SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. HANDY TECHNOLOGIES, INC., and DOES 1 through 10, inclusive, Defendants.	Case No. CGC-21-590442 ORDER RE THE PEOPLE OF THE STATE OF CALIFORNIA'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The above-entitled matter came on regularly for hearing on Wednesday, September 22, 2021. The appearances are as stated in the record. Having reviewed and considered the arguments and written submissions of all parties and being fully advised, the Court continues the motion for supplemental filings and a further hearing, as described below.

BACKGROUND

I. Allegations and Procedural Posture

Plaintiff, the People of the State of California, brought this action through two District Attorneys. On March 17, 2021, Plaintiff filed its initial Complaint against Defendant Handy Technologies, Inc. On April 12, 2021, Plaintiff filed the operative First Amended Complaint ("FAC").

Plaintiff alleges as follows. Handy is a business that offers and sells household services, including

cleaning and handyman services, to California consumers. (FAC ¶ 1.) Customers use Defendant's website or smartphone application to order and pay for services. (*Id.* at ¶ 2.) Services are rendered by cleaners and handypersons Defendant refers to as "Pros." (*Ibid.*) Defendant misclassifies the Pros as independent contractors when they are, in fact, employees. (*Id.* at ¶ 3.) As a result, Defendant (1) violates the unlawful and unfair prongs of the Unfair Competition Law ("UCL") by misclassifying its workers and fail to provide its workers the benefits of employment; and (2) violates Labor Code § 2775. (*Id.* at ¶¶ 90-99.)[1]

On June 28, 2021, Plaintiff filed the pending motion for preliminary injunction. Through the present motion, Plaintiff seeks a preliminary injunction that precludes Defendant from classifying certain Pros as independent contractors. (See Proposed Order, 2.) Defendant opposes the motion, maintaining, among other things, that Defendant operates a referral service under Labor Code § 2777 pursuant to which all or many of the Pros are properly classified as independent contractors. (See Opposition, 8-9.)

II. Requests for Judicial Notice

In the course of the regular briefing, the Court received unopposed requests for judicial notice from both parties. These requests are granted. (Plaintiff's RJN, 2-3; Chau Decl., Exs. 1-5; Defendant's RJN, 2; Cox Decl., Exs. A-B.)

III. Amicus Briefing

Three requests for leave to file amicus briefs, accompanied by proposed amicus briefs, have been submitted. As set forth below, the Court grants each of the requests. The Court appreciates the efforts of the amici to provide it with their valuable perspectives.

First, prior to the filing of Defendant's opposition, Public Rights Project, joined by California Domestic Workers Coalition; Centro Legal de la Raza; Chinese Progressive Association; The Employee Rights Advocacy Institute for Law & Policy; Equal Justice Society; Gig Workers Collective; Gig Workers United – Michigan; National Employment Law Project; People's Parity Project; Rideshare Drivers United; and Veena Dubal, requested leave to file an amicus brief in support of the motion, which Defendant opposed on the ground that it constituted an improper attempt to supplement the factual

[1] Plaintiff also alleges a UCL claim predicated on an alleged violation of the Automatic Purchase Renewals law. (See FAC ¶¶ 12-18, 100-111.)

record. The Court accepts the brief and deems it filed. The brief does not constitute an evidentiary filing and does not supplement the evidentiary record before the Court.

Second, just prior to the filing of Plaintiff's reply, California Asian Pacific Chamber of Commerce, California Hispanic Chambers of Commerce, Los Angeles Metropolitan Churches, National Action Network Sacramento Chapter Inc., National Asian American Coalition, National Diversity Coalition, and National Newspaper Publishers Association requested leave to file an amicus brief in opposition to the motion, which was unopposed. The Court accepts the brief and deems it filed.

Third, after the motion was fully briefed and shortly before the scheduled hearing, The Chamber of Commerce of the United States requested leave to file an amicus brief in opposition to the motion. Due to that and another sur-reply filing, the Court continued the hearing date and authorized Plaintiff to file a written response to the Chamber of Commerce's application for leave to file an amicus brief. (Sept. 14, 2021 Order, 1.) Plaintiff's responsive brief was, in effect, a response to the proposed amicus brief on the merits, not a response to the request for leave to file an amicus brief. Accordingly, The Court accepts the Chamber of Commerce's brief and deems it filed.

IV. Sur-Reply Filings

After the motion was fully briefed, Defendant filed a motion for leave to file a sur-reply, accompanied by a proposed sur-reply. Plaintiff opposed the request, while exercising restraint in refraining from rearguing the substantive issues addressed in Defendant's sur-reply. However, that restraint was lacking in Plaintiff's subsequent substantive response to the Chamber of Commerce's sur-reply amicus brief, straining the narrow parameters on a responsive filing imposed by the Court past their intended breaking point. The Court considered both parties' sur-reply briefs for the following reasons.[2]

First, both parties have submitted one sur-reply substantive brief.

Second, the briefs make points that could have been made at oral argument.

Given these two points, the Court considered the substantive briefs in an effort to streamline oral argument, notwithstanding its preference to abide by normal and predictable briefing schedules.

[2] The Court also takes judicial notice of the committee report included with Plaintiff's filing. The committee report is publicly available online and both parties submitted similar legislative history materials during the course of the regular briefing. The Court finds no reason to disregard any of the readily accessible online legislative history materials.

V. Evidentiary Objections

Defendant asserted "foundation" objections to testimony in three declarations provided by Plaintiff. (Defendant's Objections ¶¶ 1-10.) Defendant's objections are overruled – the arguments in the evidentiary objections go to weight rather than admissibility.

Plaintiff objected, including on hearsay grounds, to various statements in an attorney declaration that, among other things, recounted out of court statements for the truth of the matter asserted. (See Plaintiff's Objections ¶¶ 1-2.) The Court sustains the hearsay objection as to the out-of-court statements to the extent they are introduced for the truth of the matter asserted. The evidence addressed by the objection is, in any event, immaterial to the resolution of the present motion.

Plaintiff objected to the Declaration of Hogan Bradford on the ground that it is based on business records and the declarant did not specifically state that the records on which his testimony was based were made "at or near the time of the act, condition or event" or testify to the record's "identity and mode of its preparation." (*Id.* at 5-6.) Assuming the hearsay rule is implicated, the Court is unpersuaded by this general objection in the context of the entirety of the testimony provided. (See *People v. Dorsey* (1974) 43 Cal.App.3d 953, 960-61 [where bank officer testified that bank statements were business records, but failed to testify as to the mode and preparation of the bank statements, the trial court had discretion to infer that the foundational requirements were met].) The Court also overrules Plaintiff's specific objections to excerpts from the Bradford Declaration. (See Plaintiff's Objections ¶¶ 4-10.)[3]

Plaintiff made numerous objections to the testimony in and exhibits attached to the Declaration of Eli Nofzinger. The primary objections are to the failure to lay a foundation for business records and/or testimony based on business records, or the absence thereof, and failure to provide copies of certain business records described in the declaration. (See *id.* at ¶¶ 11-23.) As with the similar objections addressed to the Bradford Declaration, the Court overrules the objections to the Nofzinger Declaration.[4]

Plaintiff's objections to the DeGracia objection are overruled, at most they go to the weight. (*Id.*

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[3] Defendant acted within the parameters of Evidence Code § 1523(d). The objections raised under the header of "foundation" go to the weight. To the extent the Bradford Declaration contains or implies legal opinions regarding wage and hour law, the Court does not take the testimony as evidence of what the law is, as opposed to framing the declarant's testimony consistent with the declarant's understanding of the law.

