has not
 25 presented even a scintilla of evidence showing that it has ever been (or even felt) constrained in its
 right to terminate at will.

26 ²² The Court does not find that there is any individual variation with respect to the “distinct
 27 occupation” portion of the first *Borello* secondary factor. The Court has already held that Uber is in
 the transportation business as a matter of law, and it is similarly beyond dispute that its drivers are in
 28 the transportation business as well. Thus there can be no doubt that the “one performing services”
 here is not “engaged in a distinct occupation” from Uber, and that this answer is common for all
 class members. This is different than having a “distinct business.”

1 “employee-drivers who operate a fleet of 12 vehicles” who all use the Uber application. *See* Uber
 2 Hearing Slides at 4. The Court cannot conclude that a jury would necessarily reach the same result
 3 under the common-law test of employment with respect to Uber drivers like Mr. Forester and drivers
 4 like Manahan and Gurfinkel.²³ *See, e.g., Bowerman v. Field Asset Servs., Inc.*, No. 13-cv-0057-
 5 WHO, 2014 WL 4676611, at *10 (N.D. Cal. Sept. 17, 2014) (*Bowerman I*) (initially denying class
 6 certification for want of predominance, and remarking that “[i]t is critical to me” that some proposed
 7 class members “have independent businesses and do not work full time for [Defendant]”); *Sotelo v.*
 8 *MediaNews Group, Inc.*, 207 Cal. App. 4th 639, 657-68 (2012) (affirming denial of class
 9 certification where the trial court had found a materially significant difference between proposed
 10 class members with respect to the “distinct business” *Borello* factor).

11 Nor can the Court say with confidence that a driver like putative named Plaintiff Colopy –
 12 who is not actually a member of the class being certified herein – is sufficiently similar to Gurfinkel
 13 and Manahan to conclude that the first *Borello* test would have a common answer between these
 14 three drivers. Colopy drove for Uber through two different independent limousine companies that
 15 had themselves contracted to provide services to Uber. He did not drive exclusively Uber – Colopy
 16 also provided transportation services to the limousine companies’ clients. *See* Colopy Depo. Tr. at
 17 59:16-60:16. By contrast, Manahan and Gurfinkel contracted directly with Uber and are paid

18 ///

19 ///

20 ///

21 ///

22 ///

23
 24 ²³ That is not to say that Forester or those who subcontracted with him to perform driving
 25 services for Uber *cannot* be Uber’s employees. *Cf. Martinez*, 49 Cal. 4th at 72-74 (explaining that
 26 where a contractor is a firm’s employee, there is a “strong possibility, generally speaking, that the
 27 contractor and its employer jointly employ the contractor’s employees”) (citation omitted). What
 28 the Court decides today is simply that Plaintiffs have failed to establish sufficient commonality of
 proof to adjudicate the claims of these subcontracted drivers with the claims of those drivers who
 contracted directly with Uber to perform services. Should Plaintiffs still seek to certify an additional
 class or subclasses that includes drivers like Forester and his subcontractors, the parties should
 properly address the issue of joint employment and how that might impact the class certification
 analysis.

1 directly by Uber.²⁴ While the Court will not prejudge the issue, it seems at least plausible that a jury
2 could find this type of variation in circumstances material to the *Borello* analysis.

3 That is not to say that the Court is necessarily foreclosing class certification for drivers who
4 drove for third-party transportation companies, although further subclassing might be necessary if
5 Plaintiffs are to demonstrate that an additional class (or classes) of such drivers can be certified
6 under Rule 23(b)(3). For instance, Uber has submitted evidence that some portion of its drivers who
7 drive through third-party transportation companies only render service to Uber clients, or service
8 substantially more Uber clients than clients obtained through other sources. *See, e.g.*, Docket No.
9 307 at 394 (Ezzikhe Decl.) (indicating that “100% of my business comes from leads generated
10 through the Uber App”); *id.* at 452 (Gebretensia Decl.) (same); *id.* at 470 (Girma Decl.) (“The Uber
11 app makes up about 90% of my business”); *id.* at 286 (Collins Decl.) (same). While such drivers
12 technically drive for distinct businesses, in reality they appear to be largely (if not entirely)
13 economically dependent on Uber for their livelihoods. *See, e.g., Messenger Couriers Ass’n of Am.*
14 *v. California Unemployment Ins. Appeals Bd.*, 175 Cal. App. 4th 1074, 1092 (2009) (suggesting that

16
17 ²⁴ The Court finds that there is a material difference under *Borello* between drivers who
18 drove as subcontractors for firms that themselves contracted directly *with Uber* to provide
19 transportation services for Uber, and drivers who individually contracted with Uber and have also
20 individually contracted with Uber’s competitors such as Lyft or Sidecar. While drivers in the former
21 category at least initially appear to be engaged in a “distinct business” that is selling its services to
22 Uber (and potentially other clients), drivers in the later category more closely resemble individual
23 workers who simply labor for two or more entities. To use a hypothetical, drivers like Colopy may
24 more closely resemble workers who labor for a catering company and are assigned jobs with the
25 catering company’s clients. Drivers like Manahan and Gurfinkel, however, more closely resemble
26 fast-food workers who may work shifts at both Burger King and McDonald’s. In contrast to an
27 individual who holds two jobs, one having a distinct business, such as a consulting firm, that serves
28 many clients (as opposed to a single putative client), is a factor utilized by courts and agencies under
both California law and in other contexts when considering independent contractor status. *Compare*
Bowerman I, 2014 WL 4676611, at *11 (finding that distinct business factor under *Borello*
materially varied where “[s]ome vendors have many clients; some only FAS”) *with Bowerman II*,
2015 WL 1321883, at *10-11 (granting class certification where revised class only included
“vendors who work for FAS at least 70 percent of the time” and thus “are substantially dependent on
FAS for their revenue”). *See also* Department of Labor Administrator’s Interpretation No. 2015-1,
2015 WL 4449086, at *4-5, 8 (noting that “courts have described independent contractors as those
workers with economic independence who are operating a business of their own” and further noting
that “[a]n independent contractor typically makes investments that support a business as a business
beyond any particular job”); *Brock v. Super. Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988)
(explaining that under the FLSA test, which was partially incorporated into the California law test in
Borello, the “ultimate concern is whether, as a matter of economic reality, the workers depend upon
someone else’s business for the opportunity to render service or are in business for themselves”).

1 the *Borello* analysis requires the court to consider “criteria such as the economic dependence of the
2 worker” on the putative employer). By contrast, other Uber drivers who work for third-party
3 transportation companies may derive a much smaller portion of their business from Uber. *See, e.g.*,
4 Docket No. 307 at 378 (Enriquez Decl.) (“I would say that 30% of my revenue comes from Uber.”);
5 *id.* at 45 (Alshara Decl.) (same). While the Court is not currently willing to certify these drivers as a
6 group as class members, it is possible Plaintiffs could demonstrate that some such drivers could
7 participate in a class action via an appropriately defined subclass or subclasses where there are no
8 material variations within such subclass. At this point in the litigation, the Court is simply holding
9 that drivers who drove for third-party transportation companies cannot as a group be members of the
10 same class as Uber drivers who contracted with Uber directly, and did not operate or work for a
11 distinct business entity while driving for Uber.²⁵

12 At the hearing, Plaintiffs belatedly proposed certain subclasses that they claim could
13 eliminate any predominance issues with respect to drivers who serve Uber clients through third-
14 party transportation companies. For instance, Plaintiffs suggested that the Court could certify a
15 subclass of all drivers who operated or worked for a third-party transportation company and who
16 performed services for Uber full-time (*e.g.*, 30 or more hours per week). While it is conceivable that
17 a group of such drivers who drive essentially full time (however that is defined) for Uber may
18 present a subclass that meets commonality and predominance requires (*see Bowerman II*, 2015 WL
19 1321883, at *1, 10-11), the Court today denies Plaintiffs’ request to certify such a subclass (or other
20 possible subclasses) without prejudice. Plaintiffs have not met their burden to demonstrate that such
21 a class would be certifiable. Notably, Plaintiffs have not offered a concrete proposal regarding how
22 the members of any such subclass (or classes) could be identified for ascertainability purposes. For
23 example, Plaintiffs have not submitted any proof that they could objectively identify all drivers who

24
25 ²⁵ To be clear, the Court is also not holding that differences between class members
26 regarding the “distinct business” *Borello* factor will always be sufficiently material to the
27 classification analysis to derail class certification in every case. As noted elsewhere in this Order,
28 the *Borello* factors must be considered on a case-by-case basis. The fact that in *this specific case* the
Court finds that this *Borello* secondary factor may well have a significant impact on the merits and
thus informs the scope of the class to be certified does not require a similar finding by a different
court faced with different facts.

