IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALI RAZAK, KENAN SABANI, and KHALDOUN CHERDOUD, individually and on behalf of all others similarly situated, Plaintiffs, v. UBER TECHNOLOGIES, INC. and GEGEN LLC, Defendants.	:	Civil Action No. 16-573 Judge Michael M. Baylson

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Uber's motion is fundamentally premised on its contention that Uber is not a "transportation company," but instead a "technology" company that merely generates "leads" for "independent transportation providers" like Plaintiffs.[1] Indeed, Uber bills itself as a "modern-day Yellow Pages," a "more efficient bulletin board."[2] Drivers, according to Uber, are not employees, but rather customers who use Uber's software to connect with riders, who are also customers.[3]

Uber's continued pretense that it is merely a technology company is staggering, especially when considering that this same rhetoric was repudiated by the Northern District of California on summary judgment:

> Uber passes itself off as merely a technological intermediary between potential riders and potential drivers. This argument is fatally flawed in numerous respects.
>
> First, Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform… rather than on the substance of what Uber actually does… [Uber's] software… is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs… If, however, the focus is on the substance of what the firm actually does (*e.g.*, sells cab rides…), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own

[1] Defs.' Mem. 2, ECF 114-2; *but see* Uber's Senior Regulatory Counsel's Comments to Pennsylvania Public Utility Commission, Ex. 11 at 3 (admitting that Uber is "a certificated limousine provider authorized to furnish limousine services").
[2] Defs.' Mem. 16.
[3] Holtzman-Constan Decl. ¶5, ECF 114-12.

> marketing bears this out, referring to Uber as "Everyone's Private Driver," and describing Uber as a "transportation system"…
>
> Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers… Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers… Put simply, the contracts confirm that Uber only makes money if its drivers actually transport passengers.
>
> Furthermore, Uber not only depends on drivers' provision of transportation services to obtain revenue, it exercises significant control over the amount of any revenue it earns: Uber sets the fares it charges riders unilaterally…

O'Connor v. Uber Techs., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (citations omitted) (denying Uber's motion for summary judgment).

Uber's pretense was again slammed as disingenuous by the United Kingdom's Employment Appeal Tribunal, which held:

> [The Employment Tribunal] did not accept that the [characterization] of the relationship between drivers and [Uber] in the written agreements properly reflected the reality. In particular - and crucial to its reasoning – the [The Employment Tribunal] rejected the contention that Uber drivers work, in business on their own account, in a contractual relationship with the passenger every time they accept a trip.

Uber B.V. and Others v. Mr Y Aslam and Others, UKEAT/0056/17/DA (Employment Appeal Tribunal J., Nov. 10, 2017), Ex. 46 (affirming that Uber drivers are employees).

When this Court was first confronted with this issue, it applied much of the same reasoning:

> Plaintiffs' Complaint contains several well-pleaded allegations which the court must consider true, and **which weigh in favor of an employee-employer relationship being plausible** under the *Donovan* factors. For instance, with respect to the degree of control exercised by Defendants (factor one), Plaintiffs allege, *inter alia*, that Defendants "control the number of fares each driver receives," "have authority to suspend or terminate a driver's access to the App," "are not permitted to ask for gratuity," and "are subject to suspension or termination if they receive an unfavorable customer rating[.]" ...As to whether the services Plaintiffs rendered require a special skill (factor four), Plaintiffs allege that, in order to serve as Drivers, "drivers must undergo PPA training, testing, examination, a criminal background check and driving history check." ...As to the importance of Plaintiffs' services to the Defendants' business (factor six), Plaintiffs aver that Defendants' business is to "provide on-demand car services to the general public," and that Plaintiffs are "drivers that perform on-demand transportation services for defendants." ...Plaintiffs also specifically allege that they are "dependent upon the business to which they render service."

Oct. 7, 2016 Op., ECF 45 at 8-9; *Razak v. Uber Technologies*, No. 16-573, 2016 U.S. Dist. LEXIS 139668, 2016 WL 5874822 (E.D. Pa. Oct. 7, 2016).

