No. 18-1944

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALI RAZAK, KENAN SABANI, and KHALDOUN CHERDOUD,
Individually and on behalf of All Others Similarly Situated,

Plaintiffs - Appellants,

v.

UBER TECHNOLOGIES, INC. and GEGEN LLC,

Defendants - Appellees.

Appeal from a final Order of the United States District Court for the Eastern District of Pennsylvania, entered April 11, 2018 in Civil Action No. 16-573

BRIEF OF APPELLEES UBER TECHNOLOGIES, INC. AND GEGEN LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1.1, Uber Technologies, Inc. ("Uber") and Gegen LLC ("Gegen") make the following disclosures:

(1) For non-governmental corporate parties please list all parent corporations:

Uber: None.

Gegen: Uber Technologies, Inc.

(2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Uber: SB Cayman 2 Ltd., a private company, owns more than 10% of Uber's outstanding stock. SB Cayman 2 Ltd. is a subsidiary of Softbank Group Corp., a publicly traded corporation.

Gegen: None.

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

Uber: Other than as set forth above, none.

Gegen: None.

Dated: September 24, 2018

/s/ Robert W. Pritchard

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James Manyika, "Disruptive technologies: Advances that
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McKinsey Global Institute, May 2013 25

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. Appellees are not aware of any related case that is completed, pending, or about to be presented before this Court. Appellees are aware of other cases and proceedings in which drivers have alleged that they were "employees" of Appellees and/or their affiliated companies under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, *et seq.*, and/or related state laws.

STATEMENT OF THE CASE[1]

I. Uber Is A Technology Company.

Uber is a technology company that invents, develops, markets, and licenses technology products that enable people who want services to connect with independent providers of those services. SA1137-1139 (RSOF ¶ 25; *see* App. 0379, SA1067). The core of Uber's business is its technology. SA1141 (RSOF ¶ 34; *see* App. 0380). Uber has spent millions of dollars to develop, expand, and deploy its technology products, and it employs thousands of people in technology-centric roles. App. 0499 (ASOF ¶¶ 35-36).

[1] Where Appellants admitted a fact in the district court, this narrative cites to the admission from Appellants' statement of facts ("ASOF"), at App. 0486-0560; if necessary for context, the narrative will also cite to Appellees' original statement of facts ("SOF"), located in the Supplemental Appendix ("SA"), at SA0974-1010. Where Appellants disputed a statement of fact, the narrative cites to Appellees' reply to Appellants' statement of facts ("RSOF"), at SA1116-1234, as well as to the corresponding record evidence pertaining to the statement.

A. The Uber App Enables Riders To Connect With Drivers.

Uber's most popular technology—commonly referred to as the Uber App—enables individuals who want personal transportation services ("riders") to request transportation services from those engaged in the business of providing transportation services ("drivers"). App. 0497 (ASOF ¶¶ 28-29). The Uber App offers riders an opportunity to request transportation options that vary in type and cost; the option known as "UberBLACK" enables riders to connect with drivers who drive luxury black car sedans or town cars. App. 0497-498 (ASOF ¶¶ 29-31).

To access the Uber App, drivers open the app on their mobile device. App. 0532 (ASOF ¶ 156); App. 0010 (Apr. 11, 2018 Opinion ("Opinion") at 7). After logging in, drivers can go "online" to receive trip requests. App. 0532 (ASOF ¶ 157); App. 0010 (Opinion at 7). Uber does not control the number of trip requests that are generated by riders or the number of requests that a driver will receive; these are dependent on factors outside of Uber's control, such as the number of riders searching for rides, the number of other drivers who are online, and the relative locations of the riders and drivers. SA1192-1193 (RSOF ¶¶ 163-164; *see* App. 0382).

Uber itself is not in the business of providing transportation services in Philadelphia. SA1145-1146 (RSOF ¶ 40; *see* App. 0381). Uber does not employ

drivers in Philadelphia, and it does not contract with riders to guarantee them transportation services. SA1143-1146 (RSOF ¶¶ 37-40; *see* App. 0380-0381).

B. Agreements Confirm The Independent Contractor Status Of Independent Transportation Companies And Drivers.

Independent transportation companies who desire to use the Uber App to obtain trip requests for their businesses must first enter into a services agreement with Uber that sets forth the terms of their relationship. SA1131-1132 (RSOF ¶ 19; *see* App. 0375, 0385-0407); App. 0012-0013 (Opinion at 9-10). Pursuant to the agreement, the independent transportation companies are Uber's customers who contract with Uber (in its capacity as a technology services provider) for the opportunity to use Uber's technology in exchange for a fee for every successfully generated trip request. SA1132-1133 (RSOF ¶¶ 20-21; *see* SA0375, 0385-0407); App. 0488-0492 (ASOF ¶ 22).

The services agreements make clear that the independent transportation companies and their drivers: (a) are not controlled or directed by Uber (either generally or in the provision of transportation services); (b) retain the sole right to determine when, where, and for how long they will use the Uber App; (c) retain the option to accept or to decline, or ignore, a rider's request for transportation services at their discretion, or even to cancel an accepted request; and (d) have the freedom to operate their independent businesses at their own discretion. App. 0488-0492, 0496-0497 (ASOF ¶¶ 22, 26-27); App. 0013-0014 (Opinion at 10-11). This

includes the right to provide transportation services at any time to any third party separate and apart from the Uber App, including to private customers and riders identified using other software applications. *Id.* Finally, the services agreements confirm that the relationship between the parties is that of "independent contracting parties" and that Uber is not the employer of the independent transportation companies or their drivers. App. 0488-0492 (ASOF ¶ 22).

Once a transportation company has entered into an agreement with Uber, drivers engaged by that transportation company may use the Uber App after they agree to the terms of a "driver addendum" to the services agreement. SA1136 (RSOF ¶ 23; *see* SA0375); App. 0013 (Opinion at 10). The driver addendum confirms, among other things, that Uber "does not ... direct or control" the driver in the provision of transportation services, including "when, where, or for how long" the driver will utilize the Uber App. App. 0492-0494 (ASOF ¶ 24); App. 0014 (Opinion at 11).

C. Uber Does Not Direct Or Control Drivers.

Uber does not direct or control drivers with respect to when they go online, how long they will use the Uber App, when they go offline, and how long they will stay offline. App. 0496-0497 (ASOF ¶ 27); SA1189-1191, 1204-1205 (RSOF ¶¶ 158-160, 188-189; *see* App. 0382, SA1043-1044, 1047-1048, 1053); App. 0366 (Sept. 13, 2017 Op. at 27, noting that Appellants "concede that they could go

offline whenever they choose to do so"). For example, Razak took a two-month vacation in 2017, and he did not have to ask permission from Uber to go offline for that entire period. App. 0543 (ASOF ¶ 184). Once online, there is no requirement that the driver stay online. SA1191-1192 (RSOF ¶ 162; *see* App. 0382).

Uber does not schedule start or stop times for drivers, or require them to be online on the Uber App at any particular time or for any specific number of hours. App. 0543 (ASOF ¶¶ 185-186); SA1192-1193 (RSOF ¶ 163; *see* App. 0382); App. 0032 (Opinion at 29, noting that Appellants "are basically completely free to determine their working hours" and are permitted to go online "as little or as much as they want"). Drivers choose when to go online based on their own interests and motivations, and each driver "schedules himself." SA1205-1206 (RSOF ¶¶ 190-191; *see* SA1053-1054, 1060).

In addition to choosing *when* to go online, drivers independently decide *where* to go online; and, once online, they decide where to drive. SA1199, 1202-1203 (RSOF ¶¶ 175-176, 183; *see* ECF No. 66-10 ¶ 4); App. 0011 & 0032 (Opinion at 8 & 29); App. 0349 (Sept. 13, 2017 Op. at 10, noting that driver "may be anywhere he chooses"); SA0880-0881 (Response SOF re Partial MSJ ¶¶ 57-61).

Uber does not require drivers to accept trip requests, and drivers are free to reject trip requests for any lawful reason. App. 0537-0538 (ASOF ¶¶ 166-169); SA1193-1194 (RSOF ¶ 165); App. 0010 (Opinion at 7); App. 0348 (Sept. 13, 2017

Op. at 9); *see* SA0872-0874, 0879 (Response SOF re Partial MSJ ¶¶ 22-28, 50-51). If no driver accepts a trip request, it will go unfulfilled, as Appellees cannot require any driver to accept a trip. *Id.* Even after accepting a trip request, drivers are free to change their mind (for any lawful reason) and cancel the trip. SA1196-1199 (RSOF ¶¶ 172-174; *see* SA1045); App. 0348-0349 (Sept. 13, 2017 Op. at 9-10).