1 drove for Uber more than 30 hours per week. Alternatively, if a subclass were to be defined by the
 2 percentage of rides given to Uber customers versus customers obtained from other sources, Plaintiffs
 3 have not shown that they could objectively determine whether a driver was more like Ezzikhe or
 4 Gebretensia (*i.e.*, drive solely for Uber) or more like Enriquez or Alshara (*i.e.*, drive for Uber about
 5 30% of the time).

6 Importantly, the possible predominance problems identified immediately above do not affect
 7 the class certification analysis for the class the Court is actually certifying herein. Specifically, the
 8 class as defined does not present a predominance problem with respect to the “distinct business”
 9 factor because all drivers who operated or drove for a third-party transportation company – as
 10 opposed to driving directly for Uber itself or one of its wholly-owned subsidiaries – are currently
 11 excluded from the class defined in this order. Clearly, there can be no material classwide variation
 12 with respect to the “distinct business” *Borello* factor to the extent that all drivers who signed up to
 13 drive for Uber as a “distinct business,”²⁶ or who drove as purported subcontractors for a distinct
 14 business entity that contracted directly with Uber, are not members of the class. The members of the
 15 class consist solely of those who do not operate a distinct business in their relationship with Uber.
 16 Thus, with respect to the class actually being certified, the Court finds that the first *Borello* factor
 17 can be proved with common proof, and Rule 23(b)(3)’s predominance requirement is met.

18 ii. The Kind of Occupation, With Reference to Whether, in The Locality,
 19 The Work is Usually Done Under The Direction of The Principal or by
 20 a Specialist Without Supervision

21 There can be no question that the answer to this *Borello* secondary factor will be common to
 22 all class members. Here, the “kind of occupation” at issue (*i.e.*, driver) is the same for every class
 23 member. And Uber has presented no evidence that drivers in some locations are typically
 24 supervised while they drive, while drivers in other locations are “specialists” who can drive without
 25 supervision. Indeed, Uber argued at summary judgment that each named Plaintiff was a specialist
 26 who drove passengers without supervision. Uber SJ. Mot. at 24. The named Plaintiffs drove for

27 _____
 28 ²⁶ *I.e.*, they signed up for Uber and/or are paid in a fictitious/corporate name, instead of as
 an individual.

1 Uber in San Francisco, Los Angeles, and San Diego, respectively. Uber essentially concedes it does
2 not believe that the second *Borello* factor varies by location; it certainly has presented no evidence
3 of such variation. The second *Borello* factor will have a common answer to all class members. *See*
4 *Ayala*, 59 Cal. 4th at 538 (“In a case where every class member performs the same tasks, some
5 factors will *always be common*, such as the kind of occupation and the skill it requires.”) (emphasis
6 added) (citation omitted).

7 iii. The Skill Required in The Particular Occupation

8 The third *Borello* factor will also have a common answer for all class members. All Uber
9 drivers share the same occupation (driver), and Uber does not argue that the “skill required” of its
10 drivers varies from driver to driver or location to location. Nor is there evidence in the record that
11 the level of skill required of Uber drivers varies between class members. For instance, Uber does
12 not require a special type of license for any of its drivers. This factor can be adjudicated on a
13 classwide basis.

14 iv. Whether The Principal or The Worker Supplies The Instrumentalities,
15 Tools, And The Place of Work For The Person Doing The Work

16 The fourth *Borello* secondary factor can be adjudicated on a classwide basis. There is no
17 dispute that all drivers have to provide their own vehicles. *See, e.g.*, McCrary Report at ¶ 151
18 (“Uber does not provide drivers with a vehicle.”). Similarly, there is no dispute that Uber does not
19 provide a “place of work” for its drivers. Uber drivers work in the cars that they themselves
20 provide.

21 Indeed, the *only* equipment Uber offers to its drivers is a smartphone to access the Uber
22 application. McCrary Report at ¶ 151. Not all Uber drivers take Uber up on this offer – some
23 provide their own phones, while others lease a phone through Uber. *Id.* On the current record, it is
24 unclear whether the number of Uber drivers who lease a smartphone from Uber is large (*e.g.*, 50% of
25 the class) or small (*e.g.*, 1% of the class). If it is the latter, any individual variation would have
26 minimal impact on class certification. Moreover, the fact that some drivers lease the phone from
27 Uber does not mean that Uber is providing the phone; if the driver has to pay for the use of the
28 phone, as a financial matter, it is the driver, not Uber that is supplying the phone. And even if there

1 were significant classwide variation as to who actually provides a driver’s smartphone, this issue
 2 simply is not sufficiently material to be an impediment to class certification. *See Ayala*, 59 Cal. 4th
 3 at 539 (holding that “[w]hen the issue of common law employment is involved,” the weighing of
 4 *Borello*’s secondary indicia “must be conducted with an eye to the reality that the considerations in
 5 the multi-factor test are not of uniform significance The proper course, if there are individual
 6 variations in parts of the common law test, is to consider whether they are likely to prove material”).

7 As the cases make clear, the real heart of the inquiry under the fourth *Borello* secondary
 8 factor is the *relative* investment in equipment as between the putative employer and the laborer. *See*
 9 *Alexander*, 765 F.3d at 995 (finding that this *Borello* factor favored FedEx because drivers provided
 10 the more costly equipment, such as delivery trucks, while FedEx made significantly less expensive
 11 equipment available to drivers, such as package scanners); *Borello*, 48 Cal. 3d at 346, 355, 357
 12 (requiring the Court to consider the “employee’s investment in equipment or materials required for
 13 his task,” and noting in that specific case that the sharefarmers “invest nothing but personal service
 14 and hand tools,” whereas the putative employer made significant investments in land, transportation
 15 of crops to market, and the like); Restatement (Second) of Agency § 220 cmt. k (noting that “if the
 16 worker is using his employer’s tools or instrumentalities, *especially if they are of substantial value*, .
 17 . . this indicates that the owner is a master”) (emphasis added); *see also* Department of Labor
 18 Administrator’s Interpretation No. 2015-1, 2015 WL 4449086, at *7-8 (explaining that courts in the
 19 analogous FLSA context “consider the nature and extent of the relative investments of the employer
 20 and the worker”). Here, the relative investment in tools and equipment is reasonably discernable on
 21 a classwide basis – all drivers invest considerably more in tools and equipment by obtaining their
 22 own vehicle than Uber does by arguably providing certain of its drivers with a smartphone. Thus,
 23 the Court finds that the fourth *Borello* factor can be adjudicated on a classwide basis.

24 v. The Length of Time For Which Services Are to be Performed

25 Uber argues that this *Borello* factor cannot be adjudicated on a classwide basis because
 26 “[d]rivers’ usage of the Uber App varies dramatically. Some rarely use the App . . . [while] [o]thers
 27 use the Uber App more than 60 hours per week.” Opp. Br. at 4. This argument is meritless with
 28 respect to this factor for at least two reasons.