To quote Uber's own U.S. Operations Manager: "Drivers are at the center of the Uber experience, and the app they use to go online and earn money is at the center of theirs."[4] That "experience," as realized by the Plaintiffs, is defined by Uber's unilateral control. The evidence produced by the Plaintiffs evinces that control, and establishes an employment relationship, making summary judgment entirely inappropriate.

[4] *See* March 22, 2017 Remarks by Uber's U.S. Operations Manager, Rachel Holt, from Uber Press Call, https://www.uber.com/newsroom/press-call/.

II. PROCEDURAL HISTORY AND FACTS

The procedural history of this action has been documented in prior motions and opinions, and need not be restated here. The pertinent facts are discussed herein, and are enumerated in the statements filed herewith.

III. LEGAL STANDARDS

A. Summary Judgment

Both sides agree that summary judgment cannot be granted if a reasonable person, examining a fact "that might affect the outcome of the suit under the governing law," could find for the non-moving party.[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Determining Employment Status

Both sides also agree that the test presently utilized in the Third Circuit for assessing whether UberBlack drivers are Uber's employees is termed the "economic realities" test.[6] *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985). While the economic realities test generally focuses on six separate factors, no one factor is determinative; indeed, in some circumstances fewer than six factors may indicate the economic realities of the parties' relationship. *Id.* The six *Donovan* factors are addressed separately later in this memorandum.

[5] Defs.' Mem. 4.
[6] Defs.' Mem. 6.

An essential aspect of the economic realities test is that the parties' own categorization of their relationship is not a central factor. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("putting on an 'independent contractor' label does not take the worker from the protection of the FLSA"). The U.S. Department of Labor has issued the following guidance on this matter:

- Receiving a 1099 does not make you an independent contractor under the FLSA.[7]
- Signing an independent contractor agreement does not make you an independent contractor under the FLSA.
- Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.
- "Common industry practice" is not an excuse to misclassify you under the FLSA.[8]

There are several common sense reasons why contractual labels are not relevant. First, many, if not most, employment situations involve parties of disparate bargaining positions, so that the employee is often compelled to accept an employer's classification as a condition of employment. Second, other parties have interests in the relationship, such as government taxing authorities, the Social

[7] Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*
[8] Department of Labor, Wage & Hour Division, Get the Facts on Misclassification under the FLSA, available at https://www.dol.gov/whd/workers/Misclassification/.

Security Administration, insurance carriers, accident victims, and others. Consequently, the focus of the economic realities test is objective.

Indeed, the trend appears to be a movement toward an assumption of an employment relationship, with the burden on the purported employer to prove otherwise. *See, e.g.*, New Jersey's adoption of the "ABC test," discussed by the New Jersey Supreme Court in *Hargrove v. Sleepy's, LLC*, 106 A.3d 449 (2015), and by the Third Circuit in *Hargrove v. Sleepy's LLC*, 612 F. App'x 116 (3d Cir. 2015); and, on the other side of the country, California's rejection of the economic realities test for certain state law purposes, and its adoption of the traditional "suffer or permit to work" standard in *Dynamex Operations W., Inc. v. Superior Court*, 230 Cal. App. 4th 718 (2014).

Because the economic realities test focuses on the totality of circumstances, results in non-Uber cases are limited in value. Each case is different, usually in ways which are significant under the test. If material facts are disputed, as they are in this case, the decision ultimately must rest with the trier of fact.[9]

[9] Cases cited by Uber illustrate this limitation. *See Saleem v. Corporate Transp. Group., Ltd.*, 854 F.3d 131, 149 (2d Cir. 2017) (involving alleged employees who paid $40,000 to essentially purchase a black car dispatch franchise; the franchisor could not cancel the contract on short notice) (noting "[i]n a different case, and with a different record, an entity that exercised similar control over clients, fees, and rules enforcement in ways analogous to the Defendants here might well constitute an employer within the meaning of the FLSA."); *Chao v. Mid-Atlantic Installation Servs.*, 16 F. App'x 104 (4th Cir. 2001) (involving cable installers that invested in far more than their trucks, and utilized special skills "akin to those of carpenters,