Uber does not place any restrictions on drivers' ability to engage in personal activities while online, and Appellants have, in fact, engaged in a range of personal activities while online. SA1200-1201 (RSOF ¶ 177); App. 0012 (Opinion at 9); App. 0350 (Sept. 13, 2017 Op. at 11). For example, while online, Appellants slept, ran personal errands, conducted business for their independent transportation companies (including promoting their companies, accepting rides from private clients, and dispatching private trips to other drivers, all outside of the Uber App), smoked cigarettes, took personal phone calls, and rejected trip requests because they were tired. App. 0541-0542 (ASOF ¶¶ 178-181); App. 0012 (Opinion at 9). One driver who is also a Certified Public Accountant (CPA) goes online while he is simultaneously performing CPA work such as completing tax returns and conducting audits. SA1202 (RSOF ¶ 182; *see* ECF No. 66-10 ¶ 5, noting that when he receives a trip request, he may or may not accept it depending on what he is doing as a CPA at the time). Drivers sometimes forget to go offline, such that they remain in "online" mode on the Uber App "despite having no intention of

completing trips." App. 0012 (Opinion at 9); *see* SA0877-0878 (Response SOF re Partial MSJ ¶ 46). Appellants "spent a large portion of their time online not actually completing trips, and engaged, for at least some of the time, in these various personal activities." App. 0012 (Opinion at 9).[2]

Drivers "are permitted to work for competing companies" while also using the Uber App. App. 0031 (Opinion at 28). "UberBLACK drivers can also—and indeed actually do—choose to work for competitors when they believe the opportunity for profit is greater by doing so." App. 0034 (Opinion at 31). Uber does not prohibit drivers from using applications other than the Uber App or providing transportation services to others outside the Uber App. App. 0522 (ASOF ¶ 123); App. 0012 (Opinion at 9). The record includes evidence of a driver utilizing both the Uber App and the Lyft App simultaneously, and providing transportation services to riders identified on one app while remaining online and receiving trip requests on the other app. SA1185-1188 (RSOF ¶¶ 150-155; *see* App. 0381-0382; ECF No. 66-11). As described below, Appellants provide transportation services to riders outside the Uber App, including riders identified

[2] Appellants claim that Sabani "*drove* 87.1 hours for Uber" in one week (and "*worked* 87.1 hours" that week). Appellants' Opening Brief ("AOB") at 4 & 35 (emphasis added). The evidence Appellants cite, however, merely reflects that Sabani was *online* for 49.25 hours in a given week. AOB at 4, citing App. 0661-0662. Thus, not only do Appellants grossly exaggerate the amount of time Sabani spent online that week, but they overlook that merely being "online" does not mean that Sabani "worked" (or even "drove") that many hours. Appellants' assertions about the time they worked are not supported by the record evidence.

through a company known as Blacklane, as well as from advertising and private referrals.

II. Appellants Own—And Independently Choose How To Operate—Their Own Transportation Companies.

Luxe Limousine Services, Inc. ("Luxe"), Freemo Limo, LLC ("Freemo"), and Milano Limo, Inc. ("Milano") "are business entities owned and operated by the [Appellants]." SA1118-1119 (RSOF ¶ 1; *see* SA0959, 1082); App. 0009-0010 (Opinion at 6-7). Transportation providers who use the Uber App to generate trip requests "are free to operate their own businesses outside of UberBLACK," and these "business pursuits" (which Appellants refer to as "their personal businesses") are "outside of Uber." SA1119-1122 (RSOF ¶¶ 2-3; *see* SA0870, 0965, 0971); App. 0012 (Opinion at 9). As the following summaries reveal, Razak (co-owner of Luxe), Sabani (owner of Freemo), and Cherdoud (owner of Milano) each take different approaches to how they operate their individual business enterprises.

A. Razak Co-Owns And Operates Luxe Limousine Services.

Razak and his brother own Luxe. App. 0480-0481 (ASOF ¶ 5). Incorporated in 2012, Luxe is in the transportation business, and it has its own certificate from the Pennsylvania Public Utility Commission (PUC) to provide black car transportation services. App. 0480-0481 (ASOF ¶¶ 4-7). Luxe's PUC certificate contemplates that Luxe will provide hourly-rate services and fixed-fee black car services for special events such as weddings and proms. App. 0481 (ASOF ¶ 8).

Determining that increasing the size of its fleet would be "good business," Luxe expanded its fleet from two vehicles to six vehicles in 2015. App. 0505-0506 (ASOF ¶¶ 48-50). On its 2015 tax return, Luxe reported (and claimed $27,793 in depreciation for) a fleet of vehicles that cost $202,015. SA0986 (SOF ¶ 51); App. 0506 (ASOF ¶ 56). In 2016, Luxe expanded even more, at one point owning sixteen vehicles; it currently has fourteen vehicles in its fleet. App. 0506 (ASOF ¶¶ 52, 54); SA1151 (RSOF ¶ 53; *see* App. 0780). On its 2016 tax return, Luxe reported (and claimed $67,975 in depreciation for) an expanded fleet that cost $435,951. SA0986 (SOF ¶ 56); App. 0507 (ASOF ¶ 56). Luxe's expanded fleet coincided with a substantial increase in receipts. In 2015, Luxe had gross receipts of $285,139; by 2016, its gross receipts nearly tripled, to $744,405. SA1008 (SOF ¶¶ 207-208); App. 0548 (ASOF ¶¶ 207-208).

"[A]s business owners, [Appellants] are permitted to hire sub-contractors or other 'helpers' to drive for UberBLACK using their vehicles, and it is [Appellants'] businesses that are paid as a result, not the 'helpers.'" App. 0031 (Opinion at 28). Luxe's goal is to have one driver assigned to each of its vehicles. SA1153 (RSOF ¶ 59; *see* App. 0767). The number of drivers on Luxe's active roster may vary from week to week and has been as high as seventeen drivers at one time. SA1153-1154 (RSOF ¶ 60; *see* App. 0741, 0772). From its inception

through May 12, 2017, Luxe has had more than fifty drivers. SA0987 (SOF ¶ 61); SA1154 (RSOF ¶ 61; *see* App. 0772, SA1074-1075, 1084-1115).

Luxe charges its drivers a weekly lease payment amount, which it alone determines and sets, for the use of its vehicles, and it generates revenues from these weekly lease payments. App. 0545 (ASOF ¶ 193); SA1207 (RSOF ¶ 194; *see* App. 0741, 0770). These weekly lease payments are the primary source of revenue for Luxe, and "Luxe doesn't care if the driver just parks the vehicle in their garage and never does any trips at all, as long as they make their weekly lease payments." App. 0545 (ASOF ¶ 195); SA1207-1208 (RSOF ¶ 196; *see* App. 0768-0769).

Luxe's business model contemplates that it will lease the vehicles in its fleet to other drivers at a weekly lease amount that will exceed Luxe's expenses associated with maintaining the vehicles (*e.g.*, finance payments, insurance, repairs and maintenance, etc.), and that this excess amount will represent Luxe's profit from the operation of its business enterprise. SA1208 (RSOF ¶ 197; *see* App. 0761-0762, 0764). By acquiring more vehicles, it was Luxe's objective to generate more revenue by having more drivers pay more leases. App. 0546 (ASOF ¶ 198). In setting the lease amounts (which currently range from $350 to $500 per week), Luxe takes into account market conditions and seeks to cover expenses, attract drivers and make a profit. SA1007 (SOF ¶ 202); App. 0547 (ASOF ¶ 202); SA1209-1210 (RSOF ¶¶ 199-201; *see* App. 0753, 0762-0763).

Luxe financed the original purchase of its vehicles. SA1152 (RSOF ¶ 55; *see* App. 0754, 0768). Luxe owns one of its vehicles (a Lincoln Navigator) outright, with no financing obligation. App. 0507 (ASOF ¶ 57). Even though Luxe owns the Navigator outright, the driver who uses it to provide transportation services (not one of Luxe's owners) continues to pay a weekly lease to Luxe. App. 0548 (ASOF ¶ 206). Once its finance payments are complete on the other vehicles, Luxe will also own them outright, and its net revenues (and profits) will increase as those vehicles continue to generate lease revenues without the corresponding expense of finance payments. App. 0507, 0546 (ASOF ¶¶ 58, 198).

In addition to owning and operating Luxe with his brother, Razak also leases a vehicle from Luxe, at a rate of $450 per week. SA1007 (SOF ¶ 203); App. 0547 (ASOF ¶ 203). When other vehicles were being refinanced to lower rates (thereby leading to lower lease payments but extending the lease term), Razak made the business decision as an owner of Luxe not to refinance the vehicle that he leases so that it could be paid off more quickly. App. 0547-0548 (ASOF ¶ 205).[3] Of note, Razak did not sign up to use the Uber App to connect with riders using UberBLACK until July 8, 2014, two years *after* Luxe was incorporated. SA1123-1124 (RSOF ¶ 9; *see* SA0869).

[3] Razak's brother used to provide transportation services "a lot" using the Uber App, but he is now so busy operating Luxe ("doing the payroll, fixing the cars") that he is not driving as much. SA1154-1155 (RSOF ¶ 62; *see* App. 0769).

Luxe's drivers generate revenue by providing transportation services to riders identified from various lead-generation sources, including—but not limited to—the Uber App. SA1175 (RSOF ¶ 124; *see* App. 0742, 0747); SA0997 (SOF ¶ 125, noting income from "private bookings"); App. 0522 (ASOF ¶ 125). For example, Luxe provided its drivers with the opportunity to provide transportation services through a company known as Blacklane. SA1175 (RSOF ¶ 126; *see* App. 0799). When Luxe received transportation requests from Blacklane, Razak or his brother "accepted the Blacklane request" on behalf of Luxe and then "assigned the actual transportation job to another" driver on Luxe's active roster. SA1177-1178 (RSOF ¶ 131; *see* App. 0748, 0791, SA0883, 1052). By dispatching Luxe drivers to handle Blacklane trips, Razak and his brother generated additional revenue for Luxe's business. SA1176 (RSOF ¶¶ 127-128; *see* App. 0749, SA1052, 1059). Razak himself even provided transportation services through Blacklane. App. 0523 (ASOF ¶ 129). More frequently, however, Razak's job with respect to Blacklane trip requests submitted to Luxe was that of dispatcher—assigning transportation requests to other drivers on Luxe's roster. SA1177 (RSOF ¶ 130; *see* SA1059). In the second quarter of 2017 (April – June) alone, Luxe's drivers performed more than 300 trips generated through Blacklane, resulting in more than $28,000 in revenue. SA0998-0999 (SOF ¶ 134); App. 0525 (ASOF ¶ 134).

