SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 02/18/2020 TIME: 08:00:00 AM DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor
CLERK: Yvette Terronez
REPORTER/ERM: not reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00048731-CU-MC-CTL** CASE INIT.DATE: 09/13/2019
CASE TITLE: **The People of the State of California VS MAPLEBEAR INC [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

APPEARANCES

The Court, having taken the above-entitled matter under submission on 2/14/20 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Ruling on Motion for Preliminary Injunction

People v. Maplebear, Inc., Case No. 2019-48731

Argued: February 14, 2020, 1:30 p.m., <st1:address w:st="on"><st1:street w:st="on">Dept.</st1:street> 72</st1:address>

1. Overview and Procedural Posture.

This is a Bus. & Prof. Code section 17200 case brought by the City Attorney of San Diego on behalf of the People of the State of California against Maplebear, Inc. dba Instacart (defendant). Plaintiff alleges in its complaint:

A. Defendant is a participant in the "rising gig economy."
B. Defendant is a "same-day grocery delivery company" that employs approximately 130,000 employees nationwide as independent contractors; defendant partners with several supermarket chains.
C. Defendant's "customers use its smartphone application software program (the "Instacart App") to select and purchase their groceries. Defendant hires people to work as "Shoppers" to gather the groceries and deliver them to the customer, directing its Shoppers in great detail on exactly how to complete the delivery."
D. Defendant "maintains an unfair competitive advantage by misclassifying its Shoppers and evading long-established worker protections under California law. Since 2012, defendant has and continues to unlawfully classify its Shoppers as independent contractors instead of employees." Through this misclassification, defendant "avoids paying its Shoppers a lawful wage and unlawfully defers substantial expenses to its Shoppers, including the cost of equipment, car registration, insurance, gas,

maintenance, parking fees, and cell phone data usage."
E. Defendant "also has an unfair advantage over its law-abiding competitors because, due to the misclassification, it contributes less to California's unemployment insurance, disability insurance and other state and federal taxes."
F. Defendant "cannot meet its burden of showing its Shoppers are independent contractors under California law."

ROA 1, paragraphs 1-5.

The complaint was filed in September of 2019, and the case was assigned to Judge Trapp. Defendant challenged her, and the case was reassigned to Dept. 72. ROA 24, 42.*

On the Dept. 72 *ex parte* calendar on February 4, 2020, the City Attorney's Office sought a TRO and an OSC re preliminary injunction. ROA 12-18. The court denied the TRO and set the request for a preliminary injunction on calendar for today. ROA 52-53. The court deemed the *ex parte* moving papers (ROA 45-46) to be the moving papers for the preliminary injunction motion, and deemed the February 3, 2020 opposition brief (ROA 47) to be the opposition brief.** The court set a reply deadline of February 7. The court has reviewed the moving, opposition and reply (ROA 60) papers. Supplemental authority was lodged by the City Attorney as recently as February 13 (the court had already found and considered the case referenced). The court heard lengthy argument on February 14, and took the matter under submission. This is the court's ruling.

Defendant has filed a motion to compel arbitration, set for hearing two weeks hence. ROA 17-23, 27.

The case is set for a CMC on April 17, 2020. ROA 25.

2. <u>Applicable Standards</u>.

A. The decision whether to grant a *pendente lite* injunction is within the trial court's discretion. *IT Corp v. County of Imperial* (1983) 35 Cal.3d 63, 69. The trial court must evaluate two interrelated factors when deciding whether to issue such an injunction (1) the likelihood the plaintiff will prevail on the merits at trial; and (2) the interim harm that will occur if the injunction is denied as compared with the harm that the defendant would be likely to suffer if the preliminary injunction were issued. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 <st1:place w:st="on"><st1:state w:st="on">Cal.</st1:state></st1:place> App. 4th 1554, 1560. Plaintiff has the burden to show it is entitled to relief. *Casmalia Resources, Ltd. v County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838. An injunction will rarely be granted where a suit for damages provides a clear remedy. Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2019), § 9:510.

"Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." *IT Corp v. County of Imperial, supra,* 35 Cal.3d at 72.

B. The case is brought under the "unlawful", "unfair", and "fraudulent" prongs of Bus. & Prof. Code section 17200. To state a cause of action under the "unlawful" prong, the cause of action must plead a statute, law, or regulation that serves as the predicate for the section 17200 violation. *E.g., Farmers Ins.*

Exchange v. Superior Court (1992) 2 Cal.4th 377, 383 (section 17200 permits a cause of action under the "unlawful" prong if the practice violates some other law). To state a cause of action under the "unfair" prong, the cause of action must allege conduct by defendant "tethered to any underlying constitutional, statutory or regulatory provision." *E.g., Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366. To state a cause of action under the "fraudulent" prong, the plaintiff must allege that members of the public are likely to be deceived. *E.g., Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.