The Court recognized this limitation in its opinion on compensability. *See* Sept. 13, 2017 Op. 24-6, ECF 93; *Razak v. Uber Techs., Inc.*, No. 16-573, 2017 U.S. Dist. LEXIS 148087, at *24 (E.D. Pa. Sep. 13, 2017) ("cases are instructive to the extent that they show how courts have weighed the relative importance of various factors, yet none of them deal with the unique facts present in the instant case."). Specifically, while the facts of each case are generally unique, and the analysis is fact-intensive, the legal frameworks traditionally applied to FLSA cases are still useful.

The Court cited *Grubhub*[10] as adding "some credence to the notion," even though "[t]he facts of [*Grubhub*] were distinct." *Id.* at *36, *39. The *Grubhub* court

construction workers, and electricians, who are usually considered independent contractors."); *Herman v. Express Sixty-Minutes Delivery Serv*., 161 F.3d 299 (5th Cir. 1998) (involving a purported employer who lacked control, couriers who could pick their job, and no degree of permanency) (importantly, noting that "[t]he determination of employee status is very fact intensive, and as with most employee-status cases, there are facts pointing in both directions."); *Bui v. Minority Mobile Sys*., No. 15-21317, 2016 U.S. Dist. LEXIS 10179, 2016 WL 344969 (S.D. Fla. Jan. 28, 2016) (departing from *Donovan*, and the principle not to focus on one element, by holding: "[w]hile these factors serve as a guide, the overarching focus of the inquiry is economic dependence.") (this opinion has never been cited by other courts); *Bonet v. Now Courier, Inc.*, 203 F. Supp. 3d 1195 (S.D. Fla. 2016) (previously refusing to enter summary judgment before trial; issuing a directed verdict post-trial after evaluating testimony; departing from *Donovan* by holding that the overarching focus is on economic dependence).

[10] *Lawson v. Grubhub, Inc.*, No. 15-5128, 2017 U.S. Dist. LEXIS 106291, 2017 WL 2951608 (N.D. Cal. Jul. 10, 2017).

likewise refused to enter summary judgment under California's *Borello* standard.[11] The matter next proceeded to a bench trial, where it was revealed that the driver was not credible, had only worked for Grubhub for four months, usually worked 20 hours or less per week, and Grubhub did not evaluate the driver's performance in any fashion. *Lawson v. Grubhub, Inc.*, No. 15-5128, 2018 WL 776354, 2018 U.S. Dist. LEXIS 21171 (N.D. Cal. Feb. 8, 2018). As this Court has already noted, the facts here are materially distinct, as demonstrated below and in the supporting statement of facts. *See* 2017 U.S. Dist. LEXIS 148087, at *24, *36, *40, *41 (noting the "distinct" and "unique" of this case) ("the case law surveyed above is of limited use because the facts present in this case are so distinct").

IV. ARGUMENT

A. Overview

Uber begins its argument by stressing that – adhering to the non-negotiable contracts drafted by Uber – UberBlack drivers are independent contractors who own separate businesses. This is farce at the outset, for many reasons.

The United Kingdom's Employment Tribunal called this argument "faintly ridiculous," reasoning: "the written terms on which [Uber] rel[ies] do not correspond with the practical reality. The notion that Uber in London is a mosaic of 30,000

[11] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

small businesses linked by a common 'platform' is to our minds **faintly ridiculous**…"[12] Last month, Pennsylvania's Commonwealth Court similarly held that driving for Uber does not reflect "a positive step" toward establishing an independent business.[13]

Notably, Uber itself requires the Plaintiffs to form or otherwise affiliate with a business entity in order to work as an UberBLACK driver.[14] The Plaintiffs were referred to the same accountant by Uber for this purpose. [15] According to Plaintiff Cherdoud, Uber even covered the expense of setting up his business.[16]