In order to promote its business and generate its own leads outside the Uber App and Blacklane, Luxe advertised and developed an internet presence, including a website, a Facebook account, and a Twitter account. App. 0513 (ASOF ¶ 84); SA1161, 1163-1164 (RSOF ¶¶ 82, 91; *see* App. 0739-0740, 0742, 0745-0746). According to the Luxe website:

> Our limo service was established back in 2012 with a dream to become the best transportation option state-wide. We set out to achieve this by offering our clientele the most luxurious, reliable and safe rides around town.

App. 0513 (ASOF ¶ 85). Potential customers can submit a booking request using the Luxe website or by emailing Luxe directly. App. 0514 (ASOF ¶ 87). Luxe engaged an internet search engine optimization company to help Luxe improve its web presence and to generate leads. App. 0514 (ASOF ¶ 90). Luxe incurs expenses associated with maintaining its internet presence and online advertising (*e.g.*, Yelp and Google). SA0990 (SOF ¶¶ 81, 83); App. 0512-0514 (ASOF ¶¶ 81, 83, 89).

When one of Luxe's drivers provides transportation services (whether using the Uber App, Blacklane, or any other lead-generation source), the revenue from those services is paid to Luxe; Luxe then pays its drivers from those revenues. App. 0524 (ASOF ¶ 133); SA1155-1156, 1178-1179 (RSOF ¶¶ 63, 65, 135; *see* App. 0741, 0743, 0747). Luxe paid approximately $137,633 to its drivers in 2015, and $272,753 in 2016. SA0988 (SOF ¶¶ 66-67); SA1156-1157 (RSOF ¶¶ 66-67; *see* App. 0783, 0787). While Razak's brother initially handled the payroll for

Luxe, in 2016 the company retained a payroll clerk to perform payroll services. SA0988 (SOF ¶ 70, reflecting annual compensation of $9,800 for about 20-25 hours per week providing payroll services); App. 0509-0510 (ASOF ¶¶ 68-70).

In addition to paying its drivers and payroll clerk, Luxe incurs expenses in operating its business and maintaining its fleet, including finance payments, insurance, repairs and maintenance, towing expenses, car washes, and "all kinds of professional fees." SA1160 (RSOF ¶ 76; *see* App. 0758, 0761, 0788-0789); App. 0015 (Opinion at 12). On its 2015 tax return, Luxe claimed deductions exceeding $224,000, reflecting payments to drivers, insurance, repairs and maintenance, vehicle depreciation, advertising expenses, tolls and parking, phones, Philadelphia Parking Authority (PPA) stickers, and accounting fees. SA0989 (SOF ¶¶ 77-78); App. 0512 (ASOF ¶ 78); SA1160 (RSOF ¶ 77; *see* App. 0777-0779, SA1071-1072). By 2016, Luxe's deductible expenses grew to more than $783,000, including payments to drivers, repairs and maintenance, taxes and licenses, vehicle depreciation, advertising, commission fees, commercial insurance, phones, gas, tolls and parking, professional fees, booking fees, office supplies, limousine plates, and towing expenses. SA0989-0990 (SOF ¶¶ 79-80); App. 0512 (ASOF ¶¶ 79-80). Luxe incurred additional expenses sending Razak's brother to Buffalo, Orlando, Miami and Tampa in order to investigate whether there would be a "better opportunity" for Luxe in transferring operations to those locations. App. 0515

(ASOF ¶ 93). In addition to Luxe incurring expenses, Razak also incurs expenses for his transportation business that he writes off on his personal taxes, including $18,470 in 2015 and $9,440 in 2016. SA0992-0993 (SOF ¶¶ 96-97, 100); App. 0516 (ASOF ¶¶ 97, 100); SA1165-1166 (RSOF ¶ 96; *see* SA1056, 1077-1079).

B. Sabani Owns And Operates Freemo Limo.

Sabani began performing transportation services in Philadelphia with another limousine company—Barry Limo, LLC. SA1125 (RSOF ¶ 11; *see* SA1019). Sabani entered into a partnership agreement with Barry Limo that entitled him to 50% ownership of a Chevrolet Suburban. App. 0516 (ASOF ¶ 101). Barry Limo delegated to Sabani the responsibility for repair and maintenance costs on that vehicle. App. 0516-0517 (ASOF ¶ 102). In addition, Sabani paid $500 per week to Barry Limo towards the purchase of the Suburban, and he now owns the vehicle outright. App. 0517 (ASOF ¶ 103).

In August 2015, Sabani formed his own limousine company—Freemo—to offer transportation services to the public. SA1125-1126 (RSOF ¶¶ 12-13; *see* SA1013, 1024-1025). Sabani is the sole owner of Freemo. App. 0485 (ASOF ¶ 15). In addition to owning and operating Freemo, Sabani signed up to use the Uber App to connect with riders using UberBLACK. SA1127-1128 (RSOF ¶ 14; *see* SA0869). Over the years, Sabani has received dispatches for private trips (including some from Barry Limo and some from King Limousine) and has also

provided transportation services to riders identified using UberBLACK. SA1125 (RSOF ¶ 11; *see* SA1037-1038).

When he formed Freemo, Sabani intended to form a company that would own vehicles and lease them out to other drivers, thereby becoming a businessman who would make money by collecting lease payments from drivers. App. 0520 (ASOF ¶ 114). Sabani's "goal was to run an independent business and maybe, five or six or 10 years from now, not have to drive—to live the American dream." *Id*.

Freemo has engaged up to four drivers (including himself and at times Cherdoud) to provide transportation services. App. 0517 (ASOF ¶ 104). Sabani alone determines how much to pay Freemo's drivers. SA1168-1169 (RSOF ¶ 106; *see* SA1015). In 2016, Freemo paid one driver more than $44,000 for providing transportation services for Freemo's private trips as well as trip requests received through the Uber App. SA0994 (SOF ¶ 108); SA1169 (RSOF ¶ 108; *see* SA1023). In 2016, Freemo paid Cherdoud more than $10,000 for providing transportation services for Freemo's private trips. SA0994 (SOF ¶ 109); App. 0518 (ASOF ¶ 109).

Freemo's drivers provide transportation services outside the Uber App. App. 0527 (ASOF ¶ 142). For example, Freemo negotiated to provide one customer forty trips per week, generating $1,700 in weekly revenue, all outside the Uber App. SA1000 (SOF ¶ 145); App. 0529 (ASOF ¶ 145). Freemo also corresponded

with private customers about pricing for airport and local rides. App. 0527 (ASOF ¶ 143). Uber placed no restrictions on Sabani's right to receive Freemo trip requests while simultaneously being online on the Uber App, and Sabani personally provided over 100 trips through his company outside the Uber App. SA1181-1184 (RSOF ¶ 144; *see* SA1035-1036). In 2016, one of Freemo's drivers provided transportation services *exclusively* for Freemo's private trips. SA1169-1170 (RSOF ¶ 110; *see* SA1023). For trips performed outside the Uber App, Freemo's drivers were paid in cash or using the Square payment processing tool. SA1000-1001 (SOF ¶ 149); App. 0529 (ASOF ¶ 149). Between August 10, 2015 and May 10, 2017, Freemo used the Square tool to process approximately $140,000 in sales, all outside the Uber App. *Id.*

Sabani created a website to advertise Freemo's business and to generate private trip requests. App. 0518 (ASOF ¶ 111). Freemo's website states that it is "a privately held, full service chauffeured transportation company." App. 0519-0520 (ASOF ¶ 112). According to the website, Freemo's "fleet of vehicles [from "executive sedans to luxury SUV's"] and experienced chauffeurs [who "are required to attend a defensive driving course" and "are monitored by GPS vehicle tracking"] can handle all of your transportation needs, whether you're with a Fortune 500 company or a family looking for airport transportation." *Id.* Freemo's website solicits customers to make reservations online, by email or by calling a 24-

hour service contact number. App. 0520 (ASOF ¶ 113). Freemo has also advertised on Yelp and has a Facebook profile to promote its business. App. 0520-0521 (ASOF ¶ 115). In addition, Freemo has used "pay per click" on Google and distributes Freemo business cards at hotels. App. 0529 (ASOF ¶¶ 147-148); SA1184-1185 (RSOF ¶ 148; *see* SA1016-1018).

Sabani and Freemo incur business expenses associated with their business activities, including vehicle maintenance (gas, tires, brakes, oil changes, car wash), advertising, tolls and parking, and office equipment. SA0992, 0996 (SOF ¶¶ 98, 117-118); App. 0516, 0521 (ASOF ¶¶ 98, 116-118).