1 First, it is irrelevant.²⁷ This *Borello* factor does not ask whether a hiree’s shift is long or
 2 short (*i.e.*, whether the average hiree works 5 hours per week or 75); rather the focus is on whether
 3 the duration of the putative employment *relationship* is extended and open-ended, or short and
 4 specified. See *Alexander*, 765 F.3d at 996; *Narayan*, 616 F.3d at 903. The fifth *Borello* factor asks
 5 the fact-finder to evaluate the “length of time for which services are *to be* performed,” not the length
 6 of time for which services *are* performed within a given day or workweek. Indeed, as the Ninth
 7 Circuit recently explained in commenting on this *Borello* factor, it is the:

8 length and indefinite nature of the plaintiff Drivers’ tenure with EGL
 9 [that] point[s] toward an employment relationship This was not a
 10 circumstance where a contractor was hired to perform a specific task
 11 for a defined period of time. There was no contemplated end to the
 12 service relationship at the time that the plaintiff Drivers began
 13 working for EGL.

14 *Narayan*, 616 F.3d at 903. Whether some Uber drivers work longer days than others is simply not
 15 relevant to this determination.²⁸

16 Second, even if Uber had made (and substantiated) the correct argument with respect to this
 17 factor – that some of its drivers only remain Uber drivers for a relatively short period of time (*i.e.*,
 18 give a couple of rides and then quit) while others (like the named Plaintiffs) drive with the company
 19 for years – it would make no material difference relative to this *Borello* factor. It is undisputed that
 20 Uber’s contracts provide that the relationship between Uber and its drivers is open-ended and could
 21 have an infinite duration. See, *e.g.*, Coleman Decl., Ex. D at § 9.1 (“This Transportation Company
 22 Agreement shall commence on the date this Agreement is accepted, *for an indefinite period of time*,
 23 unless terminated by either party”); *id.*, Ex. F at 9 (no set duration to relationship between
 24 driver and Uber); *id.*, Ex. Q at § 12.1 (same); Uber SJ. Mot. at 25-26 (conceding that Uber’s

24 ²⁷ It is also inconsistent with Uber’s previous position at the summary judgment stage, where
 25 Uber acknowledged that it signs “long-term or indefinite contract[s]” with its drivers, but argued
 26 nevertheless that this *Borello* factor “either supports independent contractor status or is neutral.”
 27 Uber SJ. Mot. at 25-26.

28 ²⁸ Moreover, as noted above, it is undisputed that Uber *uniformly* relinquishes control over
 all of its worker’s hours – thus individual variation between drivers with respect to whether they
 drive full-time or part-time for Uber cannot defeat class certification because Uber’s *right* to control
 (or not control) this aspect of the drivers’ work is uniform across the class. See *Ayala*, 59 Cal. 4th at
 533-34.

1 contracts with drivers are “long-term or indefinite”). And there is no evidence in the record that,
2 contrary to the contract rights, Uber actually terminates any of its drivers after some specified term
3 has expired, or otherwise restricts its drivers’ ability to use the Uber application after some specific
4 set period of time has elapsed.²⁹ This factor is therefore capable of adjudication on a classwide
5 basis.

6 vi. The Method of Payment, Whether by Time or by The Job

7 This *Borello* secondary factor will have an answer common to the class, and is thus capable
8 of classwide resolution. There is no dispute that *all* Uber drivers are paid by the job, as Uber’s own
9 expert admits. See McCrary Report at ¶ 140 (“Drivers contracting with Uber earn money piece rate
10 when they take driving jobs.”). Uber’s only response is contained in the following sentence from its
11 opposition brief: “Drivers are generally compensated on a per-ride basis by Uber, but others may
12 have different terms depending on their relationship with Uber partners and whether the partners
13 provide vehicles and cover the drivers’ expenses.” Opp. Br. at 23. This is immaterial to this
14 *Borello* secondary factor as to the class certified herein. The class as currently defined only includes
15 drivers who were paid directly by Uber, and all drivers who are paid directly by Uber are paid on a
16 per-job basis.

17 vii. Whether or Not The Work is a Part of The Regular Business of The
18 Principal

19 As this Court has already found, Uber’s business is the business of transportation. See
20 *O’Connor*, 2015 WL 1069092, at *6 (holding that “it is clear that Uber is most certainly a
21 transportation company”). It is equally clear that Uber drivers are also in the transportation
22 business. This factor has a common answer – the drivers’ work *is* part of the regular business of
23 Uber – and thus this factor can be adjudicated on a classwide basis.

24
25
26
27 ²⁹ Admittedly, some of Uber’s contracts require drivers to accept at least one ride request
28 from Uber every 30 or 180 days to remain active on the Uber application. This is not particularly
informative, however. As long as the driver meets this minimal requirement, the contracts
contemplate that the relationship between the parties will last indefinitely. There is no specific time
frame for which Uber drivers are hired, nor specific end dates in any of the contracts.

viii. Whether or Not The Parties Believe They Are Creating The Relationship of Employer-Employee

Uber argues that the eighth *Borello* factor cannot be adjudicated on a classwide basis because its drivers likely had different subjective expectations as to whether they were creating an employment or independent contractor relationship with Uber when they first signed up to drive for the company. Opp. Br. at 22. The Court disagrees. Notably, Uber has provided no evidence that any of its drivers actually had varying subjective expectations regarding their employment status at the time of contracting. For instance, while Uber provided the court with a chart listing every one of its 400 declarants who “intended to create an independent contractor relationship with Uber,” the company submitted no corresponding chart indicating that even a single one of its declarants “intended to create an employment relationship with Uber.”³⁰ See Evangelis Decl., Ex. 11.

Indeed, the evidence overwhelmingly indicates that all Uber drivers likely understood themselves to be agreeing to be independent contractors when they first signed up to drive for Uber. Most probatively, every version of Uber’s contracts with its drivers states clearly and expressly that the parties intend to form an independent contractor relationship; not an employment relationship. See, e.g., Coleman Decl., Ex. A. at 9574 (disclaiming any employment relationship in Uber’s first driver contract); *id.*, Ex. Q at § 13.1 (disclaiming any employment relationship in Uber’s most recent driver contract). Moreover, Uber has previously admitted that it “never provided” drivers with “any employment benefits, and never reported their earnings on a Form W-2.” Uber SJ Mot. at 2. Thus, all drivers were confronted with the same set of circumstances when they signed up with Uber.³¹ These circumstances apply even in the case of the two named Plaintiffs when they first signed up to

³⁰ Nor has the Court identified any such declaration in Uber’s voluminous filing.

³¹ Of course, that is not to say that drivers were not actually Uber’s employees. Whether or not Uber misclassified its drivers is the central issue to be decided in this case. For the purposes of this particular *Borello* factor, however, the question is not whether the drivers thought they *should* be employees, or even whether after some contemplation they now think that they are employees, but whether they believed they were signing on to be Uber’s employee when the relationship between the parties was first “created.” See, e.g., Department of Labor Administrator’s Interpretation No. 2015-1, 2015 WL 4449086, at *4 (“Likewise, workers who are classified as independent contractors may receive a Form 1099-MISC from their employers. This form simply indicates that the employer engaged the worker as an independent contractor, not that the worker is actually an independent contractor . . .”).

1 be Uber drivers. *See, e.g.*, Gurfinkel Depo. Tr. at 51:3-53:15 (acknowledging that he filed his taxes
2 as an independent contractor and certified his independent contractor status to the IRS); Manahan
3 Depo. Tr. at 186:25-187:6 (same); *see also* Uber SJ. Mot. at 13 (arguing that the named Plaintiffs
4 acknowledged their alleged independent contractor status because none of them “ever reported to the
5 IRS that they had earned any wages from [Uber] or Rasier. Instead, each filed their taxes as self-
6 employed, reporting business income and taking advantage of various deductions they would not
7 have been able to take as employees”). What is important under this *Borello* factor is not the
8 particular legal label attached (expressly or implicitly) by the parties to the relationship (*cf.*
9 *Alexander*, 765 F.3d at 989; *Borello*, 48 Cal. 3d at 349), rather, it is their understanding as to the
10 nature of that relationship as a matter of fact (*e.g.*, the amount of control Uber had a right to exercise
11 and the other *Borello* factors). This factor is subject to proof common for the class.