C. Last year, the court conducted what was probably one of the first "independent contractor" cases to go to trial after *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. *Vendor Surveillance v. Henning and EDD,* Case No. 2016-37096, went to trial between March 4-12, 2019, and gave rise to a lengthy Statement of Decision. The case is now on appeal.

D. In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), the Supreme Court adopted the ABC test, a standard used in many jurisdictions in different contexts to determine a worker's classification. Under the ABC test, a worker is considered an employee unless the hiring entity establishes that the worker (a) is "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (b) "performs work that is outside the usual course of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *See Dynamex, supra*, 4 Cal.5th at 916-917. *Dynamex* applied the ABC test to all employers and workers covered by California Industrial Wage Commission (IWC) wage orders. *Id.* at 964. The case was decided in April of 2018, and the Chief Justice's decision was unanimous.

E. On September 18, 2019, the State of California enacted AB 5; it took effect January 1, 2020, and it codifies the *Dynamex* holding and adopts the ABC test for all provisions of the California Labor Code, the Unemployment Insurance Code, and IWC wage orders, with many exemptions. *See* AB 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019); *see also* Labor Code § 2750.3.

Last month, a federal judge in the Southern District of California granted a preliminary injunction in *California Trucking Association v Becerra*, 18-CV02485 (S.D.Cal. filed October 25, 2018), barring the State of California from enforcing AB 5 on motor carriers, including trucking companies and independent contractors.

On Monday, February 10, a federal judge in the Central District of California denied Uber's and Postmates' motion for a preliminary injunction against AB 5 in *Olson v. California*, 19-CV10956 (C.D. Cal. filed December 30, 2019).

3. Discussion and Ruling.

The motion for a preliminary injunction is granted, although not on the terms suggested by the City Attorney.

Initially, the People have demonstrated a probability of success on the merits of their claims. The City makes a very plausible showing of improper classification under the ABC test, and defendant's opposition does not establish defendant will probably prevail under the ABC test at trial. The matter is not free from doubt, and there is some evidence to the contrary: Prong A (*see, e.g.*, Twersky opposition declaration, paragraphs 10, 16-17, 20, 23, 25-26, 33, 36, 38; *see also, e.g.,* Temkin supporting declaration, paragraphs 10, 17); Prong B (*see, e.g.*, Twersky opposition declaration, paragraphs 10-15;

see also, *e.g.*, Evans opposition declaration, paragraphs 6-15); Prong C (*see*, *e.g.*, Twersky opposition declaration, paragraph 38). But the court finds the evidence preponderates in favor of a finding that defendant cannot satisfy at least one prong of the ABC test. At this point is it more likely than not that the People will establish at trial that the "Shoppers" perform a core function of defendant's business; that they are not free from defendant's control; and that they are not engaged in an independently established trade, occupation or business. Establishing any one of these would be enough, and it must be remembered that although the People would have the burden of going forward with the evidence, the burden of establishing proper classification is on defendant.

The balancing of harms favors the People. Defendant suggests it would be irreparably harmed if a preliminary injunction is issued. *See* Twersky opposition declaration, paragraphs 37-52 (*e.g.*, defendant would be required to hire tens of thousands of Shoppers in California; defendant would have to develop rules, protocols, and management teams to monitor the new employees' performance and control their work; defendant would have to invest in infrastructure, such as supervisory staff and software, to enforce new rules on how Shoppers allocate their time; defendant would have to redesign its business model to ensure Shoppers were actively working during compensable time; defendant would have to require Shoppers to accept all orders and prohibit them from using competing platforms during their shifts with defendant; defendant would have to secure a large workforce that would work on scheduled shifts under defendant's supervision as opposed to the flexibility of the current platform; defendant's engineers would have to design new software systems to monitor and manage the new employees; defendant's scientists would have to design systems to analyze shopping patterns and project customer demand to ascertain how many employees to schedule for shifts at specified times and places; the additional costs associated with onboarding, managing, and retaining new employees could force defendant to change its pricing strategies; and the conversion to an employment model would harm defendant's ability, the sole target of this litigation, to compete with other companies that use an independent contractor model like defendant's current model).