C. Cherdoud Owns And Operates Milano Limo.

Milano is a "sole proprietorship" that is owned by Cherdoud. App. 0485 (ASOF ¶ 16). Milano provides transportation services. SA1129-1130 (RSOF ¶ 17; *see* App. 0803). In addition to owning and operating Milano, Cherdoud signed up to use the Uber App to connect with riders using UberBLACK. SA1130-1131 (RSOF ¶ 18; *see* App. 0374).

Cherdoud started providing black car services outside the Uber App in 2016. SA1179 (RSOF ¶ 136; *see* App. 0803). At first, Cherdoud worked with Freemo (Sabani's company) to handle pre-arranged trips. App. 0525-0526 (ASOF ¶ 137). In 2016, almost one-half of Cherdoud's income was earned from trips he provided

for Freemo's private clients, outside the Uber App. SA0999 (SOF ¶¶ 138-139); SA1180 (RSOF ¶¶ 138-139; *see* App. 0815-0816).

Cherdoud invested almost $40,000 to purchase a GMC Yukon XL that he uses to complete trip requests, and he has since paid that vehicle off in full. SA0996 (SOF ¶ 119); App. 0521 (ASOF ¶ 119). In addition, Milano incurs unreimbursed business expenses in support of the business, including phone, tolls and PPA vehicle inspections. SA0993 (SOF ¶ 99); App. 0516, 521-522 (ASOF ¶¶ 99, 121-122).

Cherdoud concedes that he lacks the "courage" of other transportation providers in terms of how aggressively to promote his business, but even he has found ways to market Milano's services, such as by parking near hotels and negotiating with the doormen to have them direct hotel guests to him (even doing this while online on the Uber App). App. 0526-0527 (ASOF ¶ 140). For those trips he receives from the hotel doormen, Cherdoud uses the Square payment processing tool to charge his riders. App. 0527 (ASOF ¶ 141).

SUMMARY OF THE ARGUMENT

Appellants concede that the definition of "employee" under the FLSA and Pennsylvania law "does not extend to individuals who genuinely own their own business." AOB at 24. Appellants are correct, and their concession is dispositive.

Incredibly, Appellants failed to even ***mention*** their ownership and operation of Luxe, Freemo, and Milano in their opening brief. The undisputed facts reveal, however, that Appellants owned and operated their own independent transportation businesses, and that as a matter of economic reality, they were not dependent upon Appellees: (1) Appellants control nearly every aspect of their relationship with Appellees (including their unfettered ability to choose whether, when, where, and for how long to use the Uber App); (2) their successes and failures are primarily a reflection of their own skill, courage, and efforts as independent business owners; (3) they invest significant sums into their businesses and engage other drivers with the objective of generating future profits; (4) they use their own entrepreneurial skills to determine how best to generate leads for their businesses (the Uber App being just one of many lead-generation sources); (5) their relationship with Appellees lacks permanence as they choose when and for how long to utilize (or to refrain from utilizing) the Uber App or other lead-generation sources; and (6) their business (providing transportation services) is distinct from Appellees' business (providing technology that enables riders and drivers to connect).

Rather than confronting these undisputed facts regarding their respective business endeavors, Appellants and their *amici* seek to obscure the issues by attempting to disparage Uber as "the piece-work factory of the smartphone era" and offering a litany of complaints about the alleged ineffectiveness of the Uber

App in generating leads. AOB at 18. Such empty rhetoric does not reflect the reality of the record evidence, and it is not material to the issue that is before this Court: whether, as a matter of economic reality, Appellants were in business for themselves. They undoubtedly were.

When the undisputed facts in the record before the district court are considered as a whole, with the goal of discerning the economic reality of Appellants' relationship with Appellees, they lead to the unequivocal conclusion that Appellants cannot meet their burden to show that they are economically dependent on (or employed by) Appellees. Instead, Appellants are independent contractors who own and operate their own businesses. This Court should affirm the judgment of the district court.

STATEMENT OF THE STANDARD OF REVIEW

This Court's review of a grant of summary judgment as to employee status is plenary. *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286, 1292 (3d Cir.1991) ("The employment status of the [plaintiff] is a legal conclusion. Thus, our standard of review ... is plenary."); *Yu v. McGrath*, 597 F. App'x 62, 65 (3d Cir. 2014) (reviewing *de novo* the district court's grant of summary judgment on employee status). This Court may affirm a district court for any reason supported by the record. *Brightwell v. Lehman*, 637 F.3d 187, 191 (3d Cir. 2011).

I. Summary Judgment

A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *In Re Enterprise Rent-A-Car Wage & Hour Litig*., 683 F.3d 462, 467 (3d Cir. 2012). A disputed fact is not "material" unless its resolution could affect the outcome, and a dispute is not "genuine" unless the evidence bearing on the disputed fact is such that a reasonable person could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In order to defeat a properly supported motion for summary judgment, a party must "point to concrete evidence" in the record; unsupported assertions, conclusory allegations or mere suspicions are insufficient to overcome a motion for summary judgment. *Orsatti v. N.J. State Police*, 71 F.3d 480, 484 (3d Cir. 1995); *Schaar v. Lehigh Valley Health Servs., Inc*., 732 F. Supp. 2d 490, 493 (E.D. Pa. 2010).

The same standard applies on appeal. "All assertions of fact in [appellate] briefs must be supported by a specific reference to the record." LAR 28.3(c); *Aubrecht v. Pennsylvania State Police*, 389 F. App'x 189, 193 (3d Cir. 2010) (dismissing appeal for failure to cite record evidence and meaningfully engage relevant legal authority). Factual averments that are not supported in the record

should not be considered by this Court. *Mickens-Thomas v. Vaughn*, 407 F. App'x 597, 601 n.6 (3d Cir. 2011) (assertions finding "no support in the record" are "not credible" and will not be considered).[4]

Although a district court's grant of summary judgment depends on subsidiary factual findings, "[t]he determination of 'employee' status under the FLSA ***is a question of law***." *Verma v. 3001 Castor, Inc.*, No. 13-cv-3034, 2014 WL 2957453, at *5 (E.D. Pa. June 30, 2014) (emphasis added) (citing *Thompson v. Linda and A., Inc*., 779 F. Supp. 2d 139, 147 (D.D.C. 2011)). Thus, "[e]mployee status can be determined by the district court on a motion for summary judgment where there are no genuine disputes of material fact." *Verma*, 2014 WL 2957453, at *5 (citing *Thompson*, 779 F. Supp. 2d at 147).

II. Appellants Bear The Burden To Show Employee Status.

The FLSA and its Pennsylvania counterpart apply only to employees. *See* 29 U.S.C. §§ 203, 206-207; 43 P.S. § 333.104; *Scantland v. Jeffry Knight, Inc*., 721 F.3d 1308, 1311 (11th Cir. 2013); *Crump v. HF3 Constr., Inc.*, No. CV 14-4671,

[4] For this reason, the Court should disregard the assertions in Appellants' opening brief that do not cite record evidence or that cite to a page in the appendix that does not support the assertion, including Appellants' assertions that they "had no better alternative" than "working long hours for Uber" (AOB at 14), Sabani "worked 87.1 hours" in a week (*id.* at 35), "Uber controls where drivers drive" (*id.* at 45), and Appellants were unable "to find meaningful business elsewhere" and "earned no meaningful amount of income from other sources" (*id.* at 50).

2016 WL 6962532, at *2-3 (E.D. Pa. Nov. 29, 2016) ("Defendants could not have violated the law if Plaintiffs were not their employees.").

The district court properly held, and Appellants do not dispute, that Appellants have the burden of proving that they are employees. App. 0029 (Opinion at 26), citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946), and *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (plaintiffs bear burden regarding essential elements of their claims); *Adami v. Cardo Windows, Inc.*, No. 12-2804, 2016 WL 1241798, at *6 (D.N.J. Mar. 30, 2016) ("Plaintiff must ultimately show that [they] are all employees covered by the FLSA."); Model Civ. Jury Instr. 3rd Cir. App'x 2 (adopting Pattern Civ. Jury Instr. 5th Cir. 11.24 ("To prevail in a FLSA action, the plaintiff must prove: (1) an employment relationship with the defendant....") and Pattern Civ. Jury Instr. 11th Cir. 4.14 (same)).

ARGUMENT

"Since the start of the Industrial Revolution more than 250 years ago, the global economy has been on a steep growth trajectory propelled by a series of advances in technology.... From steam engines that replaced water mills to electricity, telephones, automobiles, airplanes, transistors, computers, and the Internet, each new wave of technology has brought about surges in productivity and economic growth, enabling efficient new methods for performing existing

tasks and giving rise to entirely new types of businesses."[5] "[T]echnology advancement continues to drive economic growth and, in some cases, unleash disruptive change. Economically disruptive technologies ... transform the way we live and work, enable new business models, and provide an opening for new players to upset the established order."[6]

As the district court recognized, "app based ride-sharing" is a "disruptive" technological innovation that transformed the transportation industry by creating an "on demand" marketplace. App. 0340 (Sept. 13, 2017 Op. at 1). The Uber App innovation "bolstered competition" by introducing a "high-tech alternative" to the customary method of connecting riders and drivers. *Phila. Taxi Ass'n, Inc. v. Uber Techs. Inc.*, 886 F.3d 332, 340 (3rd Cir. 2018). Innovations such as the Uber App have also lowered barriers to entry and obstacles to growth for entrepreneurs like Appellants seeking to establish and build their own companies and to "live the American dream." App. 0520 (ASOF ¶ 114).