[4] In any event, the objections to the Bradford Declaration and the Nofzinger Declaration are not outcome determinative.

at ¶¶ 24-31.)

Plaintiff's objection to the original Declaration of Paul Oyer is sustained. (See *id.* at 17-18.) However, the Court considers the refiled declaration accompanying the September 7, 2021 notice of errata, which cures the technical defect in the attestation.

LEGAL STANDARD

In determining whether to issue a preliminary injunction on any ground, the courts generally must evaluate two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the interim harm the plaintiff will suffer if a preliminary injunction is not issued compared to the harm the defendant will suffer if the injunction is issued. (See *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206; *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 283.) These two showings operate on a sliding scale: The more likely it is that the plaintiff will ultimately prevail, the less severe must be the harm the plaintiff alleges will occur if the injunction is not issued. (*Integrated Dynamic Solutions, Inc. v VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183.) This is particularly true when the requested injunction maintains, rather than alters, the status quo. (*Take Me Home Rescue v Luri* (2012) 208 Cal.App.4th 1342, 1350.)

Where a governmental entity seeking to enjoin the alleged violation of an ordinance that 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. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.) 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. (*Ibid.*) If it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unable to prevail on the balancing of probable harms. (*Uber*, 56 Cal.App.5th at 302 [quoting *IT Corp.*, 35 Cal.3d at 72-73].)

DISCUSSION AND ANALYSIS

I. Labor Code §§ 2775 and 2777

Since September 4, 2020, Labor Code § 2775 has set forth the framework for determining whether certain workers are independent contractors or employees. The statute uses the ABC test, which was

adopted by the California Supreme Court in *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903.)

Pursuant to the ABC test, for the purposes of the Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission wage orders, subject to certain exceptions:

> [A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

(Lab. Code, § 2775(b)(1).)

Pursuant to Labor Code § 2777, Labor Code § 2775 and the holding in *Dynamex* do not apply to the relationship between a "referral agency"[5] and a "service provider"[6] where specified conditions are met. (Lab. Code, § 2777.)[7] To avail itself of the benefit of Labor Code § 2777, the referral agency must demonstrate that each of eleven statutory criteria are satisfied:

> (1) The service provider is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.
>
> (2) If the work for the client is performed in a jurisdiction that requires the service provider to have a business license or business tax registration in order to provide the services under the contract, the service provider shall certify to the referral agency that they have the required business license or business tax registration. The referral agency shall keep the certifications for a period of at least three years. …
>
> (3) If the work of the client requires the service provider to hold a state contractor's license…, the service provider has the required contractor's license.

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[5] A "referral agency" "is a business that provides clients with referrals for service providers to provide services under a contract, with the exception" of certain specified services. (Lab. Code, § 2777(b)(2)(A), (C).) Referrals for services "include, but are not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting services." (Lab. Code, § 2777(b)(2)(B).)

[6] A "service provider" is "an individual acting as a sole proprietor or business entity that agrees to the referral agency's contract and uses the referral agency to connect with clients." (Lab. Code, § 2777(b)(4).)

[7] "The determination of whether an individual worker is an employee of a service provider or whether an individual worker is an employee of a client is governed by Section 2775." (Lab. Code, § 2777(c).)

(4) If there is an applicable licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, the service provider shall certify to the referral agency that they have the appropriate professional licensure, permit, certification, or registration. The referral agency shall keep the certifications for a period of at least three years.

(5) The service provider delivers services to the client under the service provider's name, without being required to deliver services under the name of the referral agency.

(6) The service provider provides its own tools and supplies to perform the services.

(7) The service provider is customarily engaged, or was previously engaged, in an independently established business or trade of the same nature as, or related to, the work performed for the client.

(8) The referral agency does not restrict the service provider from maintaining a clientele and the service provider is free to seek work elsewhere, including through a competing referral agency.

(9) The service provider sets their own hours and terms of work or negotiates their hours and terms of work directly with the client.

(10) Without deduction by the referral agency, the service provider sets their own rates, negotiates their own rates with the client through the referral agency, negotiates rates directly with the client, or is free to accept or reject rates set by the client.

(11) The service provider is free to accept or reject clients and contracts, without being penalized in any form by the referral agency. The paragraph does not apply if the service provider accepts a client or contract and then fails to fulfill any of its contractual obligations.

(Lab. Code, § 2777(a).)

If Labor Code § 2777 applies, the misclassification analysis is governed by *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341. (Lab. Code, § 2777(a).) The *Borello* test requires a balancing of multiple factors; the significance of any one factor, and its role in the overall calculus, may vary from case to case depending on the nature of the work and the evidence. (*Uber*, 56 Cal.App.5th at 277; see also *Dynamex*, 4 Cal.5th at 929-35, 941 n.15.)

Since September 4, 2020, district attorneys, such as those representing Plaintiff here, have had express statutory authority to bring "an action for injunctive relief to prevent the continued misclassification of employees as independent contractors" "in a court of competent jurisdiction" "in the name of the people of the State of California[.]" (Lab. Code, § 2786.)

II. Likelihood that Plaintiff will Prevail on the Merits

In the moving papers, Plaintiff contends that it has a strong likelihood of success on the merits because Defendant cannot meet the ABC test. (Motion, 17-28.) Defendant responds that Plaintiff's motion is directed at a straw man because Defendant is covered by Labor Code § 2777, meaning that the

Borello test applies, not the ABC test. (See Opposition, 20-32.) To the extent that the ABC test applies, Defendant argues that Pros are properly classified as independent contractors under that test. (*Id.* at 32-34.) Plaintiff replies that Defendant cannot establish the necessary elements pursuant to Labor Code § 2777. (See Reply, 6-17.) Plaintiff maintains that Pros are misclassified pursuant to the ABC test. (See *id.* at 12-20.) Plaintiff does not address whether the Pros are properly classified if the *Borello* test applies.

For the reasons that follow, the Court concludes that Plaintiff is likely to prevail on the merits. The ABC test is very likely to apply. Plaintiff is likely to prevail on the ABC test.