However, much of the evidence adduced by defendant actually suggests it already took steps to bring itself into compliance with *Dynamex*, and from that evidence it seems to the court that relatively minor additional steps will allow it to be in full compliance by ensuring the shoppers are true "free agents." It bears repeating that the unanimous Supreme Court's decision is now nearly 2 years old. While change is hard, defendant cannot legitimately claim surprise or that it has not had time to adjust its business model.

The policy of California is unapologetically pro-employee (in the several senses of that word). *Dynamex* is explicitly in line with this policy. While there is room for debate on the wisdom of this policy, and while other states have chosen another course, it is noteworthy that all three branches of California have now spoken on this issue. The Supreme Court announced *Dynamex* two years ago. The decision gave rise to a long debate in the legal press and in the Legislature. The Legislature passed AB 5 last fall. The Governor signed it. To put it in the vernacular, the handwriting is on the wall.

By contrast, the moving papers contain evidence that defendant's Shoppers and the public will be irreparably harmed unless a preliminary injunction is issued. A balancing of the equities favors the People. The harms alleged by the City (*see* complaint, p. 11, seeking civil penalties and "restitution to the misclassified employees ... for unpaid wages, overtime, and rest breaks, missed meals, and reimbursement for expenses necessary to perform the work") will take many months to sort out, and if indeed defendant's survival is in jeopardy (as it claims), may never be remedied by monetary compensation. Shoppers may move on to other occupations, or out of California altogether. The underpaid payroll taxes may never be recovered.

Accordingly, the motion for a preliminary injunction is granted. However, the form of order presented by the City Attorney at the time of the TRO hearing was in the form of a mandatory injunction which would, if signed by the court, almost surely result in the court essentially supervising a significant portion of the operations of the defendant. The court is not qualified to do so, lacks the inclination to do so, and given the 900+ other cases assigned to Dept. 72, lacks the wherewithal to do so. See also Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (The Rutter Group 2019), § 9:532 ("Mandatory injunctions rarely granted"). The court ordered the City Attorney to re-draft the order as a prohibitory injunction; the version tendered at the February 14 hearing was little better. The court has signed a significantly simplified version of the order.

The ruling on the motion for preliminary injunction is not an adjudication of the ultimate rights in controversy. It simply represents the court's discretionary decision whether defendant should be restrained from exercising a claimed right pending trial. *See Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286. Nothing more.

The preliminary injunction is not a final order. It is subject to modification or dissolution at any time upon a showing of either (1) a material change in the facts upon which the preliminary injunction was granted; (2) the law upon which the preliminary injunction was granted has changed; or (3) "the ends of justice would be served" by the modification or dissolution of the injunction." Code of Civil Procedure § 533.
The court does not find persuasive defendant's assertion that the court is somehow precluded from issuing a ruling by the federal injunction issued last month in *California Trucking Association v. Becerra.* Neither side here was a party in that case. That case has no more impact on this case than does the subsequent federal decision (*Olsen*) denying injunctive relief to parties other than these ones. Further, the "Shoppers" are not "motor carriers" within the meaning of the federal legislation at issue in *California Trucking.* Their principal role is described in their name: shoppers. Their delivery role is secondary to their faithful execution of defendant's customer's shopping list. In many cases, the delivery function could just as easily be carried out on a bicycle.

There is further support for the court's ruling today: the immediate availability of an appeal, a request for expedited briefing, and a definitive explication of the rights and duties of the parties by the Court of Appeal. This is a lively area of the law right now; there are numerous cases pending which may ultimately bear on the rights and duties of the parties. Also, there are evidently efforts underway to present the difficult questions raised by the conflict between traditional employment concepts and the so-called "gig economy" to the voters in the form of an initiative. Frankly, the sooner the Court of Appeal can hold forth on these issues, the sooner the parties will have a clear and definite signal of what is expected of them. This predictability is, after all, one of the key functions of law.

Having resolved the motion on the foregoing grounds, the court declines to address the other contentions of the parties. *See PDK Labs. Inc. v. DEA* (D.C. Cir. 2004) 362 F.3d 786, 799 (Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more"); *Compare Natter v. Palm Desert Rent Review Comm'n.* (1987) 190 Cal.App.3d 994, 1001 (reversal on stated grounds made it unnecessary to resolve other contentions challenging constitutionality); *Young v. Three for One Oil Royalties* (1934) 1 Cal.2d 639, 647-648 (court declined to rule on matters unnecessary to resolving the case before the court, as to do so would be to provide "dictum pure and simple").

IT IS SO ORDERED.

*Defense counsel should address with the clerk's office the apparent problem with defense counsel's address. ROA 28-40.
**The court also allowed the overlong brief.

Judge Timothy Taylor