Furthermore, the Uber App and the Uber experience is personal to the driver, not to the driver's company.[17] Uber communicates with drivers, not companies.[18] Uber performs background checks on drivers, not companies.[19] Uber tracks *driver* ratings and *driver* cancellations, and deactivates *drivers*.[20] These policies are set

[12] *See* Ex. 46 at ¶ 68 (emphasis added).
[13] *Lowman v. Unemployment Comp. Bd. of Review*, 2018 Pa. Commw. LEXIS 52, at *12 (Commw. Ct. Jan. 24, 2018).
[14] Pls.' SOF ¶ 1.
[15] *Id.*
[16] *Id.* at ¶ 1,16
[17] *See* footnote 4 *supra* ("Drivers are at the center of the Uber experience, and the app they use to go online and earn money is at the center of theirs.").
[18] *See*, *e.g.*, Exs. 18-22, 40-42.
[19] *See* Pls.' SOF ¶¶ 259-61.
[20] *Id.* at ¶¶ 249-58

forth in Agreements, drafted exclusively by Uber, called "Driver Addendum" and "Driver Deactivation Policy."[21]

Pursuant to these policies, neither the drivers nor their companies have a contractual relationship with riders. Riders instead contract with Uber who in turn contract with the Plaintiffs to provide transportation services. Accordingly, the driver does not know the rider's identity,[22] does not know the rider's destination until the trip begins,[23] cannot negotiate or discuss fares with the rider,[24] and cannot accept payment from the rider.[25] The driver's corporate affiliation does not factor into this structure, whatsoever.

As a result of this structure, drivers (and their affiliated companies) have no recourse against riders who fail to pay Uber.[26] For example, Plaintiff Sabani was only partially compensated for a trip because the rider had used a stolen credit card, which presumably Uber had on file and could have checked.[27] Plaintiff Cherdoud was not compensated, whatsoever, for a trip because he forget to hit the "begin trip" button.[28] Under normal circumstances, Plaintiff Cherdoud could have asked the

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[21] *See* ECF 68-4; ECF 68-8.
[22] *See* May 8, 2017 Razak Dep. 152:8-17, ECF 68-17 (testifying that drivers receive only an alias).
[23] *See* Sept. 13, 2017 Op. 8, ECF 93; *Razak*, 2017 U.S. Dist. LEXIS 148087, at *12.
[24] *See* Pls.' SOF ¶¶ 245-46; Ex. 42.
[25] *See* footnote 22 *supra*.
[26] *See* Pls.' SOF ¶ 247.
[27] *Id.*
[28] *Id.*

rider to pay him directly at the end of the trip. Not so in Uber's system, as such a request is grounds for deactivation.[29]

Uber's "corporate affiliation" argument is "faintly ridiculous," and appears to be nothing more than a premeditated misclassification defense. Indeed, Uber does not require UberX drivers to incorporate, and those drivers are forced to accept "similar" contracts.[30] Nor do the limousine regulations require drivers to incorporate. The regulations instead require limousine drivers to either: (1) own a certificate of public convenience, (2) be employed by the certificate holder, or (3) lease the limousine directly from the certificate holder. 52 Pa. Code § 1051.8(a). Here, all three Plaintiffs are permitted to provide limousine services in Philadelphia by virtue of Uber's certificate of public convenience, which is why their vehicles are registered under Uber's limousine fleet and are insured by Uber. [31]

In sum, the mere fact that UberBLACK drivers are affiliated with business organizations has no bearing on the economic realities of their relationships with Uber.

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[29] *Id.* at 247; *see also* Uber's Driver Deactivation Policy, ECF 68-6 ("soliciting payment of fares outside the Uber system" in grounds for deactivation).
[30] *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102, 1107 n.2 (9th Cir. 2016); *see also Checker Cab Phila. v. Phila. Parking Auth.*, No. 16-4669, 2018 U.S. Dist. LEXIS 13671, 2018 WL 587298 (E.D. Pa. Jan. 28, 2018) (discussing the UberX model).
[31] *See* Pls.' SOF ¶¶ 44-46, 239-43.