A. Whether Labor Code § 2777 is Likely to Apply

On the merits, Defendant will need to show that Labor Code § 2777 applies to invoke the *Borello* test, as opposed to the ABC test. To show that Labor Code § 2777 applies, Defendant will need to show that it is a referral agency, Pros are service providers, and each of the eleven conditions set forth in Labor Code § 2777 are satisfied.

At present, Defendant argues that it is Plaintiff's burden, in seeking a preliminary injunction, to show that Defendant will be unable to carry its burden to establish the prerequisites to Labor Code § 2777 on the merits. (Opposition, 20.) Moreover, Defendant contends that the application of Labor Code § 2777 will turn on individualized inquiries. (*Id.* at 21-31.) Accordingly, Defendant concludes that Plaintiff have not established that they are likely to prevail at trial, especially in an effort to establish that Labor Code § 2777 is inapplicable to all Pros. (*Id.* at 31.)

Plaintiff replies that it does not bear the burden of anticipating and responding to affirmative defenses in its moving papers. (Reply, 6 n.2.) Responding to Defendant's substantive argument, Plaintiff contends that Defendant cannot establish several of the requirements of Labor Code § 2777. (*Id.* at 7-17.)

For the reasons that follow, considering each factor and Defendant's ultimate obligation to prove that every factor is satisfied, the Court finds that Labor Code § 2777 is strongly unlikely to apply, such that there is a strong likelihood that the ABC test will govern the misclassification dispute on the merits.

1. Defendant's Service

Defendant provides a platform for consumers to purchase cleaning and handyman services

provided by Pros. (See, e.g., Stillman Decl., Exs. 1-2; DeGracia Decl. ¶ 2.)[8] Entities interested in providing services through Defendant's platform may download Defendant's app and submit applications to Defendant to become Pros. (See Demiraiakian Decl. ¶ 3; Gillman Decl. ¶ 3; DeGracia Decl. ¶ 3; Nofzinger Decl. ¶¶ 3, 10; see also Adams Decl. ¶¶ 2-3; Nofzinger Decl. ¶ 11.)

Pros complete an onboarding process. (See Nofzinger Decl. ¶¶ 4, 8, 10.) To secure work from Defendant's platform, Pros must agree to Defendant's Independent Contractor Acknowledgment and Defendant's Service Professional Agreement. (See Adams Decl. ¶ 5; Gillman Decl. ¶ 3; Nofzinger Decl. ¶¶ 4, 8, 10; DeGracia Decl. ¶¶ 4-5.) Pros also are required to watch orientation videos that provide some degree of guidance regarding the performance of cleaning and/or handyman services. (See Adams Decl. ¶ 3; Demiraiakian Decl. ¶ 4; Gillman Decl. ¶ 4; see also DeGracia Decl. ¶ 18.)

After obtaining access to Defendant's service, a Pro may obtain work through Defendant's app. (See DeGracia Decl. ¶¶ 5, 9; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6.) Pros may obtain work by accepting jobs from a list provided to them through the app. (See DeGracia Decl. ¶ 9; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6.)[9] Before deciding whether to accept a job, Pros are able to review the type of work, the date and time of the work, the duration of the work, the payment for the work, the general area of the work, and possibly, some details regarding the project. (See DeGracia Decl. ¶¶ 9, 23; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6.) Pros choose whether or not to accept jobs from the list based on the information provided, including the

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[8] Defendant also operates lines of business through which it refers customers from third-party retail partners, such as Google, Lowe's, Overstock, Target, Walmart, and Wayfair, to Pros. (See DeGracia Decl. ¶¶ 6, 26; Otto Decl. ¶¶ 9-11; Lima Decl. ¶¶ 8-12.) Plaintiffs target only Pros performing cleaning and/or handyman services that are booked and paid for by customers through Defendant's website or app, not Defendant's Home Improvement Referrals or jobs generated through Defendant's contracts with third-party retailers. (See Proposed Order ¶ 3; Reply, 24.) Accordingly, the factual record discussed herein does not address the referral systems in place in these lines of business, even where they diverge from the referral systems in place in the line of business that Plaintiff challenges through the present motion. (Compare, e.g., Lima Decl. ¶ 9 [Economy Rooter sets its rates for installation work referred from Lowe's through Defendant by negotiating with Defendant; consumers contact Economy Rooter to make complaints or request subsequent work without involving Defendant]; with Nofzinger Decl. ¶ 5, Ex. A [Defendant resolves consumer complaints pursuant to its policies]; DeGracia Decl. ¶¶ 22, 28].)

[9] Consumers may also use the app to request a specific Pro for an assignment. (DeGracia Decl. ¶ 12.) In those instances, Pro will have an opportunity to accept the job before the listing is made available to other Pros. (*Ibid.*) The app facilitates such bookings by allowing customers to include Pros that have performed work for them in the past as members of their "Pro Team." (*Id.* at ¶ 16.) It is also possible for subsequent bookings to be made outside of Defendant's platform. (*Id.* at ¶ 17.) Defendant maintains a policy providing that it is entitled to a $100 fee for off-platform bookings, but "very rarely" charges the fee and has "little practical way" to enforce the requirement. (*Ibid.*)

payment. (DeGracia Decl. ¶ 27; Munn Decl. ¶ 14.) After accepting a job, a Pro will be given access to the consumer's contact information and the address where the work is to be performed. (See DeGracia Decl. ¶ 9; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6.) The customer will also learn the Pro's name after the Pro accepts the job, but before service is rendered. (DeGracia Decl. ¶ 15.) At this point, the Pro and the consumer can communicate. (See *id.* at ¶ 21.)

After the booking is complete, a Pro may cancel an accepted job without a penalty up to 48 hours in advance of the scheduled start time. (*Id.* at ¶ 22.) If there is a cancelation, Defendant finds a replacement. (*Ibid.*) To do this, Defendant may increase the compensation for the job to attract a Pro at the last minute, even if this means the Pro will end up being paid more by Defendant than Defendant is paid by the customer. (*Id.* at ¶¶ 22, 26.)

After the work is completed, or where the customer no-shows or makes an untimely cancellation, Defendant handles billing and customer disputes. (See Nofzinger Decl. ¶ 5, Ex. A; DeGracia Decl. ¶¶ 22, 26, 28.)

2. Whether Defendant is a "Referral Agency," Pros are "Service Providers," and Consumers are "Clients"

To show that Defendant is a "referral agency," Defendant must show that Pros are "service providers," within the meaning of the statute. (See Lab. Code, § 2777.) Accordingly, Defendant must show that Pros are individuals acting as a sole proprietor or business entity[10] that agree to Defendant's contract and use the referral agency to connect with "clients," as that term is defined in the statute. (See Lab. Code, § 2777(a), (b)(4).)

Clients, for the purposes of the statute, include "[a] person who utilizes a referral agency to contract for services from a service provider" and "[a] business that utilizes a referral agency to contract for services from a service provider that are otherwise not provided on a regular basis by employees at the client's business location, or to contract for services that are outside of the client's usual course of business." (See Lab. Code, § 2777(b)(1).)