The contrary rhetoric of Appellants and their *amici* reflects nothing more than hostility to the transformative change that is brought about by technological innovation. This Court cautioned against such regressive thinking, noting that "if incumbents could prevent new entrants or new technologies from competing ...

[5] James Manyika, "Disruptive technologies: Advances that will transform life, business, and the global economy," McKinsey Global Institute, May 2013, at p.23.

[6] *Id.* at preface.

then 'economic progress might grind to a halt' [and] [i]nstead of taxis we might have horse and buggies; instead of the telephone, the telegraph; instead of computers, slide rules." *Phila. Taxi Ass'n*, 886 F.3d at 346.

This case presents the straightforward question of whether Razak, Sabani, and Cherdoud could carry their burden of proving that they were Appellees' employees based on the record evidence presented to the district court. On that question, the answer is a resounding "No." Appellants admitted all the facts needed to conclude that they are independent contractors who are in business for themselves and who are not economically dependent on (and thus not employees of) Appellees. Appellees request that this Court affirm the district court's order granting their motion for summary judgment.

I. Appellants Do Not Identify Any Genuine Disputes of Material Fact.

In support of their motion for summary judgment, Appellees presented a statement of undisputed facts (with appropriate citations to the record) sufficient to show that Appellants could not meet their burden to prove that they were employees of Appellees under the FLSA or Pennsylvania law. SA0974-1010.

In response, Appellants "had a full opportunity to present all relevant facts bearing on the question of whether they are employees." App. 0041 (Opinion at 38). As the party opposing summary judgment, Appellants were obligated to present evidence sufficient to show that there are genuine disputes of material fact

pertinent to the question of their status as employees or independent contractors, or, if no material facts were in dispute, to establish that those facts support the legal conclusion that they are employees. They did neither.

In their opposition to summary judgment, Appellants admitted most of the averments set forth in Appellees' statement of facts. App. 0476-0550 (ASOF); SA1116-1117 (RSOF at 1-2, listing 118 facts admitted by Appellants). For the averments that Appellants purported to dispute, their opposition often consisted of mere *non sequiturs* that failed to rebut Appellees' statement, or else failed to include citations to supporting record evidence. *See*, *e.g.*, SA1117 (RSOF at p.2, explaining how Appellants' attempt to dispute that they own Luxe, Freemo and Milano did not comply with Rule 56(c) or demonstrate a genuine dispute); *see* SA1118-1213 (RSOF, citing more than 80 similar examples of deficient purported disputes). Not surprisingly, when the district court referenced a fact that Appellants professed to dispute, the court found that "such dispute was either not 'genuine,' or not 'material,' or both." App. 0013 (Opinion at 10 n.6-7).

In its opinion, the district court presented a "fair account" of the facts that were "not genuinely disputed by Plaintiffs." App. 0008 (Opinion at 5). On appeal, Appellants do not challenge ***any*** of the district court's factual findings or otherwise identify ***any*** genuine disputes with respect to the material facts that the district court relied upon in finding that Appellants were properly classified as independent

contractors. Rather than arguing that genuine disputes of material fact precluded summary judgment, Appellants argue that a reasonable jury could consider the same facts evaluated by the district court and reach a different legal conclusion. AOB at 56-57. Appellants' argument misconstrues the role of the district court vis-à-vis a jury. By failing to challenge the accuracy of the district court's factual findings, and by not pointing to any record evidence showing the existence of any genuinely disputed material facts, Appellants essentially concede that there are no genuine disputes of material fact that need to be submitted to a jury. It was therefore appropriate for the district court—not a jury—to reach a legal conclusion on Appellants' status as independent contractors.

II. Appellants Do Not Challenge The Legal Standard Applied By The District Court.

Appellants also do not challenge the applicable legal standard that the district court applied to the undisputed material facts. As the district court explained, the "seminal case in this Circuit for determining whether a worker is an employee under the FLSA is *Donovan v. DialAmerica Mktg., Inc*., 757 F.2d 1376 (3d Cir. 1985)." App. 0017 (Opinion at 14). In *Donovan*, this Court identified six non-exclusive factors to consider when analyzing whether an individual is an employee or an independent contractor:

(1) the degree of the alleged employer's right to control the manner in which the work is to be performed;

(2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

(3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

(4) whether the service rendered requires a special skill;

(5) the degree of permanence of the working relationship; and

(6) whether the service rendered is an integral part of the alleged employer's business.

Donovan, 757 F.2d at 1382-83. Appellants agree that *Donovan* provides the correct standard. AOB at 17.

Consistent with the Supreme Court's guidance in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), the *Donovan* factors are not to be applied mechanically, and the presence or absence of any particular factor is not dispositive. Instead, "courts should examine the circumstances of the whole activity" with a consideration of whether, "as a matter of economic reality," the individuals are in business for themselves or "dependent upon the business to which they render service." *Donovan*, 757 F.2d at 1382; *Haybarger v. Lawrence Cty. Adult Probation & Parole*, 667 F.3d 408, 418 (3d Cir. 2012) ("As we recognized in applying the economic reality test in the context of the FLSA, whether a person functions as an employer depends on the totality of the circumstances rather than on technical concepts of the employment relationship.").

While it does not appear that this Court has ever had occasion to apply the economic reality factors to the specific question of whether black car drivers are independent contractors or employees under the FLSA, the United States Court of Appeals for the Second Circuit recently ruled in a similar factual scenario that the black car drivers in that case are independent contractors. *Saleem v. Corp. Transportation Grp., Ltd*., 854 F.3d 131, 139 (2d Cir. 2017). In *Saleem*, the court recognized that the "black-car drivers exercised their business acumen in choosing the manner and extent of their affiliation with [the defendant dispatch companies]; were able to work for rival black-car services, cultivate their own clients ... ; made substantial investments in their businesses; and determined when, where, and how regularly to work. They owned or operated enterprises which were flexible and adaptable to market conditions ... these driver-owners were small businessmen." *Id*.[7] Like the drivers in *Saleem*, Appellants are in business for themselves and are independent contractors.

[7] *See also Freund v. Hi-Tech Satellite, Inc*., 185 F. App'x 782, 784 (11th Cir. 2006) (drivers are independent contractors); *Chao v. Mid-Atlantic Installation Servs., Inc*., 16 F. App'x 104, 106 (4th Cir. 2001) (same); *Herman v. Express Sixty-Minutes Delivery Servs., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (same); *Bui v. Minority Mobile Sys., Inc.*, No. 15-21317-CIV, 2016 WL 344969, at *6 (S.D. Fla. Jan. 28, 2016) (same); *Bonet v. Now Courier, Inc.*, 203 F. Supp. 3d 1195, 1207 (S.D. Fla. 2016) (same).

III. As A Matter Of Economic Reality, Appellants Are Independent Contractors Who Own Their Own Businesses.

As Appellants concede, the definition of "employee" under the FLSA and Pennsylvania law "does not extend to individuals who genuinely own their own business." AOB at 24. The district court properly concluded that the undisputed facts compelled the legal conclusion that, as a matter of economic reality, Appellants are independent contractors who are in business for themselves.

As if hoping that this Court will not notice that they own and operate independent transportation companies that have generated more than ***$1 million*** in receipts since their inception, Appellants do not even mention Luxe, Freemo, and Milano in their opening brief. Between them, Appellants' companies own fleets of vehicles, engage other drivers to drive those vehicles, lease vehicles as a revenue-generating activity, obtain private bookings, generate leads from Blacklane and other referral sources, provide transportation services generated from leads obtained outside the Uber App, dispatch other drivers to provide transportation services, advertise and market their transportation services to the public, maintain an internet presence, retain a payroll services provider, incur substantial deductible business expenses (vehicle financing, insurance, repairs, maintenance, car washes, professional fees, office equipment, etc.) as investments in the growth of their enterprises, generate profits (and risk losses) from operating their businesses, and regularly exercise entrepreneurial judgment.

The district court analyzed each of the six *Donovan* factors in light of the undisputed facts. The court concluded that the *Donovan* factors, when examined with a consideration of the economic reality of the relationship between the parties, compelled the legal conclusion that Appellants are independent contractors. The court found that four of the *Donovan* factors "weigh heavily" in favor of independent contractor status, while the other two favored employee status only to "a slight degree" and did not "carry much weight" in the analysis. App. 0029-0041 (Opinion at 26-38). Consistent with *Donovan*, the court assessed the "totality of the circumstances" and concluded that Appellants did not present sufficient evidence of employment status to avoid summary judgment. App. 0041 (Opinion at 38).

The mere fact that the district court determined that not all factors weigh in favor of independent contractor status did not preclude summary judgment. In *Yu v. McGrath*, for example, an FLSA independent contractor misclassification case, this Court held that "[e]ven given the breadth of the statute's definitions, and construing the facts in the light most favorable to Yu, we agree with the district court that 'no reasonable jury could conclude that [she] was an employee.'" 597 F. App'x at 66. In *Yu*, the court found that two of the *Donovan* factors "weigh in favor of finding an employment relationship, to some extent" while "the other factors weigh against her." *Id.* Nonetheless, this Court affirmed that there was no employment relationship for purposes of the FLSA. *Id*.