B. Application of the Six *Donovan* Factors

1. The degree of the alleged employer's right to control the manner in which the work is to be performed.

Conspicuously absent from Uber's memorandum is any discussion of the first *Donovan* factor. The reason is obvious. Uber exercises extensive control over UberBLACK drivers when they are online with the Uber app. Here are some examples:

- Uber reserves the right to temporarily or permanently terminate a driver's access to the Uber App;[32]
- Uber will deactivate a driver for cancelling trips, or for provoking a rider to cancel the trip;[33]
- In order to receive fares from the City's major transportation hubs, the Philadelphia Airport and 30th Street Train Station, drivers must wait in queues in a specific locations;[34]
- Uber will block drivers that it believes are attempting to manipulate the queue;[35]
- Uber provides drivers with a mere 15 seconds to accept a trip request, otherwise it is deemed rejected, thereby requiring drivers to be engaged with the App;[36]
- "If a driver does not accept three trip requests in a row, the Uber App automatically switches the driver from online to offline. While offline, drivers are not eligible to accept ride requests";[37]

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[32] *See* Dec. 11, 2015 Technology Services Agreement ¶ 12.
[33] *Id.* at ¶¶ 172, 249-52.
[34] *Id.* at ¶158
[35] *Id.* at ¶ 160.
[36] *See* Sept. 13, 2017 Op. 8, ECF 93; *Razak*, 2017 U.S. Dist. LEXIS 148087, at *43.
[37] *Id.*

- "The rider's destination is not disclosed to the driver until the rider's trip begins… Thus, in considering whether to accept a request, the driver has no knowledge whether it will be a short ride or very long — which affects driver compensation and may also restrict personal activities";[38]

- Uber controls "the frequency with which [Uber] offers Requests to [the driver]";[39]

- Uber controls marketing, and decides which service (*e.g.* UberBLACK or UberX) it will promote;[40]

- Drivers must submit to a background check conducted by Uber, even if a driver already passed the PPA's background check;[41]

- Uber will deactivate and/or waitlist drivers under its background check policy, even if that driver is approved by the PPA;[42]

- Uber requires all drivers to maintain a "driving rating" of at least 4.7 out of 5 stars;[43]

- Uber decides what average rating a driver must maintain;[44]

- A driver who falls short of the average rating requirement, even if it is by a mere .05, will be deactivated;[45]

- Uber controls how fares are calculated, and can unilaterally change prices without notice;[46]

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[38] *Id.* at *43-*44.
[39] *See* Pls.' SOF ¶ 163.
[40] *Id.* at ¶ 164.
[41] *Id.* at ¶¶ 259-61.
[42] *Id.*
[43] *Id.* at ¶¶ 255-258.
[44] *Id.*
[45] *Id.*
[46] *Id.* at ¶ 246.

- Uber decides when it will employ "surge pricing," which in part is intended to decrease demand;[47]
- Uber may, "at any time," raise its "service commission";[48]
- UberBLACK drivers are required to drive particular makes and models of car, as determined by Uber;[49]
- Uber decides when the drivers will be paid, which is currently on a weekly basis;[50]
- Regardless of a driver's net pay, Uber makes weekly deductions against the drivers' earnings;[51]
- Each week, Uber deducts PPA assessments from the drivers' earnings;[52]
- Each week, Uber deducts vehicle finance payments from the drivers' earnings;[53]
- Each week, Uber deducts insurance premiums from the drivers' earnings;[54]
- Uber unilaterally negotiates and selects the insurance policy that drivers must buy into;[55]