These definitions determine the scope of Labor Code § 2777 – if they are not satisfied, then the

[10] The types of business entities, other than sole proprietorships, identified in the statute are partnerships, limited liability companies, limited liability partnerships, and corporations. (See Lab. Code, § 2777(a).)

eleven-factor analysis is not triggered. Nevertheless, the parties do not address these definitions in their briefing.

There are at least two lines of inquiry of some significance. The first is whether "individuals acting as a sole proprietor" has a meaning that is narrower than "individuals." Defendant seems to say that it does not. (Opposition, 20, 31.) Essentially, Defendant seems to argue that any individual who secures work through Defendant's app is, by virtue of so doing, a sole proprietor. (See *ibid.*) The Court is skeptical of this line of argument. If any individual who takes work from Defendant becomes a sole proprietor then there would be no purpose to the statutory language limiting the scope of the definition to "an individual acting as a sole proprietor or business entity" – the statute would simply say "an individual or business entity." (See Lab. Code, § 2777(a), (b)(4); see also Chau Decl., Ex. 4 at 7, Ex. 5 at 7.) Secondarily, however, Defendant argues that if some of the entities that use its app are covered and others are not then the proposed injunction is overbroad. (See Opposition, 21 [Plaintiff cannot argue that all Pros fall outside Labor Code § 2777 without evidence as to all of their individual situations].) Plaintiff does not seem to dispute that some entities that use the app satisfy this criterion. Accordingly, the Court focuses instead on other issues.

The second line of inquiry relates to whether the requisite relationship between a Pro and a consumer exists where there is no contractual relationship between the Pro and the consumer, such that the Pro is not providing services to a consumer pursuant to a contract between the two of them. It is clear from the statute that the services provided by a Pro to a consumer must be provided "under a contract" for the statute to apply. (See Lab. Code, § 2777.) It is less clear whether the "contract" in question may be a contract between the "referral agency" and the "client" or "service provider," or must be a contract between the "service provider" and the "client." While the Court finds reason to suspect it is the latter,[11]

[11] There are reasons to suspect that the services must be rendered under a contract between the service provider and the client. First, the statute defines the term "[r]eferral agency contract[.]" (Lab. Code, § 2777(b)(3)(A).) In so doing, the statute provides that: (a) the "intermediary services provided to the service provider by the referral agency are limited to client referrals and other administrative services ancillary to the service provider's business operation;" and (b) "A referral agency's contract may include a fee or fees to be paid by the client for utilizing the referral agency. This fee shall not be deducted from the rate set or negotiated by the service provider[.]" (Lab. Code, § 2777(b)(3).) These substantive provisions are included in the subparagraphs setting forth the definition of the term. The term does not appear elsewhere in the section. Accordingly, although these provisions appear in a definition section, they appear to substantively limit the scope of the referral agency's contract. Second, the statute, in various other places, appears to contemplate the entry of a contract between a client and a service

the Court is mindful that the issue is under consideration in the context of a motion for preliminary injunction where it was not briefed in detail. As discussed in the following sections, the Court concludes that Defendant is strongly unlikely to meet all of the requirements of Labor Code § 2777 for independent reasons. Accordingly, the Court does not resolve this question through this order.[12]

3. Control and Direction of the Referral Agency in Connection with the Performance of the Work for the Client

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros are free from Defendant's direction and control in connection with the performance of work for the client, both as a matter of contract and in fact. (See Lab. Code, § 2777(a)(1).) The Court does not resolve the parties' dispute, with respect to this factor, on the present motion. The relevant tests[13] require Defendant to meet a conjunctive set of conditions on the merits. The Court concludes, as stated above and detailed below, that Defendant is unlikely to meet all of the other relevant conditions on the merits, such that Plaintiff is likely to prevail on the merits. Accordingly, the resolution of this factor is immaterial to the outcome of the present motion.

4. Certification of Business License and Maintenance of Records

If the work is performed in a jurisdiction that requires Pros to have a business license or business tax registration in order to provide the services under the contract, Defendant must show that Pros certified to Defendant that they have the required business license or business tax registration and that Defendant keeps the certifications for a period of at least three years to invoke Labor Code § 2777 on the merits. (See Lab. Code, § 2777(a)(2).) To this point, Defendant provides a declaration stating that Defendant secures certifications from Pros that the Pros and any assistants are fully-licensed and

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provider. (See Lab. Code, § 2777(a)(10) [discussing rate setting], (b)(1) [clients use "a referral agency to contract for services from a service provider"], (b)(5)-(6) [in exemption certain individuals, referring to contracts between the service provider and the client].) However, there are other indicia, or alternate readings of these same provisions, that would support the conclusion that the clients may contract instead with the referral agency for services from the service providers. (See Lab. Code, § 2777(b)(1), (4) [whereas client uses referral agency to "contract for services from a service provider," service provider uses referral agency to "connect" with clients]; Lab. Code, § 2777(a)(2), (b)(2)(A) [referring to work "under the contract" and "under a contract," without specifying the parties to the contract].)

[12] This is one way of seeking to answer the ultimate question – whether Defendant operates a "legitimate referral agency" based on its business model. (See Chau Decl., Ex. 5 at 9-10.) The statutory factors are intended to provide a concrete means of assessing whether Defendant does so. (See *ibid.*) Accordingly, the Court joins the parties in focusing on the statutory factors.

[13] This factor is an element of both the ABC test and the Labor Code § 2777 test.

authorized to provide the services being offered and keeps records of those certifications for at least three years. (Opposition, 21; DeGracia Decl. ¶ 5.) Plaintiff does not respond to this evidence. (See Reply, 6-17.) The Court finds that Defendant is likely to be able to satisfy this element on the merits.

5. Contractor's License

If the work for the client requires Pros to hold a state contractor's license, Defendant must show that Pros have the required contractor's license to invoke Labor Code § 2777 on the merits. (See Lab. Code, § 2777(a)(3).)

Defendant argues that a contractor's license is not required for the vast majority of the work performed by Pros because 99.9 % of the jobs listed on Defendant's app are for less than $500 and submits a declaration substantiating the value of the jobs claimed on Defendant's app. (Opposition, 21; Bradford Decl. ¶ 10.) Plaintiff does not identify any likely deficiency in this element. (Reply, 6-17.) The Court finds that Defendant is likely to be able to satisfy this element on the merits, at least as to the substantial majority of Pros.

6. Certification of Professional Licensure, Permit, Certification, or Registration and Maintenance of Records

If there is an applicable professional licensure, permit, certification, or registration administered or recognized by the state available for the type of work being performed for the client, Defendant must show that Pros certified to Defendant that they have the appropriate professional licensure, permit, certification, or registration and that Defendant keeps the certifications for a period of at least three years to invoke Labor Code § 2777 on the merits. (See Lab. Code, § 2777(a)(4).)