12 Moreover, the California Supreme Court in *Ayala* cautioned that the relevant inquiry with
13 respect to this particular *Borello* factor may depend not just on the subjective beliefs of the parties,
14 but on “general custom with respect to the nature of the work.” *Ayala*, 59 Cal. 4th at 538. The
15 Court explained:

16 It is not determinative that the parties believe or disbelieve that the
17 relation of master and servant exists, except insofar as such belief
18 indicates an assumption of control by the one and submission of
19 control by the other. However, community custom in thinking that a
kind of service, such as household service, is rendered by servants, is
of importance.

20 *Id.* (citation omitted). Community custom is likely informed by facts commonly applicable to the
21 class.

22 Finally, even if there were individual variance with respect to this factor, it would still not
23 defeat class certification because this particular *Borello* secondary factor is entitled to the least
24 weight of all of the various factors. As the *Borello* opinion itself makes clear, “[t]he label placed by
25 the parties on their relationship is not dispositive, and subterfuges are not countenanced.” *Borello*,
26 48 Cal. 3d at 349. Indeed, in *Alexander* the plaintiffs formally admitted that they all “intended to
27 enter into an independent contractor relationship” with FedEx when they were first hired, and
28 nevertheless the Ninth Circuit held that they were employees as a matter of law. *See Alexander*, 765

1 F.3d at 996-97; *see also* *JKH Enters., Inc. v. Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046,
 2 1064 (2006) (recognizing that “neither JKH’s nor the drivers’ own perception of their relationship as
 3 one of independent contracting” is dispositive or particularly important when balanced with the
 4 remaining *Borello* factors); *Grant v. Woods*, 71 Cal. App. 3d 647, 654 (1977) (“[T]he belief of the
 5 parties as to the legal effect of their relationship is not controlling if as a matter of law a different
 6 relationship exists.”). Because this factor is typically not entitled to significant weight, Uber could
 7 not defeat class certification even if it had established that some of its drivers had a different
 8 subjective understanding of the parties’ relationship than others.

9 ix. The Alleged Opportunity For Profit or Loss Depending on His
 10 Managerial Skill

11 Uber argues that this *Borello* secondary factor cannot be adjudicated on a classwide basis
 12 because some Uber drivers employ “driving strategies” in an effort to maximize profits, while others
 13 do not. Opp. Br. at 23-24. For instance, Uber notes that some drivers “target geographic regions
 14 that tend to have higher demand, drive during hours when demand is at its peak, or drive when
 15 ‘surge pricing’ is available. On the other hand, some drivers . . . drive when and where they are
 16 available, regardless of demand or surge pricing.”³² *Id.* at 23. This argument fails. Notably, the
 17 factor asks whether the drivers have an “*opportunity* for profit or loss depending on . . . managerial
 18 skill.” *Borello*, 48 Cal. 3d at 355 (emphasis added). Uber, however, once again erroneously focuses
 19 on the “variations in the actual exercise of control” rather than the relevant “right to control.” *Ayala*,
 20 59 Cal. 4th at 536. Uber does not claim that it prohibits some drivers from driving in certain
 21 “geographic regions that tend to have higher demand” while permitting others to drive in these more
 22 profitable areas. Nor does Uber dictate whether only some drivers can drive during surge pricing.
 23 All Uber drivers have the exact same “opportunity” to earn profits or losses depending on their
 24 alleged “managerial skill.”

27 ³² Whether a reasonable juror would consider such decisions to be examples of a driver’s
 28 “*managerial skill*” is significantly open to doubt. But at the class certification stage that is of no
 moment, because the answer to that question will be the same for all class members.

x. The Alleged Employee's Investment in Equipment or Materials
Required for His Task, or His Employment of Helpers

As noted above, class members' investment in equipment or materials is the same on a classwide basis – there is no dispute that *all* drivers provide their own equipment, including vehicles, with the possible exception of some unspecified portion of class members who might lease a smartphone from Uber. And even in that instance, it appears that it is the driver who is the party providing the phone because the driver pays to lease it from Uber. The Court finds that any such variation is either non-existent or immaterial to the class-certification analysis, and that common questions predominate with respect to investment in equipment or materials. *See* Section II.E.1.g.iv, *supra*.

Uber argues, however, that there is still considerable variance among class members with respect to this *Borello* secondary factor because a number of Uber drivers employ helpers (*i.e.*, hire subcontractors), while others do not. Uber argues that this difference is highly material to the class certification analysis, and that variance on this *Borello* factor defeats predominance. The Court disagrees.

First, it is important to note that Uber purports to allow all of its drivers to hire subcontractors. There is no evidence in the record that Uber permits some drivers to hire helpers, while prohibiting others from doing so. Thus, Uber's right to control class members' employment of helpers is uniform across the class.

More importantly, however, the fact there may be variance as to whether class members actually employ helpers is immaterial to the weighing of the *Borello* factors in this specific case. The law is clear that where the principal retains the right to "approve all helpers, this [is] indicative of control of the details of the drivers' performance under California law." *Alexander*, 765 F.3d at 994 (citing *Narayan*, 616 F.3d at 902). That is, the tenth *Borello* factor may weigh in favor of finding employee status *even if* a putative employee has hired subcontractors, so long as the subcontractors hired were subject to the principal's approval and control. As the Ninth Circuit explained in *Alexander*, citing other recent Ninth Circuit case law:

1 In *Narayan*, we concluded that, where drivers ‘retained the right to
2 employ others to assist in performing their contractual obligations,’
3 but the company had to approve all helpers, this was indicative of
4 control of the details of the drivers’ performance under California law.
5 616 F.3d at 902. And in *Ruiz*, we found that drivers were employees
6 where the company ‘retained ultimate discretion to approve or
7 disapprove of those helpers and additional drivers.’ 754 F.3d at 1102.
8 ‘Approval was largely based upon neutral factors, such as background
9 checks required under federal regulations,’ but the drivers nonetheless
10 did not have an unrestricted right to choose these persons, which is an
11 ‘important right that would normally inure to a self-employed
12 contractor.’ *Id.* [further citations omitted]. Further, ‘any additional
13 drivers were subject to the same degree of control exerted by Affinity
14 over the drivers generally.’ *Id.*

15 *Alexander*, 765 F.3d at 994. (internal modifications omitted).

16 As the above-cited cases make clear, a worker’s right to hire subcontractors (or the worker’s
17 actual utilization of subcontractors) is only indicative of a *bona fide* independent contractor
18 relationship where the putative employer does *not* retain the right to approve the worker’s choice of
19 subcontractors and where the putative employer does *not* retain the right to subject the worker’s
20 chosen subcontractors to the “same degree of control” as the worker herself. *See Alexander*, 765
21 F.3d at 994.