[47] *Id.* at ¶ 39.
[48] *Id.* at ¶ 34; *see also* Dec. 11, 2015 Technology Services Agreement ¶ 4.4.
[49] Pls.' SOF ¶ 238.
[50] *Id.* at ¶¶ 94-95, 120, 170.
[51] *Id.* at ¶¶ 76, 94-95, 120, 170.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at ¶¶ 25, 37,

- Uber has vehicle requirements on top of those maintained by the PPA – the color must be black and certain models are not permitted;[56]

- Uber will deactivate drivers who solicit payments outside of the Uber App;[57]

- Drivers are not permitted to use the App, or their relationship with Uber, to "divert any business from [Uber] to a competitive transportation broker, or any transportation providers";[58]

- Drivers are not permitted to promote their personal business to Uber customers, even if the customer affirmatively solicits the drivers' personal business;[59]

- Uber limits the number of consecutive hours that a driver may work, and drivers who exceed Uber's limit are automatically logged off for six hours;[60] and,

- Uber establishes territorial limitations that dictate where a driver can pick up fares.[61]

That is not an exclusive list. *See, e.g.*, Uber's Deactivation Policy, ECF 68-8 (prohibiting, *inter alia*: firearms, using another driver's account, using a vehicle not previously approved by Uber, anonymous pickups, street hails, and "***unconfirmed***" complaints of alcohol use).

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[56] Holtzman-Conston Dep. 27:21-29:13, ECF 76-2.
[57] Pls.' SOF ¶ 9.
[58] *Id.*
[59] *Id.*
[60] *Id.* at ¶¶ 158, 187.
[61] *Id.* at ¶ 175.

Uber's current motion does not address the first *Donovan* factor. In the past, however, Uber has argued that its rules are immaterial to the Plaintiffs' employment status because, in practice, Uber does not impose consequences on noncompliant drivers. That argument, as applied to the economic realities test, is substantively and factually flawed.

"Actual control of the manner of work is not essential; rather, it is the right to control which is determinative." *Drexel v. Union Prescription Ctrs*., 582 F.2d 781, 785 (3d Cir. 1978); *Williams v. Jani-King of Phila. Inc*., 837 F.3d 314, 321 (3d Cir. 2016) ("It is the existence of the right to control that is significant, irrespective of whether the control is actually exercised") (citing the Pennsylvania Supreme Court's decision in *Universal Am-Can v. Workers' Comp. Appeal Bd. (minteer)*, 762 A.2d 328 (Pa. 2000)); Restatment (Second) of Agency §220 (2010) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control").

As demonstrated, whether Uber acted on its rules is immaterial to the economic realities test. Indeed, Uber's rules, by their very nature, are meant to influence driver behavior. Furthermore, taking Uber's argument to its logical conclusion, only insubordinate employees – the ones who are disciplined – would be protected under the FLSA, which would be an absurd result.

In any event, there is substantial evidence in the record that Uber does enforce its rules. Uber punished Plaintiff Cherdoud for violating its "empty sleeper" policy, resulting in a one week ban from airport pickups.[62] Uber deactivated Plaintiff Sabani for having a driving rating of 4.65 out of 5 stars, which is .05 below Uber's mandate.[63] Uber deactivated Plaintiff Razak for violating their background check policy.[64] All three Plaintiffs, moreover, have been disciplined by Uber.

And then there is Uber's continued assurance that there is "[n]o evidence… that Uber imposed *any consequences* for drivers' cancellation rate,"[65] which was incorporated into this Court's opinion on compensability. *See* Sept. 13, 2017 Op. 10, ECF 93; *Razak*, 2017 U.S. Dist. LEXIS 148087, at *15. As it turns out, there is evidence. A Philadelphia-based UberBLACK driver by the name of Rashid Sheikh was deactivated "due to an excessively high cancellation rate."[66]

Uber reserves *and* exercises its right to terminate or suspend its relationship with any UberBLACK driver at-will. This is "strong evidence in support of an employment relationship." *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981,

[62] *Id.* at ¶ 254.
[63] *Id.* at ¶¶ 255-58.
[64] *Id.* at ¶¶ 259-261.
[65] *See, e.g.*, Defs.' Mem. in Supp. of Mot. for Recons. 4, ECF 95-2.
[66] *See* Decl. of Rashid Sheikh, Ex. 43 (attaching a message from Uber confirming that his account was deactivated due to his cancellation rate).