As noted above, Defendant provides a declaration stating that Defendant secures certifications from Pros that the Pros and any assistants are fully-licensed and authorized to provide the services being offered and keeps records of those certifications for at least three years. (Opposition, 21; DeGracia Decl. ¶ 5.) Plaintiff does not respond to this evidence. (See Reply, 6-17.) The Court finds that Defendant is likely to be able to satisfy this element on the merits.

7. Provision of Services Under Service Provider's Name

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros deliver services to the client under Pros' name, without being required to deliver the services under Defendant's name. (See

Lab. Code, § 2777(a)(5).)

This element is likely to pose some difficulty for Defendant on the merits, although it may be satisfied as to a meaningful percentage of Pros. The record indicates that Pros are not required to deliver services under Defendant's name – no requirement to do so has been identified. (See Reply, 16-17.) However, Plaintiff notes several instances in which Defendant recommends Pros to describe themselves as "Handy professionals" or refers to Pros as rendering services provided by Defendant. (See *id.* at 17 n.20 [citing Stillman Decl., Exs. 2, 17, 61].) Whether or not there is a requirement, the actual delivery of services under Defendant's name likely precludes a finding in Defendant's favor. (See Lab. Code, § 2777(a)(5).) As to at least some Pros, it appears likely that services were rendered under Defendant's name, particularly in light of documents describing Pros as Defendant's professionals. (See Stillman Decl., Exs. 2 at 4, 17, 61; see also Nofzinger Decl., Ex. I [Pro describing himself as a "Handy vendor"].)

8. Provision of Tools and Supplies

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros provide their own tools and supplies to perform the services. (See Lab. Code, § 2777(a)(6).) There does not appear to be any significant dispute that the tools and supplies that Pros use to "perform the services" are not provided by Defendant. (See FAC ¶ 70(A), (F); Opposition, 22; Reply, 17.) Plaintiff argues only that Defendant provides the app, which Plaintiff argues is an essential and mandatory tool used "in order for" Pros to perform services. (Reply, 17.) The Court finds this argument unpersuasive – the app is used to identify and accept jobs and communicate with clients about jobs. In the sense that it is necessary to obtain a client in order to perform a service for that client, the app is necessary in order to perform a service for that client. But the app is not used to perform the services. Physical tools and supplies, not apps, are used to perform the services that Pros provide to customers. The Court finds that Defendant is likely to be able to satisfy this element on the merits.

9. Customary or Previous Engagement in an Independently Established Business or Trade of the Same Nature as, or Related to, the Work Performed for the Client

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros are customarily engaged, or were previously engaged, in an independently established business or trade of the same

nature as, or related to, the work performed for the client. (See Lab. Code, § 2777(a)(7).)

At minimum, on the present record, Defendant is likely to prevail on this factor as to a meaningful proportion of the Pros implicated by the present motion.[14] Defendant has submitted a declaration to the effect that Pros must "generally" attest to prior paid experience doing the kinds of work they are looking to find using Defendant's app. (DeGracia Decl. ¶ 3.) Similarly, the record reflects that many Pros meet this requirement. (See *id.* at ¶ 4; Cox Decl. Ex. D at 76:20-115:22, Ex. E at 109:25-110:9.)

10. Absence of Restrictions on Maintaining a Clientele and Seeking Work Elsewhere

To invoke Labor Code § 2777 on the merits, Defendant must show that Defendant does not restrict Pros from maintaining a clientele and Pros are free to seek work elsewhere, including through a competing referral agency. (See Lab. Code, § 2777(a)(8).)

There is no dispute that Defendant has a contractual right to collect a $100 payment from Pros if Pros make subsequent bookings with clients they first contacted through the app without running their subsequent bookings through the app. (Stillman Decl., Ex. 6 at 23; DeGracia Decl. ¶ 17; see also Cox Decl., Ex. D at 127:8-128:7.)[15] There is no dispute that Defendant has enforced that contractual right. (DeGracia Decl. ¶ 17 [testifying that "Handy very rarely charges this fee"].) For this reason,[16] Defendant is unlikely to meet this requirement on the merits. Simply, Defendant restricts Pros from maintaining a clientele by securing and/or enforcing the contractual right to penalize them for treating clients that have been referred through Defendant's app as their own clients, rather than Defendant's clients.

11. Hours and Terms of Work

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros set their own hours and terms of work or negotiate their hours and terms of work directly with the client. (See Lab. Code, § 2777(a)(9).)

Defendant argues that it will satisfy this factor on the merits because Pros can negotiate

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[14] Plaintiff's argument seems to be only that the requirement is not met as to all Pros. (Reply, 14-15.) The Court focuses attention on the requirements that may impact all Pros within the scope of the present motion.

[15] $100 is a substantial penalty – very few jobs claimed on Defendant's platform are valued at $500 or more. (Bradford Decl. ¶ 10.)

[16] Aside from this restriction, the record indicates that Pros are free to seek work elsewhere and maintain a clientele generated from other sources. (See Stillman Decl., Ex. 6 at § 6(f).)

scheduling, scope of the work, and "other terms" with customers at any time. (Opposition, 22-23.) Plaintiff responds that Defendant controls many terms of the work – the amount Pros get paid; how Pros are deactivated; which jobs to present to Pros; how Pros litigate disputes; what happens when Pros are late to a job; what happens when Pros finish work early; what happens when Pros cancel; whether Pros can reschedule; what happens when a customer is not present when a Pro reports for work; and other things. (Reply, 11.) Plaintiff also contends that Defendant controls the hours of work because it limits work to the time between 7 a.m. and 11 p.m. (*Ibid.*)

For at least the reasons that follow, Defendant is unlikely to prevail on this factor.

First, in the first instance, Pros do not set the hours of work or the duration of a work assignment or negotiate the hours of work or duration of a work assignment directly with the client – Pros are given a contractually binding reporting time and a completion time from Defendant via Defendant's app. (See Stillman Decl., Ex. 6 at 4-5; DeGracia Decl. ¶¶ 9-10.) The record indicates that Pros can and do renegotiate these terms of the work in some circumstances (see Nofzinger Decl., Ex. K), but renegotiating an agreed term is not the same as setting a term or negotiating a term in the first instance. This is underscored by the schedule of liquidated damages for "service failure/cancellation" in the contract between Pros and Defendant, which includes a fee of $15 for "[f]ailure to start Job at time specified by Service Requester and Service Requester complains" and a fee of $10[17] for cancellation or rescheduling "on less than 48 hours' notice but with more than 24 hours' notice prior to the Job start time[.]" (Stillman Decl., Ex. 6 at 4-5, 22.)

Second, Defendant dictates the mode by which disputes between Pros and clients will be resolved. More specifically, Pros must accept an arbitration agreement that binds them to arbitrate any disputes they have with clients to use Defendant's app. (*Id.*, Ex. 6 at 14.)