22 The evidence here demonstrates that Uber maintains a uniform right to approve its drivers’
23 chosen subcontractors. And it is undisputed that Uber maintains the very same right to control the
24 performance of its drivers’ chosen subcontractors as it does over the drivers themselves. *See, e.g.*,
25 Uber SJ. Mot. at 9 (stating that the “Licensing Agreements expressly provide that: . . . [t]he
26 transportation companies’ employees *and subcontractors* are bound by the terms of the Licensing
27 Agreements”) (emphasis added). For instance, the record shows that drivers are flatly prohibited
28 from “[a]llowing someone else to drive under your Uber account,” which is characterized as a “zero
tolerance” event. Docket No. 223-13 at 8; *see also* Docket No. 238-1 at 2 (“[Y]our account has been
deactivated permanently due to receiving reports that you have been sharing your account with other
drivers. This is not an acceptable practice, *as all of our drivers must go through the application
process for safety reasons.*”) (emphasis added). Moreover, Uber’s contracts with its drivers mandate
that any driver/entity who wants to hire a subcontractor must have that subcontractor sign one of
Uber’s “Driver Addenda,” which contracts state that the subcontractor must bind herself to the very

1 same contract with Uber as the “hiring” driver/entity. *See, e.g.*, Coleman, Decl., Ex. D. at § 1.8
2 (“‘Driver Addendum’ means the applicable terms and conditions that Transportation Company is
3 required to enter into with all Drivers prior to allowing access to the Software and Uber Services . . .
4 By consenting to this agreement, You are consenting to the Driver Addendum.”); *id.*, Ex. E (Driver
5 Addendum) at § 1 (“As a condition of receiving trip requests though the Service, Subcontractor
6 hereby acknowledges and agrees to be bound by the Software License and Online Services
7 Agreement between Transportation Company and Uber”); *see also id.* at § 2.1 (providing Uber
8 with the right to fire subcontractors in its “sole discretion” if the subcontractor does not meet
9 standards set by Uber). Uber exercises a veto right over all subcontractors, and subjects all
10 subcontractors to the exact same level of control as all of its other drivers. Under such
11 circumstances, therefore, whether a class member actually employs helpers or not will likely have
12 no impact on the *Borello* analysis – either the class member does not hire helpers or the class
13 member does hire helpers who must be approved and are monitored by Uber; in either case, this
14 *Borello* factor would appear to weigh in favor of a finding of employee status. More importantly,
15 whatever its probative value on the merits, there are no material variances in this factor which defeat
16 predominance.

17 xi. Whether The Service Rendered Requires a Special Skill

18 The answer to this *Borello* factor will be common to all class members. Either the jury will
19 decide that all Uber drivers require special skills to drive for Uber, or not. *See Ayala*, 59 Cal. 4th at
20 538 (“In a case where every class member performs the same tasks, some factors will *always be*
21 *common*, such as the kind of occupation and the skill it requires.”) (emphasis added) (citation
22 omitted). Uber has not argued to the contrary. Because there will be no variation between class
23 members with respect to this factor, it supports class certification.

24 xii. The Degree of Permanence of The Working Relationship

25 As noted above in subsection (e), Uber’s contracts and course of dealing indicate that this
26 factor can be resolved uniformly on a classwide basis – Uber drivers are not hired to work for
27 specific terms. Rather, they are hired for an unspecified and indefinite period. *See, e.g.*, Coleman
28

1 Decl., Ex. D at § 9.1 (“This Transportation Company Agreement shall commence on the date this
2 Agreement is accepted, *for an indefinite period of time*, unless terminated by either party . . .”).

3 xiii. Whether The Service Rendered is an Integral Part of The Alleged
4 Employer’s Business

5 The last of *Borello*’s secondary factors will also have a common answer, and it is one that is
6 already known. As this Court previously found as a matter of law, “Uber’s drivers provide an
7 ‘indispensable service’ to Uber, and the firm ‘could no more survive without them’ than it could
8 without a working smartphone app. Or, put more colloquially, Uber could not be ‘Everyone’s
9 Private Driver’ without the drivers.” *O’Connor*, 2015 WL 1069092, at *8. Even if the jury were
10 permitted to reach its own conclusion on this factor, there can be no dispute that the question admits
11 no individual variation. The question is *not* whether a particular driver is an integral part of Uber’s
12 business, but whether the “service rendered” by the drivers (*i.e.*, driving) is integral to Uber’s
13 business. This factor can be adjudicated on a classwide basis.

14 xiv. Conclusion

15 At bottom, it appears that common questions will substantially predominate over individual
16 inquiries with respect to class members’ proper employment classification under the *Borello* test.
17 Indeed, every (or nearly every) consideration under the California common-law test of employment
18 can be adjudicated with common proof on a classwide basis. Some may favor Plaintiffs’ position on
19 the merits, while others support Uber’s. But all favor certification. Thus, this portion of the Rule
20 23(b)(3) inquiry weighs strongly in favor of class certification.

21 2. Plaintiffs’ Tips Claim

22 Because the threshold question of class members’ employment status can be adjudicated on a
23 classwide basis, the Court must next consider whether class members’ substantive claim for
24 withheld/converted tips under Labor Code section 351 is susceptible to classwide adjudication. The
25 Court concludes that it is.

26 Labor Code section 351 provides that “[n]o employer or agent shall collect, take, or receive
27 any gratuity or a part thereof that is paid, given to, or left for an employee by a patron . . .” Cal.
28 Lab. Code § 351. Determining Uber’s liability under section 351 will require the jury to consider

1 two issues. First, did Uber “take, or receive any gratuity” from its riders? And second, if Uber has
2 “taken or received” such gratuities, has Uber “paid” or “given” the full amount of those tips to its
3 drivers? Here, both questions can be answered by common proof, and thus Rule 23(b)(3)’s
4 predominance test is met.

5 Plaintiffs have cited extensive evidence that Uber has consistently and uniformly advertised
6 to customers that a tip is included in the cost of its fares (*i.e.*, evidence that Uber “takes or receives”
7 a gratuity). *See, e.g.*, Docket No. 277, Ex. 12 (November 2011: “When the ride is over, Uber will
8 automatically charge your credit card on file. No cash is necessary. Please thank your driver, but *tip*
9 *is already included.*”) (emphasis added); Ex. 16 (November 2011: “*All Uber fares include the tip . . .*
10 *.*”) (emphasis added); Ex. 13 (May 2012: “There’s no need to hand your driver any payment, and the
11 *tip is included.*”) (emphasis added); Ex. 14 (January 2013: “With UberBlack, SUV, and UBERx
12 there *is no need to tip.* With Uber TAXI we’ll automatically add 20% gratuity for the driver.”)
13 (emphasis added); Ex. 15 (April 2015: “payment is automatically charged to a credit card on file,
14 *with tip included*”) (emphasis added).³³ Uber does not even contest this fact in its papers.

15 Moreover, Uber has stipulated for the purposes of this litigation that, despite its
16 representations that a “tip is included,” a “tip has *never* been part of the calculation of fares for
17 either UberBlack or UberX in California.” *See* Docket No. 313-16 (emphasis added). That is, Uber
18 essentially admits that despite making allegedly consistent and uniform representations to customers
19 that a tip was *included* in all of its fares, Uber never actually calculated such a tip, and clearly never
20 segregated and remitted any tip amount to drivers.³⁴ Or, put differently, Uber has stipulated that it
21 kept the entire amount of any tip that might be “included” in its fares. These facts, if proven at trial,
22

23 ³³ All of the cited statements were apparently made by Uber on either its website or in
24 promotional materials intended for riders who were new to using the Uber application. The Court
25 also notes that Uber made similar representations regarding gratuities to its drivers. *See, e.g.*,
26 Docket No. 223-6 at 7 (onboarding script: “Remember, fare includes gratuity and so if the client
27 offers you a tip tell them that the fare includes the tip. There should be no confusion about that!);
Docket No. 223-24 (threatening driver with termination for accepting cash tip and informing driver
that Uber has “calculated the average fare with tip for drivers in Los Angeles and have ALREADY
adjusted our fares to compensate you accordingly . . .”).

28 ³⁴ Uber could not possibly have remitted a tip to drivers that it did not even calculate or
actually include in its fares.

1 will likely establish Uber’s uniform and classwide liability for violating California’s Tips Law. *See*
2 Reply Br. at 14-15 (arguing correctly that “Plaintiffs have evidence that Uber has uniformly charged
3 a tip to passengers but has not actually distributed a tip to its drivers. Should the drivers be
4 employees, those facts establish violation of Cal. Labor Code § 351”); *see also Guifu Li*, 2011 WL
5 4635198, at *15 (certifying class claims brought pursuant to section 351 because common proof was
6 available to prove that employer had consistently converted class members’ gratuities).