It is undisputed that Appellants alone decide whether, when, where, and for how long (if at all) to utilize the Uber App to generate leads or to provide transportation services. They alone decide how to operate their transportation companies to maximize their profits, including how to generate customers and demand for their services. They alone decide the degree to which they will invest in their respective business endeavors, including whether and to what extent to expand their fleet of vehicles, to engage other drivers and to advertise. Their skill and "courage" in operating their respective businesses impact their success or failure as independent entrepreneurs. They have no permanent working relationship with Appellees and have complete control over the manner and extent of their utilization of the Uber App (including whether and when to go online, whether to accept trip requests, and whether to use other lead-generation sources). While none of the *Donovan* factors is determinative on its own, those factors considered as a whole in light of the underlying economic reality of the relationship between the parties demonstrate that Appellants are, as a matter of law, properly classified as independent contractors who own and operate their own independent transportation businesses.

A. Appellants Control All Material Aspects Of Their Transportation Services.

The district court correctly held that the first *Donovan* factor—the degree of the alleged employer's right to control the manner in which the work is to be

performed—"weighs heavily in favor of 'independent contractor' status." App. 0034 (Opinion at 31).

First, the district court held that "the written agreements entered into by the [Appellants] and their transportation companies point to a lack of control by Uber." App. 0029 (Opinion at 26). Relying on *Rutherford*, Appellants contend that the Court should ignore such "contractual formalities." AOB at 30. In *Rutherford*, the Supreme Court made the unremarkable observation that merely labeling an employee an independent contractor, without more, does not as a matter of law establish independent contractor status. 331 U.S. at 729. Appellees do not contend otherwise. Here, however, not only do the written agreements reflect the parties' *intent* to form an independent contractor relationship, they also grant *actual control* to Appellants in the operation of their transportation companies. As the district court recognized, the agreements are relevant in part because they "specifically detail the many ways that Uber is ***not*** entitled to control UberBLACK drivers." App. 0030 (Opinion at 27).

Looking beyond the agreements, the district court also analyzed the reality of the parties' relationship and found that the agreements accurately describe what the undisputed material facts reveal to be the *actual relationship* between the parties: Appellees have no contractual right to (and do not) direct or control the independent transportation companies or their drivers, either generally or in their

provision of transportation services. Rather, the independent transportation companies and their drivers retain the sole right to (and do) determine when, where, and for how long they will provide transportation services and when, where, and for how long they will use the Uber App, either alone or in combination with their own marketing efforts and other lead-generation sources. When they choose to use the Uber App, drivers are free to (and do) go online and offline whenever they want. *Herman*, 161 F.3d at 303 (drivers' ability to set their own hours and days of work demonstrated that company had minimal control over them); *Arena v. Delux Transp. Servs., Inc.*, 3 F. Supp. 3d 1, 10-11 (E.D.N.Y. 2014) (fact that defendants had little control over when plaintiff drove or how much he drove supported independent contractor status).

Moreover, while online on the Uber App, drivers are free to (and do) engage in personal activities, ignore and/or cancel trip requests, and pursue other business endeavors at the same time. *Saleem*, 854 F.3d at 147 (ability to reject trip requests, or even to avoid requests altogether by going offline, is indicative of independence associated with independent contractor status); *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension*, 85 F.3d 1374, 1380-81 (8th Cir. 1996) (affirming finding of independent contractor status based in part on "considerable autonomy regarding when and how long they would work" and noting that ability to refuse assignments without penalty was indicative of independent contractor status);

Herman, 161 F.3d at 303 (ability to reject jobs was indicative of independent contractor status).

Independent transportation companies and their drivers also have the contractual freedom to (and do) provide transportation services at any time to any third party, separate and apart from the Uber App. This includes providing transportation services to private customers and using other software applications to obtain trip requests *even when they are online* on the Uber App. "[O]n its face, a company relinquishes control over its workers when it permits them to work for its competitors." *Saleem*, 854 F.3d at 141-42 (fact that plaintiff could (and did) work for business rivals suggests that defendant exercised "minimal control" and weighs in favor of independent contractor status, noting also that "when an individual is able to draw income through work for others, he is less economically dependent on his putative employer"); *Herman*, 161 F.3d at 303 (that drivers were free to work for other courier delivery systems and were not subject to non-compete agreements supported independent contractor status); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015) ("If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.").

Appellants' arguments about the "right to control" factor do not identify any genuine dispute as to any of these freedoms. Rather, Appellants offer a litany of

complaints about their dissatisfaction with their utilization of the Uber App as a lead-generation tool. *See, e.g.*, AOB at 36-38.[8] Such complaints are not relevant to Appellants' status as independent contractors, because Appellants retain complete control over whether, when, where and how they might choose to utilize the Uber App to obtain leads in the first place. As independent contractors, if Appellees are dissatisfied with their experience using the Uber App, they can (and do) choose not to go online, or to go offline; and they can (and do) choose to ignore (or cancel) trip requests. The determinative and undisputed fact is that they have the power to choose whether and to what extent to engage with the Uber App. Such Appellant-retained authoritative control over whether, when, where, and how the work is done is simply not consistent with employee status.

B. Appellants Have The Opportunity For Profit Or Loss Based On Their Managerial Skill And Entrepreneurial Courage.

The district court next correctly held that the second *Donovan* factor—the alleged employee's opportunity for profit or loss depending on his managerial

[8] For example, Appellants complain that if a driver ignores three consecutive trip requests, the Uber App will move the driver from online to offline status. AOB 10. Appellants mischaracterize this as a "suspension" in an apparent attempt to show "control" over their online time. *Id.* Such rhetoric ignores that: (a) drivers who are transitioned to offline status may go back online *immediately*; and (b) moving drivers offline is a reasonable system integrity measure (since trip requests are sent to one driver at a time, having drivers online who do not intend to accept requests slows down the process of connecting riders and drivers). App. 10 (Opinion at 7); App. 0240 (Holtzman-Conston Dep. 54:5 – 55:14); SA0832 (Holtzman-Conston Decl. ¶ 16).

skill—"strongly favors a conclusion that UberBLACK drivers are not employees." App. 0036 (Opinion at 33).

Appellants complain that the mere ability to earn more money by working more hours is not the type of "managerial skill" contemplated by the second *Donovan* factor. AOB at 49-51. Appellants' argument both mischaracterizes the record and misconstrues the district court's rationale. The district court specifically recognized that Appellants' opportunities for profit and loss did not depend solely on *how long* they utilized the Uber App. Rather, Appellants can be strategic in using their skill to determine *when*, *where* and *how* to utilize the Uber App to obtain more lucrative trip requests and to generate more profits. App. 0034-36 (Opinion at 31-33).

In addition, the district court recognized that Appellants can generate profits (and risk incurring losses) based on the decisions they make in the investment and operation of their independent businesses—Luxe, Freemo, and Milano. App. 0034-0035 (Opinion at 31-32, noting that Appellants are "independent contractors pursuing their own entrepreneurial opportunities in search of profit"). *Saleem*, 854 F.3d at 144, n.29 ("investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit"); *Li v. Renewable Energy Solutions, Inc.*, No. 11-3589, 2012 WL 589567, at *8 (D.N.J. Feb. 22, 2012) (opportunity for profit or loss exists if earnings are tied to performance or if

investment may be lost if business does not succeed). One example of this concept from this case is Razak's investment in a fleet that reached up to sixteen vehicles at its peak, and his corresponding objective to lease those vehicles to other drivers in order to generate revenue from the lease payments. Razak, however, is not alone. All of the Appellants invest in the success of their respective transportation companies, and they make financial commitments in an attempt to generate a "return on ... investment." *Saleem*, 854 F.3d at 144; *Donovan*, 757 F.2d 1387-88 (investment in paid advertisements in an effort to gain more business is indicative of independent contractor status).

Appellants' reliance on *Donovan* for the proposition that their opportunity for profit and loss is measured by the amount of fares they generate using the Uber App is misplaced. In *Donovan*, this Court ***rejected*** the proposition that economic dependence is established by evaluating the money workers earn. Rather, the Court held that economic dependence "examines whether the workers are dependent on a particular business ... for their continued employment." *Donovan*, 757 F.2d at 1385. Moreover, the facts in *Donovan* are plainly distinguishable from the facts here, as the home researchers in that case were not permitted to offer their services to other businesses and organizations, and could only work if the company needed their services. *Id.* Therefore, the plaintiffs' economic alternatives were affirmatively limited by the employer, and the ***only*** way they could earn more

money was to work more hours. *Id.* By contrast, Appellants are neither affirmatively limited to nor economically dependent on Appellees because they have the freedom to choose: they can (and do) offer their services to other businesses and organizations, and they are able to (and do) provide transportation services to riders they separately identify through their own advertising and marketing efforts and other lead-generation sources.[9]

Appellants also rely on *Martin* for the proposition that, where a worker's wages are a function of the number of hours worked, the worker is economically dependent on the employer's business. However, *Martin* is inapposite. First, in *Martin*, the plaintiffs' ability to earn was determined less by the number of hours they chose to work than by the location of the gas station where they worked, and that location was a factor completely within the control of the employer. Second, this Court analyzed all six *Donovan* factors in *Martin*, and found that *every factor* supported a finding of employee status. 949 F.2d at 1294. Accordingly, *Martin* is of no help to Appellants here.