Third, Defendant dictates that Pros must provide their own tools and supplies, precluding, or influencing, negotiations between Pros and clients on this point. (*Id.*, Ex. 6 at 8-9.)

12. Rates

To invoke Labor Code § 2777 on the merits, Defendant must show that, without deduction by Defendant, Pros set their own rates, negotiate their rates with the client through Defendant, negotiate

[17] There are larger fees for later cancellations and/or failure to appear without notice.

rates directly with the client, or are free to accept or reject rates set by the client. (See Lab. Code, § 2777(a)(10).)

As summarized above and confirmed in Defendant's briefing, Defendant lists jobs at specified rates and Pros choose whether to accept the jobs given the specified rate. (See Stillman Decl., Ex. 6 at 6; Opposition, 23.) Defendant takes the difference between what the Pros is paid and what the customer pays. (See Stillman Decl., Ex. 6 at 6; Opposition, 23.)

Defendant argues that this factor is met because: (1) After accepting a job, a Pro can attempt to renegotiate a rate or walk away if the job is more complicated than expected; and (2) Pros can and do "set their own rate" by choosing to accept only work that exceeds a rate of their own choosing. (*Id.* at 23-25.) For the reasons that follow, these arguments are unlikely to prevail on the merits.

Defendant's first argument is unpersuasive for two reasons. One, on the law, Defendant's first argument pertains to renegotiation of accepted rates, not initial rate setting. Whether or not a rate may be renegotiated if the work required is different from the work referred, this does not address the statutory criterion – which focuses on how the rates are set in the first instance. (See Lab. Code, § 2777(a)(10).) To the extent the statute may arguably be ambiguous, the legislative history supports the conclusion that the statute concerns how the initial rate is set, not renegotiation that may occur if the work required is different than the work that was referred. (See Chau Decl., Ex. 5 at 9-10.) Two, on the facts, Defendant's argument is unsupported by evidence. (See Opposition, 23; Sur-Reply, 5; DeGracia Decl. ¶¶ 21, 23 [declaring that Pro's may "renegotiate the start time of the job" after accepting it and that a job is complete when the Pro has worked the time specified in the listing, even if tasks remain to be completed, at which point the Pro and the customer can add additional time to the job for which the Pro can be compensated through Defendant by submitting a message to Defendant; not declaring that a Pro is permitted to, or has, renegotiated the agreed rate for the work that the Pro agreed to perform]; Munn Decl. ¶ 15 [describing negotiations of "some terms," which included requiring a customer to buy materials necessary to complete a job and refusing to complete certain tasks, without describing any event in which the rate was renegotiated].)

Defendant's second argument is unpersuasive for three reasons. First, Defendant implicitly concedes, as it must, that Pros do not negotiate their rates with clients through Defendant, negotiate rates

directly with clients, or accept or reject rates set by the client. (See Lab. Code, § 2777(a)(10).) This is because Pros accept or reject rates set by Defendant, which are different from the rates customers agree to pay Defendant to have the work performed. (See DeGracia Decl. ¶¶ 9, 23, 27; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6; Munn Decl. ¶ 14.)[18] Instead, Defendant contends that the freedom to accept only work for which Defendant sets a rate that a given Pro deems acceptable means that, within the meaning of the statute, the Pro has set his or her own rate. (See Opposition, 23-25; Lab. Code, § 2777(a)(10).) Second, if de facto rate setting in the manner at issue here was sufficient to satisfy Labor Code § 2777(a)(10), then there would be no need for Labor Code § 2777(a)(10) in light of Labor Code § 2777(a)(11), which requires service providers to be free to accept or reject clients or contracts. Third, the legislative history makes clear what is apparent from the statute, the Legislature wished to provide "legitimate referral agencies" that provide referrals at a rate previously set by the Pro with the substantive benefit of the *Borello* test. (See Chau Decl., Ex. 5 at 9-11.) Defendant is familiar with this business model, in its Lowe's line of business, the operation of which Plaintiff does not challenge through the present motion, Defendant forwards work to Pros pursuant to a fixed rate card. (See Otto Decl. ¶¶ 7, 10; Lima Decl. ¶¶ 8-9.) That is not what is happening here. At bottom, this factor may be satisfied where the Pro sets a rate and is referred work at that rate, not where, as here, a Pro is referred everything and permitted to choose which work to accept.

13. Freedom to Accept or Reject Clients and Contracts

To invoke Labor Code § 2777 on the merits, Defendant must show that Pros are free to accept or reject clients and contracts without being penalized in any form by Defendant, except where Pros accept a client or contract and then fail to fulfill any of their contractual obligations. (See Lab. Code, § 2777(a)(11).)

[18] Defendant engages with a straw man in a series of arguments, including a First Amendment argument, concerning the offer and acceptance of a contractual rate. (Opposition, 24-25.) These arguments engage a straw man because they assume that the problem is the order in which offer and acceptance are communicated between Defendant and Pros. (*Ibid.*) That is incorrect. There are three relevant classes of parties, referral agencies (Defendant), service providers (Pros), and clients. Labor Code § 2777(a)(10) does not concern itself with the order of offer and acceptance, it concerns itself with ensuring that a rate is agreed on between the service providers and clients. Accordingly, the reason that Defendant cannot invoke the *Borello* test is that Defendant negotiates two rates, one with the client and one with the Pro, rather than facilitating an agreement on rates between the two and receiving compensation from the client in the form of a service fee. (See Lab. Code, § 2777(a)(10); Chau Decl., Ex. 5 at 9-11.)

There is no dispute that, in the first instance, Pros decide whether to accept or reject clients. Plaintiff argues that this is insufficient to satisfy Labor Code § 2777(a)(11) because (1) there is no communication between Pros and clients until after acceptance occurs; (2) Defendant does not communicate all "job details" until two hours before the job starts, which is within a "penalty period" for late cancellation; and (3) In some areas, Defendant incentivizes Pros to accept more jobs by moving them to a higher pay tier if they accept more work, effectively penalizing Pros who accept less work by denying them advancement. (Reply, 16.)

The Court finds it unlikely that Defendant will fail to satisfy this factor across all Pros in issue.[19] On the present motion, the Court is persuaded that the opportunity to accept or reject clients and contracts at the outset, even with imperfect information, is likely to satisfy the requirement, provided there is no penalty for doing so. However, the record does suggest that in some geographic regions for some lines of work, Defendant may list the same jobs at the same time to different Pros at different rates of pay based on, among other things, the number of jobs the Pros have done, respectively, in a specified time period. (See Stillman Decl., Ex. 44.) There is a reasonable argument that this is a penalty for failing to accept more jobs through Defendant's platform. However, it does not appear to impact all workers at issue in connection with the present motion.

B. Likely Result

1. ABC Test

a. Work Outside the Scope of the Usual Course of the Hiring Entity's Business

Defendant's business is described above. To reiterate, as relevant here, Defendant provides services to customers and Pros.