7 Uber argues otherwise, but as Plaintiffs rightly point out, Uber’s arguments are all premised
8 on a fundamental misunderstanding of section 351 and Plaintiffs’ Tips Claim. For instance, Uber
9 argues that “[t]o the extent some drivers *would not have* received tips – regardless of Uber’s
10 ‘policies’ – those drivers have suffered no injury and have no Article III standing.” Opp. Br. at 26.
11 Under Plaintiffs’ theory, however, no such drivers exist; Uber’s alleged practice was to charge *every*
12 rider for a tip (“tip is included”) on *every* ride. Plaintiffs’ claim is that after charging every rider for
13 a tip, Uber then failed to pay any of those gratuities to the drivers. *See* Reply Br. at 15 (explaining
14 that Plaintiffs’ theory is that all passengers “actually paid tips (because they were labeled as such),
15 but they were never remitted to drivers”). The fact that some drivers, but for Uber’s alleged forced
16 tipping practice, might not have been tipped by a particular rider left to his or her own devices is
17 immaterial to Plaintiffs’ claim.

18 Similarly, Uber’s argument that some drivers receive/received cash tips from passengers (in
19 addition to those allegedly collected by Uber) is irrelevant to either the class certification analysis or
20 the merits of Uber’s liability under section 351. Under Plaintiffs’ theory of the case (and more
21 importantly, under the language of section 351 itself) any cash tips that were paid to drivers would
22 simply be an *additional* gratuity that the customer provided to the driver over and above the tip that
23 Uber already charged to the rider (*i.e.*, the tip that Uber allegedly advertised was “included” in the
24 fare). Nowhere in the language of section 351 did the Legislature provide that an employer can
25 withhold a portion of an employee’s gratuity that was paid directly to the employer as some sort of
26 set-off against an additional gratuity that the patron paid to the employee directly. *See* Cal. Lab.
27 Code § 351 (“No employer or agent shall collect, take, or receive any gratuity *or a part thereof* that
28 is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an

1 employee on account of a gratuity, or require an employee to credit the amount, or any part thereof,
2 of a gratuity against and as part of the wages due the employee from the employer. Every gratuity is
3 hereby declared to be the sole property of the employee or employees to whom it was paid, given, or
4 left for.”) (emphasis added).

5 Uber relatedly contends that class certification is not appropriate on the Tips Claim because a
6 jury cannot determine damages without conducting a host of individualized inquires. Specifically,
7 Uber argues that class certification is inappropriate because the precise amount of any gratuity that a
8 rider would have paid his driver varies dramatically from ride-to-ride depending on driver
9 performance and other variables. Opp. Br. at 26. This argument misses the mark for a few reasons.
10 First, Uber fails to recognize that it has never given riders the ability to change the amount of the
11 “included” tip that Uber allegedly charges passengers. Rather, if one credits the Plaintiffs’ evidence,
12 Uber tells riders that some unspecified tip is being unilaterally imposed by Uber, and riders have no
13 power to change this amount for any reason. Because the tip is unilaterally set by Uber without any
14 possible input from riders, there is no reason to suspect that the “included tip” amount would vary
15 from ride-to-ride based on driver performance or any other factor. A poor performing Uber driver
16 would receive the exact same tip as a high-performing driver because Uber has never given riders
17 the ability to actually vary the tip amount it charges them.

18 Moreover, Uber cannot defeat class certification simply because individualized damages
19 might be difficult to calculate. *See Levy*, 716 F.3d at 513-14 (confirming that even after *Dukes* and
20 *Comcast*, “the presence of individualized damages cannot, by itself, defeat class certification under
21 Rule 23(b)(3)”). In any event, damages will be very easy to calculate on a classwide basis here.
22 Again, Plaintiffs’ theory is not that Uber unlawfully stole (or prevented drivers from obtaining)
23 *additional* tips that riders would have given to drivers in unknown amounts at their individual
24 discretion. Rather, the theory is that drivers did not receive *the* [singular] tip that Uber actually
25 “included” in the fare and which tip was unilaterally charged to riders’ credit cards in some
26 unspecified amount. Assuming for a moment that the jury finds Uber liable for violating section
27 351, it will then be tasked with determining what portion of the fares charged actually was the tip.
28 This the jury can likely do from its own common experience, or, perhaps, with the aid of expert

1 testimony. In any event, the jury could assess damages based on common formula or mathematic
2 approach that applies uniformly to the class.³⁵ There is no indication that any individualized
3 assessments would be required to calculate damages.³⁶ Thus, Rule 23(b)(3)'s predominance
4 requirement is satisfied with respect to class members' claims for violations of California's Tips
5 Law.

6 F. Individualized Inquiries May Predominate For Drivers Who Did Not Opt-Out of Uber's
7 Most Recent Arbitration Clauses

8 Before considering the final Rule 23(b)(3) requirement, superiority, the Court notes that the
9 class as certified excludes all drivers who "electronically accepted any contract with Uber or one of
10 Uber's subsidiaries that is listed in the Appendix to this Order, *unless* the driver timely opted-out of
11 that contract's arbitration agreement." The arbitration agreements listed in the Appendix are those
12 that include this Court's mandated opt-out notice and procedures. *See O'Connor*, 2013 WL
13 6407583; *O'Connor*, 2014 WL 1760314. All of these agreements contain class action waivers that
14 purport to prevent the drivers from participating in any class action lawsuit against Uber. *See*
15 Colman Decl., Exs. K-Q. Instead, the contracts purport to require the drivers to pursue any claims
16 they might have against Uber in individual arbitration. *Id.*

17 As this Court has explained at length both in this case and in the related *Mohamed* litigation,
18 the Court previously exercised its power under Federal Rule of Civil Procedure 23(d) to assert

20 ³⁵ For instance, the jury could determine that the average customer (or driver, or both) would
21 expect that any advertised "included gratuity" would be 15% of the total fare charged. Once the jury
22 determined the gratuity amount that Uber actually charged (and admittedly withheld from drivers),
23 the damages calculation is mechanical. For instance, assume that the jury does conclude that Uber
24 violated the Tips Law, and uniformly withheld a customary 15% gratuity on each ride. If a driver
25 performed a ride that cost the customer \$10, then \$1.50 of that fare amount would have been the
26 "tip" that Uber was required to remit to the driver free and clear. Thus, Uber would only have been
27 permitted to charge its own 20% "service fee per ride" on the remaining \$8.50 of the fare. In such a
28 case, Uber's fee would have been \$1.70. If the jury determines that Uber actually took 20% of the
entire \$10 ride amount, Uber will have received a \$2.00 fee when it should have only charged the
driver \$1.70. In this circumstance the driver would be entitled to a damages award of 30 cents.
There is no reason classwide damages could not easily be discerned using simple arithmetic and
Uber's own business records.

³⁶ There is no reason to suspect that this damages inquiry would be different for different
drivers (*e.g.*, there is no evidence that drivers in San Diego would customarily receive 12% tips,
while San Francisco drivers typically earn 25% tips).

1 control over class communications in this action in order to “protect the integrity of the class and the
2 administration of justice.” *O’Connor*, 2014 WL 1760314, at *3; *see also Mohamed*, 2015 WL
3 3749716, at *4 (describing the Court’s prior orders in this litigation vis-à-vis arbitration).
4 Specifically, after Uber issued new contracts in 2013 to putative class members that contained
5 “inconspicuous” arbitration agreements with class action waivers, and which contracts permitted
6 drivers to opt-out of arbitration only by complying with “extremely onerous” and essentially illusory
7 opt-out protocols, this Court required Uber to send corrective notices to its drivers that were
8 intended to insure that (1) all drivers were “given clear notice of the arbitration provision” in Uber’s
9 contracts, and (2) provide drivers with a reasonable means of opting out of the arbitration provision.
10 *See O’Connor*, 2013 WL 6407538, at *7. Uber complied with the Order, and since early 2014, the
11 Court understands that all of Uber’s contracts with its drivers have included the Court’s approved
12 corrective notice and opt-out procedures. *See Colman Decl.*, Exs. K-Q.