[9] In any event, the ability to generate profit based on the number of jobs the worker is willing to accept *can be* indicative of independent contractor status. *Freund*, 185 F. App'x at 783 (independent contractor status supported where workers could earn greater sums of money by accepting more jobs, performing more efficiently, and hiring employees); *Dole v. Amerilink Corp.*, 729 F. Supp. 73, 77 (E.D. Mo. 1990) (fact that installers could earn more or less money depending on their initiative was an indicia of independent contractor status); *Hodgson v. E. Falls Sand & Gravel Co.*, No. 69-407, 1972 WL 952, at *4 (M.D. Pa. Aug. 30, 1972) (truck drivers were independent contractors where opportunity for profit depended in part on number of trips they were willing to take).

Appellants' reliance on *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28 (1961), and *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987), is similarly misplaced, as these cases actually support the conclusion that Appellants are properly classified as independent contractors. *Goldberg* involved members of a co-operative who manufactured knitted goods at their homes. The Supreme Court found that they were not independent contractors because they were confined to work for one organization and were prohibited from selling their products freely on the market. *Goldberg*, 366 U.S. at 29. The reverse is true here: Appellants are genuine free agents who provide their transportation services whenever and to whomever they want.

Lauritzen is also distinguishable. In that case, the migrant workers were found to be employees because their opportunity for profit or loss depended entirely on "defendants' land, crops, agricultural expertise, equipment, and marketing skills." 835 F.2d at 1538 (noting that were it not for defendants, the migrant workers would be unemployed). Here, there is no such dependence. Appellants use their own vehicles and business acumen to generate revenue, and they utilize the Uber App as just one of many ways to generate leads for their transportation companies. Their utilization of the Uber App is based entirely on their own decisions about what is most beneficial to Luxe, Freemo, and Milano. The market for Appellants' services does not depend on the Uber App, and, if the

Uber App ceased to exist, Appellants would continue providing rides and generating business through any number of alternative means, such as Blacklane, Lyft, their own independent business development efforts, and by obtaining a fleet of vehicles and leasing them to other drivers.

In their opening brief, Appellants ignore the undisputed facts regarding their substantial investments in support of Luxe, Freemo, and Milano, the opportunities for profit generated by those investments and nourished by their skills and courage in building their businesses, and the risks of loss they face if their businesses do not succeed. These are the hallmarks of an independent contractor.

C. Appellants Make Significant Investments In Their Businesses And Engage Helpers.

The district court correctly held that the third *Donovan* factor—the alleged employee's investment in equipment and engagement of helpers—"strongly favors independent contractor status." App. 0037 (Opinion at 34).

Appellants and their companies make substantial investments in support of their business endeavors. Appellants' businesses have invested more than $500,000 in vehicle purchases alone.[10] In addition, Appellants make ongoing investments (vehicle maintenance and repair, marketing and advertising, professional fees, etc.)

[10] *Freund*, 185 F. App'x at 784-85 (independent contractor status supported where cable installer "drove his own vehicle and provided his own tools and supplies" for jobs); *Herman v. Mid-Atl. Installation Servs., Inc.*, 164 F. Supp. 2d 667, 675 (D. Md. 2000) (providing own truck or van and tools at considerable cost indicates contractor status), *aff'd*, 16 F. App'x 104 (4th Cir. 2001).

for the purposes of maintaining and growing their businesses. *Saleem*, 854 F.3d at 144-46 (noting that large capital expenditures are highly indicative of independent contractor status); *Herman*, 161 F.3d at 308 ("If the workers have sizeable capital investments at stake, they are more akin to independent entrepreneurs seeking a return on their risky capital investments, than to employees."). In evaluating a worker's investment, courts consider whether the individual made financial commitments in an attempt to generate a "return on ... investment." *Saleem*, 854 F.3d at 144. It is undisputed that Appellants have made a substantial financial commitment in order to generate profits for Luxe, Freemo, and Milano.[11]

The engagement of "helpers" is also indicative of an independent contractor relationship. *Donovan*, 757 F.2d at 1382 (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir.1981)); *Adami*, 2016 WL 1241798, at *8-9 (installer's ability and discretion to hire helpers and to determine what each would be paid are facts indicative of an independent contractor relationship). Here, it is undisputed that Appellants' businesses can (and that Luxe and Freemo do) engage helpers to

[11] Appellants' only argument about the third *Donovan* factor is to complain that some of their investments were financed in part through an alleged "capital partner" of Uber. AOB 52-53. This argument is a red herring. Appellants were permitted to finance their vehicle purchases however they wanted. SA1173-1174 (RSOF ¶ 120; *see* App. 0813). For example, Sabani financed his purchase directly through Barry Limo. App. 0516-0517 (ASOF ¶¶ 101-103). Appellants' argument also ignores that a significant portion of their ongoing investment is not financed at all (*e.g.*, advertising, vehicle repair and maintenance, etc.). It is not surprising that Appellants do not cite any authority showing the relevance of their *non sequitur* financing argument.

support their business endeavors, and that they decide how much to pay their helpers. Luxe has paid hundreds of thousands of dollars to its drivers, and even retained a payroll provider to handle the workload. As for Freemo, it is notable that Cherdoud was one of Freemo's helpers and provided transportation services for Freemo's private trips.

It is undisputed that Appellants invest heavily in their own success (not just financially, but also in time, energy, courage, skill and determination). The degree to which these investments will yield returns is a function of the business acumen of each individual Appellant. As a matter of economic reality, Appellants have significant control over the "essential determinants of profits in [their] business." *Saleem*, 854 F.3d at 145. These facts strongly support Appellants' independent contractor status.

D. Appellants' Work Requires Special Skill.

The district court held that the fourth *Donovan* factor—whether the services rendered require a special skill—"does not carry much weight in establishing Plaintiffs' burden." App. 0038 (Opinion at 35).

The fourth *Donovan* factor weighs in favor of independent contractor status. In addition to the skills required to provide quality black car transportation services, it is undisputed that Appellants' overall operation of their Luxe, Freemo, and Milano business enterprises requires special skills beyond mere driving. For

example, through his operation of Luxe, Razak acquired and maintains a fleet of vehicles (as many as sixteen at one time) and has engaged more than fifty drivers to drive those vehicles for private clients obtained through marketing efforts and riders identified by third-party sources such as Blacklane. Similarly, through their operations of Freemo and Milano, Sabani and Cherdoud rely on their skills and initiative to generate business outside the Uber App. *Donovan*, 757 F.2d at 1381 (ability to exercise "initiative, business judgment, or foresight in their activities" weighs in favor of independent contractor status).[12] The difference in strategies pursued (and corresponding receipts generated) by Luxe versus Freemo versus Milano is testament to the impact of the special skills required to operate and grow a transportation company.

E. Appellants' Relationship With Appellees Lacks Permanence Because Appellants Alone Determine The Extent Of Their Affiliation.

The district court correctly held that the fifth *Donovan* factor—the degree of permanence of the working relationship between the worker and the alleged employer—"weighs heavily in favor of [Appellants'] independent contractor status." App. 0040 (Opinion at 37).

[12] *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 506 (10th Cir. 2012) (creating licensed, limited liability company, among other facts, supported district court's conclusion that plaintiff was in business for himself); *Weary v. Cochran*, 377 F.3d 522, 528 (6th Cir. 2004) (reflecting profits and losses as sole proprietor on tax return evidenced independent contractor status).

The district court found that Appellants have "complete freedom regarding how long they wish to serve" and "there is no permanence of the working relationship whatsoever." App. 0039 (Opinion at 36). In response, Appellants contend that the fact that they have utilized the Uber App "for years" makes them more akin to at-will employees who may continue to utilize the Uber App "with no definite end point." AOB at 54-55. Appellants misconstrue the inquiry suggested by the fifth *Donovan* factor.

The mere fact that Appellants have utilized the Uber App for the past few years does not mean that there is "permanence" in the relationship. It is undisputed that Appellants can choose when to go online and offline, and when to accept a trip request. Appellants can go offline for as long as they wish (even indefinitely), without any consequence (*e.g.*, Razak going offline for two months without seeking permission). As with the first *Donovan* factor, it is Appellants' complete freedom to choose whether, when, and for how long to engage with (or disengage from) the Uber App that makes this factor favor independent contractor status.

In addition, the fact that Appellants can freely provide transportation services for their own companies, and pursue leads generated by companies like Lyft and Blacklane, is strong evidence of a lack of permanence. *Saleem*, 854 F.3d at 142 & 147; *Donovan*, 757 F.2d at 1385 (worker who is not dependent on particular business for continued employment is more likely independent

contractor); *Freund*, 185 F. App'x at 784 (when addressing "degree of permanence of the working relationship" factor, courts consider, among other factors, plaintiff's ability to work for other companies); *Bui*, 2016 WL 344969, at *6 (plaintiffs could perform transportation services for any entity and therefore were not economically dependent on the alleged employer); *Adami*, 2016 WL 1241798, at *9 (portable nature of individual's investments suggests that individual is not tied to one revenue source, but is instead "capable of working elsewhere"); *Browning v. CEVA Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012) (plaintiffs who could provide delivery services to other companies were independent contractors).

Appellants are not beholden to the Uber App, and the frequency and duration of their use of the Uber App is entirely of their own choosing. They remain free to utilize any number of other lead-generation sources to generate business for their companies, depending on what they perceive to be most beneficial to their business interests.

The Uber App represents one resource that transportation companies such as Luxe, Freemo, and Milano can use to connect with potential customers and to leverage for the profitability of their businesses. But it is just one lead-generation tool in their toolbox, joining numerous other resources and technologies used by Appellants. Just as Appellants can access and leverage the Uber App for the benefit of their businesses, so too can they access and leverage many other

technological innovations (*e.g.*, other lead-generation tools, driving direction applications, the Square payment processing tool, etc.). Appellants' decisions about when, where, and how to utilize those tools do not create "permanence" between Appellants and those who develop those tools.