Customers may post a job and, for a price, Defendant will see to it that the job is done. (DeGracia

[19] Consistent with the parties' briefing, the Court assumes for the purposes of this discussion that Labor Code § 2777(a)(11) refers to acceptance or rejection of the specific clients or contracts referred to the service provider by the referral agency in question. However, the Court notes that the section could be read to refer to acceptance of, among other things, any contracts. Such a reading may render subparagraph (a)(11) somewhat duplicative of subparagraph (a)(8). However, to the extent such a reading of subparagraph (a)(11) is appropriate, then Defendant is unlikely to prevail on the factor for the same reason that Defendant is unlikely to prevail on subparagraph (a)(8) – if a Pro accepts a contract from a client that was previously referred by Defendant without using Defendant's app, then the Pro is subject to a $100 penalty. Thus, Pros are not free to accept contracts without penalty from Defendant.

Decl. ¶¶ 5, 9, 22-23, 26-27; Nofzinger Decl. ¶ 5, Ex. A; see also Stillman Decl., Exs. 6 at 4-5.) Defendant takes customer satisfaction seriously. (See Stillman Decl., Ex. 61; DeGracia Decl. ¶¶ 22, 26; Nofzinger Decl., ¶ 5, Ex. A.) If the Pro to whom the work is assigned cancels at the last minute, Defendant will offer another Pro more money to timely perform the work and will resolve disputes about the performance of the work directly with the customer. (DeGracia Decl. ¶¶ 22, 26.) If there is a complaint about the manner in which services were rendered, Defendant will resolve the complaint pursuant to the terms by which it renders service to the customer. (Compare Nofzinger Decl. ¶ 5, Ex. A; with Lima Decl. ¶ 12 [because customers know that Economy Rooter, an entity not within the scope of Plaintiff's present motion, is separate from Handy, customers contact Economy Rooter with any complaints regarding the work Economy Rooter did].) If customer feedback indicates that customers are not satisfied with the work performed by a Pro, Defendant will stop assigning work to the Pro. (See Stillman Decl., Ex. 6 at 12 [Defendant has contractual right to terminate agreement if, among other things, a Pro fails to meet the applicable minimum rating].)

Pros, in turn, have access to a list of jobs – i.e., the business that Defendant has brought in – from which they may secure work. (See DeGracia Decl. ¶ 9; Adams Decl. ¶ 8; Demiraiakian Decl. ¶ 5; Gillman Decl. ¶¶ 5-6.)[20]

Defendant argues that the ultimate provision of services is outside the scope of Defendant's business. (Opposition, 32-33.) On the present record, the Court finds Defendant unlikely to succeed on this line of argument or to otherwise satisfy this factor of the ABC test.

The gravamen of Defendant's argument is that the scope of Defendant's business ends when a referral is provided, it does not extend to the actual provision of the work. If this were true, Defendant would not take the various actions, described above, to ensure that services are rendered to clients in the event that the service provider to whom a referral was given cancels or, perhaps more importantly, resolve disputes arising out of the work performed, including by paying out remedies pursuant to contractual arrangements between Defendant and the clients. Through those actions, Defendant conducts a business that provides end services – handyman and cleaning work – to consumers. The scope of

[20] It is unnecessary to discuss other services that Defendant provides to Pros in conjunction with the present discussion.

Defendant's business is underscored by the its own descriptions of its services. (See Motion, 19-20 [citing record].)[21]

The out-of-state cases on which Defendant relies do not persuasively support Defendant's position. In *Q.D.-A., Inc. v. Indiana Dep't of Workforce Dev.* (Ind. 2019) 114 N.E.3d 840, the alleged employer provided a service that matched drivers with customers who need too-large-to-tow vehicles driven for them. (*Q.D.-A.*, 114 N.E.3d at 843.) The Indiana Supreme Court ruled that the drivers were not employed by the alleged employer because, among other things, the drivers, not the alleged employer, did the driving. (*Id.* at 847-48.) To the extent that *Q.D.-A.* holds that a business does not engage in delivery services as part of its usual course of business because it classifies the workers who perform delivery services as independent contractors, the Court finds *Q.D.-A.* inapposite. (See *Uber*, 56 Cal.App.5th at 296 [summarily distinguishing *Q.D.-A.* on the ground that it did not involve continual coordination between worker and company or financial interdependence].) Moreover, the holding in *Q.D.-A.*, if interpreted broadly, is irreconcilable with California's statutory scheme, which provides that a referral agency – i.e., an agency that refers work to outside entities classified as independent contractors – is exempt from the ABC test. The entire statutory structure would be for naught if the second factor of the ABC test were never satisfied when the alleged employer relied on independent contractors to render the end services. On the present facts, Defendant provided end services through Pros based on its relationships with the customers and the Pros, whether or not the services were rendered by Pros rather than individuals who are undisputedly employed by Defendant.[22]

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[21] Defendant argues that the nature of its business does not depend on the wording of its advertising. (Opposition, 33-34.) But the point is this, the advertising confirms that Defendant is in the business of providing end-services to consumers, as primarily demonstrated by the service guarantees that Defendant provides to consumers. In any event, if Defendant is arguing that the scope of its business excludes services it advertises to its customers, then Defendant is, all other things being equal, likely to face difficulty on the merits. (See *Namisnak v. Uber Technologies, Inc.* (N.D. Cal. 2020) 444 F.Supp.3d 1136, 1143 [argument that Uber is "not a transportation company" strained credulity because Uber advertised itself as a transportation system].)

[22] These facts also distinguish Defendant from a staffing agency that takes no responsibility for the services that are ultimately rendered. (See *State Dept. of Employment, Training & Rehab., Employment Securities Div. v. Reliable Health Care Services of South Nev., Inc.* (1999) 115 Nev. 253, 259 [noting that providing patient care and brokering workers are distinct businesses]; *Trauma Nurses, Inc. v. Board of Review, New Jersey Dept. of Labor* (1990) 242 N.J. Super. 135, 147 [same].) By taking responsibility for the services that are ultimately rendered as part of its usual course of business, Defendant has included the provision of services within its usual course of business.

b. Control and Direction in Connection with the Performance of the Work; Customary Engagement in an Independently Established Trade, Occupation, or Business of the Same Nature

The first and third factors of the ABC test have close analogs in the elements of Labor Code § 2777. Consistent with the Court's discussion of the Labor Code § 2777 factors, above, the Court relies on the second factor of the ABC test in concluding that Defendant is unlikely to be able to carry its burden of establishing proper classification of the Pros at issue on the merits. The Court does not further address the first and third factors of the ABC test in detail here.

2. *Borello*

Plaintiff has not argued that the preliminary injunction sought would be justified if *Borello* applies. The Court concludes that Plaintiff has not presently demonstrated a likelihood of success on the merits under *Borello*.