988 (9th Cir. 2014). Based on this right, and Uber's pervasive control, there is a substantial inference that the Plaintiffs are employees under the first *Donovan* factor.

2. The alleged employee's opportunity for profit or loss depending upon his managerial skill.

UberBLACK drivers have absolutely no opportunity to utilize their managerial skills to maximize their profits from Uber. Uber chooses which drivers will receive rider fares.[67] Uber calculates the rider's fare.[68] Uber collects the rider's money.[69] Uber pays the driver a percentage – set by Uber, not by the driver - of the rider's fare, after first deducting whatever Uber believes the driver owes it.[70] Uber controls marketing, and has promoted its UberX service at the cost UberBLACK drivers.[71] The driver has no ability to change any of this, other than to make himself available to Uber as often as possible. This requires an exercise of stamina, not managerial skill.

Since the Plaintiffs' managerial skills are irrelevant to their earnings as UberBLACK drivers, Uber diverts the Court's attention to the Plaintiffs' personal business pursuits. Yet, even outside of Uber, the Plaintiffs' opportunity for profit or loss based on their managerial skills is miniscule.

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[67] *See* Holtzman-Conston Dep. 117:6-19, ECF 66-5.
[68] *See* Pls.' SOF at ¶¶ 39, 246.
[69] *Id.* at ¶ 247.
[70] *Id.* at ¶¶ 76, 94-95, 120, 170, 247.
[71] *Id.* at ¶ 164.

The sums that the Plaintiffs put into advertising their private businesses are small, and the gains, if any, are minor.[72] The vast majority of the Plaintiffs' income is derived from Uber.[73] In 2014, for example, all of the income earned by Plaintiffs Cherdoud and Sabani was from Uber.[74]

This Court is well aware of the reason: Uber controls not only their drivers, but also the market, and small companies simply cannot compete.[75] *See Checker Cab Phila.*, 2018 U.S. Dist. LEXIS 13671, at *80 (discussing Uber's impact on the taxicab and limousine markets in Philadelphia). Consequently, if the Plaintiffs are to earn any income as limousine drivers, they must maintain their status with Uber. That involves submission, not managerial skill. Thus *Donovan*'s second factor also indicates an employer-employee relationship.

3. The alleged employee's investment in equipment or materials required for his task, or his employment of helpers.

At first glance this is arguably the only *Donovan* factor favoring independent contractor status. UberBLACK drivers are required to provide fancy, expensive cars when driving for Uber, a significant investment, whether the driver purchases or

[72] *Id.*
[73] *Id.* at ¶¶ 217-25.
[74] *Id.* at ¶¶ 217-22.
[75] *See* Jan. 4, 2018 Sabani Dep. 36:19-21.

leases the car. In some cases such an investment has been taken as evidence of independent contractor status. *See, e.g.*, *Saleem*, 854 F.3d at 144.[76]

Here, the legal significance of the Plaintiffs' investments is mooted by Uber's control over those investments. The Plaintiffs' vehicles are registered to Uber because they operate under Uber's certificate of public convenience.[77] The insurance policy is negotiated and purchased by Uber, with the premiums passed onto the Plaintiffs through weekly deductions against their earnings.[78] Similarly, Uber deducts money for regulatory assessments and vehicle finance payments.[79] These deductions occur every week, regardless of whether the Plaintiffs earned enough money to cover the expenses, which is economic coercion to go out and make Uber more money.[80]

Upon close analysis, these investments actually evince the Plaintiffs' employee status under the third *Donovan* factor.