The undisputed material facts in this case show that Appellants' transportation companies market and advertise to solicit customers outside the Uber App, promote their businesses online and elsewhere, develop non-Uber App referral and customer relationships, use and leverage other lead-generation sources (*e.g.*, Blacklane) and technology applications (*e.g.*, the Lyft App, Square), generate additional revenue outside the Uber App (*e.g.*, by purchasing vehicles and leasing them to others), and otherwise operate and hold themselves out to the world like the independent businesses that they are. These undisputed facts undermine any perceived "permanence" in the relationship.

F. Appellants' Businesses Are Not Integral To Appellees' Business.

The district court held that the sixth *Donovan* factor—whether the service rendered is an integral part of the alleged employer's business—"tends to support the [Appellants'] burden of proof that they are employees ... but only to a slight degree." App. 0041 (Opinion at 38).

Relying on *dicta* from an interlocutory California district court opinion in a case that is currently on appeal, the district court reasoned (and Appellants

contend) that "Uber drivers are an essential part of Uber's business as a transportation company." App. 0040 (Opinion at 37); AOB at 41-42, citing *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015). Appellees respectfully submit that the foregoing conclusion is not supported by the record evidence ***in this case***. Of note, whereas the district court cited to ample record evidence in support of those *Donovan* factors it held favored independent contractor status, the district court did not cite to anything in the record to support its conclusion on the sixth factor.

As noted above, the record evidence in this case reflects that Uber is ***not*** a transportation company. Rather, Uber is a technology company that invents, develops, markets, and licenses technology products. Uber is not in the business of actually providing transportation services in Philadelphia; it does not employ drivers in Philadelphia; and it does not contract with riders seeking transportation services to provide those services.

Whereas Uber is a technology company, the three companies owned and operated by Appellants—Luxe, Freemo, and Milano—are most certainly companies in the business of providing transportation. *See Donovan*, 757 F.2d at 1385 & n.11 (critical consideration is "nature of the work performed by the workers" and whether workers "performed the primary work of" purported employer). Here, Appellants transport riders, whereas Appellees develop

technology that can be used by Appellants to connect with riders. The fact that Appellees' technology may enable Appellants to connect their businesses with certain riders (and the fact that such connections ultimately benefit Appellees as well as Appellants) does not make Appellants' transportation services an integral part of Appellees' business as a technology company. Uber is not, precisely speaking, in the business of providing rides, just as eBay is not in the business of selling Beanie Babies even though those who purchase such collectibles can use eBay's technology to connect with those who sell them.

The fact that independent parties who contract with one another are important to each other ***is the reason they contract with each other***, but it says ***nothing*** about the parties' relationship. *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring). Despite Appellants' rhetoric, providing rides in Philadelphia is not an integral part of Appellees' business. The core of Appellees' business (its technology products) would continue to exist and have market value even if Appellants stopped using the Uber App. Similarly, in light of the many other lead-generation options they utilize, the core of Appellants' businesses (providing transportation services to riders) would continue to exist and have market value even in the absence of the Uber App technology.

Appellees are certainly part of the "transportation ecosystem" in Philadelphia, but there is no dispute that their place in that ecosystem is

economically distinct from Appellants' place in that ecosystem. Appellants provide black car transportation services to riders in Philadelphia. Appellees provide technology that enables Appellants and other transportation providers to easily connect with individuals seeking black car transportation services.

Appellants' related argument about being treated as "employees" for purposes of the certificate of public convenience (AOB at 5-6 & 44) is a red herring. Those who wish to provide black car services in Philadelphia are required to hold a PPA certificate of public convenience or to do so in connection with an entity that holds a PPA certificate. App. 0503 (ASOF ¶ 42). The fee for a PPA certificate is $12,000, but qualified transportation companies who do not hold their own certificate may affiliate with an entity that holds one. App. 0503 (ASOF ¶ 43); SA1147-1148 (RSOF ¶ 44; *see* App. 0381). Gegen, a wholly-owned subsidiary of Uber, holds a PPA certificate. App. 0502-0503 (ASOF ¶ 41). Thus, one way to get into the transportation business without having to pay for a PPA certificate is to affiliate with Gegen. SA1149 (RSOF ¶ 46; *see* SA1020). While some transportation providers who utilize the Uber App operate under the certificate held by Gegen, others operate under certificates held by other limousine companies licensed by the PPA. SA1148-1149 (RSOF ¶ 45; *see* App. 0381). Such affiliations do not convert independent transportation companies into employees of the holder of the PPA certificate under the FLSA and Pennsylvania law.

Upon completing its own review of the record evidence in this case, this Court should conclude that, while the parties' respective businesses may have a symbiotic relationship in the transportation ecosystem, the sixth *Donovan* factor actually favors independent contractor status, since Appellants' services as transportation providers are not an integral part of Appellees' business as a technology company. *See Brightwell*, 637 F.3d at 191 (court may affirm for any reason supported by the record). At minimum, the district court's conclusion with respect to the sixth *Donovan* factor is properly viewed as non-determinative, since it does not weigh so strongly in favor of employment status as to change the ultimate holding that Appellants are independent contractors.

IV. The *Amicus* Brief Filed In Support Of Appellants Should Be Disregarded.

An *amicus* participates only for the Court's benefit and is not subject to the rigors of examination. Thus, this Court has the discretion "to determine the fact, extent, and manner of participation by the *amicus*." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991). The *amicus* brief filed in support of Appellants fails to provide reliable information that is pertinent to the question at issue in the case. It is unhelpful and should be disregarded. *See Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132-33 (3d Cir. 2002).

First, *amici* offer what they call "publicly-available research" and ask that this Court remand the case so the district court can consider that research as part of

a "fully-developed record" on remand. *Amicus* Brief at 9. Respectfully, Appellants already "had a full opportunity to present all relevant facts bearing on the question of whether they are employees under the FLSA." App. 0041 (Opinion at 38). The district court relied on the evidentiary record and concluded that Appellants cannot show that they are employees of Appellants. It is much too late for *amici* to request an opportunity to present their "publicly-available research" to the district court.

Second, *amici* cite to materials that are unreliable, irrelevant, and offered for no apparent purpose other than to try to prejudice Uber in the eyes of this Court. As just some examples, *amici* cite an article containing inadmissible anecdotes from a statistically insignificant number of anonymous drivers regarding their alleged earnings using the Uber App in New York City several years ago, an article about a taxi driver who took his own life, an article about an accident involving an autonomous vehicle, and an unpublished research draft bearing the stamp "Draft. Do not cite or circulate."[13] This Court should disregard the prejudicial articles cited by *amici* and the arguments derived therefrom, since they do not shed any light whatsoever on the only issue before this Court: the economic reality of the relationship between Appellants and Appellees. Based on the undisputed facts in

[13] *Amicus* Brief at 12-14 & 18, citing Kossoff, *Uber Drivers Speak Out: We're Making a Lot Less Money than Uber is Telling People*, Business Insider (Oct. 29, 2014); Fitzsimmons, *A Taxi Driver Took His Own Life*; Wakabayashi, *Uber's Self-Driving Cars Were Struggling Before Arizona Crash*, New York Times (Mar. 23, 2018); Schor, *Dependence and Precarity in the Sharing Economy*, Unpublished Mimeo, Boston University (Mar. 26, 2017).

the record evidence before the district court, the economic reality is unambiguous: Appellants are independent contractors, in business for themselves.

CONCLUSION

In this action, the district court properly recognized that: (a) there were no genuine disputes as to any material fact; and (b) Appellees were entitled to judgment as a matter of law. Appellants cannot meet their burden to show that they are employees of Appellees under the FLSA or Pennsylvania law. Appellees respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

Dated: September 24, 2018

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CERTIFICATE OF BAR MEMBERSHIP, COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPEFACE REQUIREMENTS, AND VIRUS CHECK

I, Robert W. Pritchard, counsel for Appellees Uber Technologies, Inc. and Gegen LLC, certify, pursuant to Local Appellate Rule 28.3(d) that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit. I further certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(7), and Local Appellate Rules 31.1(c) and 32.1(c), that the foregoing Brief of Appellees is proportionately spaced and has a typeface of 14-point Times New Roman, contains 12,930 words (not counting portions excluded from the word count by Rule 32(f)), and that the text of the electronic brief is identical to the text of the paper copies. I further certify, pursuant to Local Appellate Rule 31.1(c), that Trend Micro Office Scan, Version 11, Service Pack 1 has been run on this Brief before filing and that no virus was detected.

Dated: September 24, 2018

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CERTIFICATE OF SERVICE

I, Robert W. Pritchard, counsel for Appellees Uber Technologies, Inc. and Gegen LLC, certify that on September 24, 2018, I filed the foregoing Brief of Appellees and the Supplemental Appendix via the Court's CM/ECF system, causing a Notice of Docket Activity and a copy of the filing to be served upon the following counsel of record who are registered CM/ECF Filing Users:

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Pursuant to LAR 31.1 and the April 29, 2013 and November 9, 2016 standing orders, an original and six paper copies of this Brief, and four paper copies of the Supplemental Appendix, were sent to the Clerk of the Court via Federal Express:

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