13 Earlier this year, the Court ruled on a motion to compel arbitration brought by Uber in a
14 related case. *See Mohamed*, 2015 WL 3749716. In the Court’s order, it considered the
15 enforceability of certain of Uber’s contracts with its drivers that contained the Court’s approved
16 notice and opt-out procedures, described above. *Id.* The Court noted that “it would be hard to draft
17 a more visually conspicuous opt-out clause even if the Court were to aid in the drafting process,
18 which it actually did.” *Id.* at *17. The Court similarly noted that Uber’s revised contracts provide
19 drivers a “reasonable means of opting out” of arbitration. *Id.* Nevertheless, the Court, applying
20 *Gentry v. Super. Ct.*, 42 Cal. 4th 443 (2007), found that there was a modicum of procedural
21 unconscionability under the contracts and therefore concluded that further inquiry into substantive
22 unconscionability was warranted. Because the agreements at issue also contained a substantively
23 unconscionable and non-severable Private Attorneys General Act (PAGA) waiver, the Court
24 ultimately concluded that Uber could not compel the Plaintiffs’ claims in *Mohamed* to arbitration
25 pursuant to the 2014 version of the agreements. *See Mohamed*, 2015 WL 3479716, at *32-36.

26 As the California Supreme Court explained in *Gentry*, even a contract that contains a
27 conspicuous and otherwise meaningful opt-out clause will not be found to be entirely lacking in
28 procedural unconscionability where the agreement (1) does not adequately call attention to specific

1 substantively unconscionable or otherwise unfavorable terms in the agreement, and (2) where the
2 Court has reason to suspect that the party accepting the agreement (*i.e.*, the party who did not draft
3 the agreement) would not have “felt free to opt-out.” *See Mohamed*, 2015 WL 3749716, at *19-20
4 (summarizing and applying *Gentry*). The Court found both factors present in Uber’s revised
5 contracts, although the Court acknowledged that it is “an extremely close question” whether the
6 Plaintiffs in *Mohamed* were subject to the “same general economic pressures” not to opt-out of the
7 arbitration agreement “that concerned the Court in *Gentry*.” *Id.* at *20. Because the Court
8 concluded that the specific Plaintiffs before it were “lower-level laborer[s]” without much economic
9 clout, however, the Court found that the *Gentry* test was met. *Id.*

10 Uber argues persuasively that determining whether any individual class member may benefit
11 from this Court’s ruling in *Gentry* (and thus may participate in this class action) could well require
12 an “individualized inquiry that turns on . . . the economic means of the driver and the circumstances
13 under which he or she accepted the arbitration agreement.” *Opp. Br.* at 39. As noted, the plaintiffs
14 in *Mohamed* were relatively poor unskilled laborers who depended on Uber for their incomes. *See*,
15 *e.g.*, *Mohamed* Docket No. 37-3 (Gillette Decl.) at ¶ 11 (indicating that Uber was Plaintiff’s sole
16 source of income). Uber has presented evidence, however, that some reasonably sizeable portion of
17 its drivers may not face the same “general economic pressures” to obtain employment as the
18 plaintiffs in *Mohamed*. For instance, Christopher Armentrout is an UberX driver with a full-time job
19 who normally drives for Uber “less than five hours a week,” typically on weekend evenings. Docket
20 No. 307 at 78. Lee Samantha Faelnar Te similarly drives for UberX only a few hours a week when
21 she is not working at her full-time job for California Credit Union. Docket No. 307 at 397; *see also*
22 *Evangelis Decl.*, Ex. 13. A credible argument could be made that such drivers would not have felt
23 the same general economic pressure to assent to Uber’s arbitration agreement as drivers who appear
24 more economically dependent on Uber for their livelihoods. *See, e.g.*, Docket No. 307 at 6
25 (Abousleiman Decl.) (drives for UberX ten to twelve hours a day, six days a week, with no outside
26 employment); Docket No. 307 at 269 (Chu Decl.) (drives for UberX “between 2:00 p.m. and 2:00
27 a.m. six days a week” with no other employment). Any substantial variation on the applicability of
28

1 *Gentry* to a particular driver could seriously undercut predominance with respect to the arbitration
2 question.³⁷

3 The Court will not definitely decide the *Gentry* issue now, as the current class certified
4 herein only includes those drivers who are *not* bound to one of Uber’s more recent contracts, unless
5 the driver timely exercised his opt-out rights. Uber has not argued that individualized issues
6 regarding the validity or applicability of any arbitration clause will predominate with respect to
7 those drivers who are only bound to its earlier pre-2014 contracts. Some of these contracts do not
8 even contain a class action waiver or arbitration provision. *See, e.g.,* Colman Decl., Exs. A-B. And
9 for those earlier contracts that do contain class action waivers and arbitration provisions (*i.e.,* certain
10 2013 agreements), but that do not contain this Court’s corrective notice and opt-out procedure, the
11 Court has concluded that such arbitration provisions are unconscionable and unenforceable
12 regardless of the individual driver’s economic circumstances or any other possible differences
13 between signatories. *See Mohamed*, 2015 WL 3749716, at *21-31. Moreover, the Court has
14 concluded that Uber’s likelihood of success on appeal of this Court’s determination that the
15 arbitration provisions in these contracts are unenforceable is exceedingly low. *See Gillette*, 2015
16 WL 4481706, at *2-7. Simply put, the Court concludes that there are no individualized issues to
17 resolve with respect to whether drivers bound to such earlier agreements may participate in this class
18 action lawsuit, and thus Rule 23(b)(3) permits all drivers who are bound only to Uber’s pre-2014

19
20
21 ³⁷ This Court’s *Gentry* ruling could also present a superiority problem if the class were to
22 include individuals who are otherwise bound to one of the relevant arbitration provisions. The
23 Court’s Order denying Uber’s motion to compel arbitration pursuant to its latest agreements is
24 currently being appealed to the Ninth Circuit. As this Court has recently recognized, “the propriety
25 of its application of *Gentry*’s procedural unconscionability rule at least presents a ‘serious issue’ on
26 appeal” because “the proper application of *Gentry* appears to remain an issue of first impression in
27 the Ninth Circuit.” *Mohamed v. Uber Techs., Inc.*, -- F. Supp. 3d --, 2015 WL 4483990, at *4 (N.D.
28 Cal. 2015). “Moreover, the application of *Gentry* is undoubtedly important to the ultimate
resolution of the validity of the 2014 Agreements’ arbitration provisions. If the Ninth Circuit
expressly refuses to follow *Gentry* . . . then this Court’s procedural unconscionability finding is
unlikely to survive appellate review, and the 2014 arbitration provisions would likely be enforced
under California law.” *Id.* Given that there is a chance that the Ninth Circuit might reverse this
Court’s order with respect to *Gentry*, certifying, noticing, and litigating a class on behalf of a large
number of individuals who may later need to be excluded from the class does not make sense as a
matter of judicial efficiency. Of course, once the Ninth Circuit definitively rules on these issues,
depending on its ruling, it is possible that a class consisting of individuals who agreed to these
contracts could possibly be certified.

1 agreements (or those who opted-out of its later agreements listed in the Appendix) to be members of
2 the class.