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[76] It may be noted that the provision of a car was ***not*** viewed as significant in assessing another driver relationship under the FLSA. *See Lawson v. Grubhub, Inc.*, 2018 U.S. Dist. LEXIS 21171, at *44 (N.D. CA Feb. 8, 2018) ("[The GrubHub driver] did not have to purchase any special equipment or tools to perform the work; all he needed was a cell phone and a mode of transportation which he already had").
[77] *See* Pls.' SOF ¶¶ 44, 196, 233-236, 239-240.
[78] *Id.* at 243-44.
[79] *Id.* at 236, 240, 244.
[80] *Id.* at 236.

4. Whether the service rendered requires a special skill.

Cases uniformly hold that a requirement of a special skill to perform one's duties is evidence of independent contractor status, while the absence of such a requirement supports employee status. *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1295 (3d Cir. 1991); *Adami v. Cardo Windows, Inc*., No. 12-2804, 2016 WL 1241798, 2016 U.S. Dist. LEXIS 42152, at *32-*33 (D.N.J. Mar 30, 2016). UberBLACK drivers must be licensed (and able) to drive cars. This is "not a 'special skill' in the sense of requiring long training or apprenticeship." *Adami, supra.*, at *32. Consequently this *Donovan* factor also supports employee status.

5. The degree of permanence of the working relationship.

Long term relationships are consistent with "the length and continuity characteristic of employment." *Martin*, 949 F.2d at 1295. Sporadic, short-term relationships are not. *Adami*, 2016 U.S. Dist. LEXIS 42152, at *33. All of the drivers involved in this matter have driven for Uber for years, and for many hours per week.[81] The parties discussed this at some length in the course of Uber's motion for summary judgment on the issue of compensability. This *Donovan* factor clearly favors employee status.

[81] *See, e.g.*, Plaintiffs' Time Date, ECF Nos. 68-10, 68-11, 68-12.

6. Whether the service rendered is an integral part of the alleged employer's business.

> The critical consideration in assessing the integral relationship factor is the nature of the work performed by the workers: does that work constitute an "essential part" of the alleged employer's business?

Martin, 949 F.2d at 1295.

As mentioned earlier, Uber still pretends to be nothing more than a Yellow Pages service. Uber's memorandum emphasizes that its self-serving contract states: "Uber is a technology services provider that does not provide transportation services, function as a transportation carrier, nor operate as a broker for the transportation of passengers."[82] This is ridiculous, and insulting.[83]

Uber itself has clearly, repeatedly and publicly proclaimed that it is indeed in the business of providing transportation services.[84] Uber itself has created a disputed material fact issue!

Beyond Uber's chameleon transformations: Without drivers, there would be no reason for riders to download the Uber App. Uber's revenue is derived from the commission it takes on each fare. Without drivers, who complete those fares, there is no Uber. Clearly the services performed by UberBLACK drivers are fundamental to Uber's existence. This *Donovan* factor conclusively supports employee status.

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[82] Defs.' Mem. 13.
[83] This rhetoric has twice been dubbed disingenuous by other courts. *See O'Connor* and Employment Appeal Tribunal J. *supra*.
[84] *See, e.g.*, Ex. 11-13; *see also* footnote 4 *supra*.

V. CONCLUSION

This Court previously opined that the Plaintiffs' allegations weigh in favor of an employee-employer relationship under the *Donovan* factors.[85] Those allegations have been proven true. It is now clear that Uber does control the number of fares each driver receives; that Uber can unilaterally terminate a driver's access to the App, for any reason Uber deems proper; that Uber is in the business of providing public transportation services; that Uber's viability depends on its drivers; and that the drivers, having made their investment in Uber, are dependent on retaining their ability to drive for that company. Plaintiffs' relationship with Uber meets each and every one of the *Donovan* factors pointing to employment.

Plaintiffs expect that Uber will dispute some of the facts cited herein. That is why Plaintiffs themselves have not moved for summary judgment. Summary judgment is not appropriate, and Uber's motion should be denied accordingly.

Respectfully submitted:

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[85] Oct. 7, 2016 Op., ECF 45 at 8-9.