3 G. Superiority Test is Satisfied For Plaintiffs' Tips Claim

4 Finally, in addition to satisfying all four requirements of Rule 23(a) and the predominance
5 requirement of Rule 23(b)(3), the Plaintiffs must also show that “a class action is superior to other
6 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).
7 With respect to the Court’s “superiority” analysis, the Federal Rules suggest that the Court should
8 consider:

9 (A) the class members’ interests in individually controlling the
10 prosecution or defense of separate actions;

11 (B) the extent and nature of any litigation concerning the controversy
12 already begun by or against class members;

13 (C) the desirability or undesirability of concentrating the litigation of
14 the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

15 Fed R. Civ. P. 23(b)(3)(A)-(D).

16 Uber does not even contest the superiority element, and it appears easily satisfied. First, as
17 discussed above, because common issues predominate with respect to every aspect of the common-
18 law test for employment, it will “be far more efficient to resolve the question of employment status
19 on a class-wide, rather than individual, basis.” *Dalton*, 270 F.R.D. at 565; *see also Estrada v. FedEx*
20 *Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 14 (2007). Similarly, efficiency counsels in favor
21 of litigating the merits of class members’ substantive Tips Claims on a classwide basis, as both
22 liability and damages under section 351 can easily be adjudicated in one proceeding. To the extent
23 that class members have an interest in individually controlling the prosecution of their own action
24 for conversion of gratuities, they are free to opt-out of the class. *See id.* In any event, there is no
25 evidence that any class members’ claims are expected to be so valuable that a significant number of
26 class members would have an interest in separately prosecuting their own actions under section 351.
27 *See Breeden*, 229 F.R.D. at 630 (holding that even for “those members of the putative class who
28 could potentially submit the largest claims for damages – those who were relatively high wage

1 earners and who are able to substantiate claims of significant [damages] . . . are nonetheless unlikely
2 to present the court with the kinds of multi-million dollar claims frequently at issue in Rule 23 class
3 actions”).

4 Nor is there extensive ongoing litigation pending regarding these claims. The Court is aware
5 of one action pending in Los Angeles Superior Court (*Price v. Uber Techs.*, No. BC554512 (L.A.
6 Superior Court) that involves similar California Labor Code claims to those asserted here. A review
7 of the docket in *Price* shows that the case has not advanced as far as this litigation. No motion has
8 yet been filed therein. Hence, the parallel nature of the *Price* action does not counsel in favor of
9 putting off class certification in this case.³⁸ Nor is there any reason to suspect that this class action
10 will become so unmanageable that it would be more efficient to litigate thousands of separate
11 misclassification and gratuities lawsuits. For the reasons explained above, not only are common
12 questions likely to predominate with respect to the class claims, it appears this litigation may *only*
13 contain common questions with common answers. Given the extent of predominance of common
14 questions in this litigation, the Court cannot foresee any manageability issues at trial. Thus
15 resolving the class members’ claims through one adjudication rather than thousands of separate suits
16 is clearly the superior method of resolving these cases for the Plaintiffs, Uber, and the Court.

17 H. Plaintiffs’ Counsel Will Fairly And Adequately Represent The Interests of The Class

18 Federal Rule of Civil Procedure 23(g) mandates that if this Court certifies a class it “must
19 appoint class counsel.” Fed. R. Civ. P. 23(g)(1). In making this appointment, the Court must
20 principally evaluate the adequacy of class counsel to fairly represent the interests of the class, *see*
21 Fed. R. Civ. P. 23(g)(4), which requires the Court to consider such factors as the work counsel has
22 done to-date in the action, her experience handling class actions and other complex litigation, her
23 knowledge of the applicable law, and the resources counsel will bring to bear in prosecuting the
24 action. *See* Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

27 ³⁸ Notably, Uber is located in San Francisco, so as between the two actions, it appears at
28 least minimally more convenient to litigate the class claims in this forum rather than in Los Angeles.

1 Uber hardly attempts to argue that Plaintiffs' current attorney, Ms. Shannon Liss-Riordan, is
2 inadequate to serve as class counsel in this matter. Indeed, Uber does not even argue that Ms. Liss-
3 Riordan is unqualified to represent these Plaintiffs, and any such argument would be without merit.
4 The Court knows Ms. Liss-Riordan to be a capable advocate, and further notes that she is a leading
5 practitioner in the field of employment misclassification both in this District and nationwide.

6 Nevertheless, Uber professes concern that Ms. Liss-Riordan is inadequate to serve as class
7 counsel here because she is overextended given all of the multitude of cases she is currently
8 prosecuting against Uber and similar firms. The Court shares Uber's concern at least in theory, and
9 advises Ms. Liss-Riordan to focus considerable time and attention on this case now that it has been
10 certified. That said, the Court has not witnessed anything in Ms. Liss-Riordan's performance in this
11 case (or in any of the many others she is currently prosecuting before this Court) to date that would
12 cause the Court to be concerned that Ms. Liss-Riordan and her colleagues will not prosecute this
13 action vigorously and with skill on behalf of the class members. Ms. Liss-Riordan is adequate, will
14 fairly represent the interests of the class members, and is therefore appointed class counsel in this
15 matter.

16 I. The Remainder of Plaintiffs' Motion is Denied Without Prejudice

17 As noted above, the Court has denied certain of Plaintiffs' requests for class certification.
18 Notably, the Court denied Plaintiffs' request to certify their substantive law claims under Labor
19 Code section 2802 principally because Plaintiffs thus far have failed to satisfy Rule 23(a)'s
20 adequacy requirement to the extent Plaintiffs seek to fulfill the tests of commonality and
21 predominance by using IRS reimbursement rates as the exclusive measure of damages for class
22 members. The Court has also denied Plaintiffs' request to certify additional classes or subclasses of
23 drivers, such as drivers who labored for distinct third-party transportation companies. These denials
24 are without prejudice, however, as Plaintiffs may be capable of making a sufficient showing to
25 warrant certification of certain additional claims and/or subclasses. *See Bowerman I*, 2014 WL
26 4676611, at *1, 13 (denying class certification motion without prejudice to renewal within 45 days).
27 If Plaintiffs wish to attempt to make such a showing, they shall file an appropriate supplemental
28 brief within thirty-five (35) days of the date of this order. Uber may file an appropriate response

1 within twenty-one (21) days of the date Plaintiffs serve their supplemental brief, if any. The Court
2 will set further hearing if deemed necessary. Absent further certification of any subclass(es) or
3 claims, the Court will proceed towards trial on the merits based on the class certified herein.

4 **III. CONCLUSION**

5 The Court hereby certifies a class action on behalf of the following individuals to pursue
6 their claim that Uber has violated California's Unfair Competition Law by violating Section 351 of
7 the Labor Code:

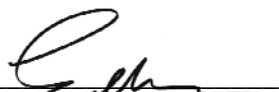
8 All UberBlack, UberX, and UberSUV drivers who have driven for
9 Uber in the state of California at any time since August 16, 2009, and
10 who (1) signed up to drive directly with Uber or an Uber subsidiary
11 under their individual name, and (2) are/were paid by Uber or an Uber
12 subsidiary directly and in their individual name, and (3) did not
13 electronically accept any contract with Uber or one of Uber's
14 subsidiaries which contains the notice and opt-out provisions
15 previously ordered by this Court (including those contracts listed in
16 the Appendix to this Order), *unless* the driver timely opted-out of that
17 contract's arbitration agreement.

18 The parties are ordered to meet-and-confer regarding the contents and logistics of class
19 notice and other relevant procedural details in advance of the next case management conference,
20 which is scheduled for October 22, 2015 at 10:30 a.m. At that conference, the parties shall be
21 prepared to discuss any proposal regarding further class certification.

22 This order disposes of Docket No. 276.

23 IT IS SO ORDERED.

24 Dated: September 1, 2015

25 
26 EDWARD M. CHEN
27 United States District Judge
28

APPENDIX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. June 21, 2014, Uber Software License and Online Services Agreement (Exhibit K to Colman Declaration)
2. June 21, 2014, Driver Addendum Related to Uber Services (Exhibit L to Colman Declaration)
3. June 21, 2014, Rasier Software Sublicense & Online Services Agreement (Exhibit M to Colman Declaration)
4. November 10, 2014, Uber Logistik, LLC Software License and Online Services Agreement (Exhibit N to Colman Declaration)
5. November 10, 2014 Driver Addendum to Software License And Online Services Agreement (Exhibit O to Colman Declaration)
6. November 10, 2014 Raiser [sic], LLC/Rasier-CA, LLC/Rasier-PA, LLC Software License and Online Services Agreement (Exhibit P to Colman Declaration)
7. April 3, 2015 Uber USA, LLC Software License And Online Services Agreement (Exhibit Q to Colman Declaration)