III. Irreparable Harm

A. *IT Corp.* and *Uber*

"In general, when considering a request for a preliminary injunction, the trial court weighs two interrelated factors. The first is the likelihood the party seeking relief will prevail on the merits, and the second is the relative interim harm to the parties if the preliminary injunction is granted or denied. [Citations.] The goal is to minimize the harm that an erroneous interim decision would cause. [Citation.]" (*Uber*, 56 Cal.App.5th at 283.)

"Once a governmental entity establishes that it will probably succeed at trial, a presumption should arise that public harm will result if an injunction does not issue. However, some consideration must be given to the harm likely to be suffered by the defendant where that harm is alleged to be grave or irreparable." (*IT Corp.*, 35 Cal.3d at 72; see also *Uber*, 56 Cal.App.5th at 283-84.) This variation applies here, because Plaintiff is a public prosecutor authorized to seek injunctive relief to prevent the continued misclassification of employees as independent contractors. (See *Uber*, 56 Cal.App.5th at 284.) This framework applies whether the injunction is prohibitory or mandatory. (See *id.* at 284-85.)

Under *IT Corp.* and *Uber*, if it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unable to

prevail on the balancing of the probable harms. (*Id.* at 307.) Ultimately, it is a trial court's responsibility, sitting in equity, to arrive at a just solution. (*Id.* at 308.) Trial courts have a reserve of discretionary power to consider competing policy arguments, inevitable trade-offs, and the public interest in exercising their equitable authority. (*Id.* at 307-08.)

B. The Injunction Sought

The scope of the injunction is limited to: "All individuals who perform or performed cleaning and/or handyman services for Handy in the State of California at any time during the pendency of this action, and who (1) signed up to perform cleaning and/or handyman services directly with Handy or a Handy subsidiary under their individual name or with a fictional/corporate name and (2) are paid by Handy or a Handy subsidiary directly under their individual name or with a fictional/corporate name for their services as cleaners or handypersons." (Proposed Order ¶ 3.) Plaintiff seeks a preliminary injunction that prevents Defendant from classifying these individuals as independent contractors and requiring Defendant to treat these individuals as employees. (*Id.* at ¶¶ 1-2.)

C. The Harms Alleged by Plaintiff

To the extent that Plaintiff is required to show harm, Plaintiff argues that allowing Defendant to continue classifying the Pros within the scope of the present motion during the pendency of this litigation as independent contractors will cause irreparable harm, as follows.

Plaintiff argues that when Defendant misclassifies Pros it causes them to suffer irreparable harm by denying them the full benefits of employment – payment of the minimum wage for all hours worked, payment of overtime wages, indemnification for business expenses, provision of meal and rest breaks, workers' compensation coverage, and provision of sick leave. (See Motion, 30-32; Reply, 22.) Plaintiff contends that Defendant does not transmit Disability Fund contributions or contribute to the State's Unemployment Insurance Trust Fund, rendering Pros ineligible for Stata Disability Insurance, Paid Family Leave, and Unemployment Insurance benefits. (Motion, 32.)

Plaintiff argues that when Defendant misclassifies Pros it causes law-abiding competitors to suffer irreparable harm by reducing Defendant's labor costs. (*Id.* at 33-34.)

Plaintiff argues that when Defendant misclassifies Pros it causes irreparable harm to the public at large by undermining the social safety net and destabilizing labor markets. (*Id.* at 34-35.)

Defendant responds that Pros receive adequate compensation and have sufficient access to social safety net programs as independent contractors. (Opposition, 38-40.) Moreover, Defendant argues that Plaintiff cannot point to any competitor that was harmed as a result of Defendant's classification of Pros as independent contractors. (*Id.* at 39.) Accordingly, Defendant asserts that Plaintiff's contentions are nothing more than unsupported lawyer argument. (*Id.* at 38.)

D. The Harms Alleged by Defendant

Defendant argues that the proposed injunction would irreparably harm it because it would have to suspend its business in California so that it could restructure its business over a period of "many months" at a cost of "millions of dollars." (Opposition, 35.) Further, Defendant contends that any such restructured business would be limited in geographic scope, if restructuring is viable or possible. (*Ibid.*) Moreover, Defendant contends that Pros would be irreparably harmed if Defendant's service became unavailable because Pros would have less, and less convenient, access to work and the other attendant services Defendant provides. (*Id.* at 37-38.)

E. Balancing of Harms and the Propriety of the Requested Injunctive Relief

As the Court has determined that Plaintiff is likely to prevail on the merits, Plaintiff is entitled to the benefit of the rules set forth in *IT Corp* and *Uber* in connection with the balancing of the harms and the determination of whether to issue preliminary injunctive relief.[23] In the present case, the balancing of the harms and the scope of the injunction present intertwined issues. For the reasons that follow, the Court directs supplemental briefing and sets a further hearing concerning these issues.

First, the Court finds Plaintiff's proposed injunction improper because it precludes Defendant from taking permissible legal pathways to compliance. Consistent with the foregoing discussion, the Court is persuaded that Plaintiff have a strong likelihood of showing that Defendant currently is not complying with the law. However, there are at least three ways that Defendant can bring itself into compliance: (1) Defendant can reclassify the Pros at issue as employees; (2) Defendant can restructure its

[23] For ease of drafting, the balance of this section is written in language consistent with a finding that Defendant is in violation of the law. The Court recognizes that no final adjudication has occurred and that its preliminary assessment of the likely result on the merits may be erroneous, a factor that the Court must keep in mind in deciding whether to issue a preliminary injunction. (See *Uber*, 56 Cal.App.5th at 307 [explaining that courts "must consider the potential harm caused by an *erroneous* interim decision" as basis for assuming that if the injunction were ultimately determined to have been "wrongly entered," the harm to defendants – disruption of their businesses – could be fairly considered grave or irreparable].)

operations so that it satisfies Labor Code § 2777;[24] or (3) Defendant can restructure its operations so that it satisfies the ABC test. The preliminary injunction, however, would bar Defendant from classifying its cleaning and handyman workers as independent contractors and failing to provide them all of the attendant benefits of being employees. (See Proposed Order ¶¶ 1-2.) The Court finds it improper to foreclose Defendant from engaging in a lawful means of operating its business.[25]

Second, and relatedly, Plaintiff has not proposed an injunction that is tailored to the law and facts of this case. This means that the parties have not briefed salient legal issues that may relate to an effort to craft an injunction that permits Defendant to restructure its operations so that Pros are no longer misclassified because they are properly classified as independent contractors.

Third, and relatedly, the manner in which the relative harms are quantified and balanced may shift depending on how Defendant's violation is framed. As noted above, depending how you count, Defendant did at least two things wrong: (1) It structured its business in a way that Pros are employees; and (2) It classified Pros as independent contractors. Plaintiff focuses on the harms arising from (2), and to a significant extent, that focus is correct. But, at the same time, Defendant is not required to pay the benefits that Plaintiff's seek if, assuming it is practicable, different measures are taken to abate the violation. It is not clear from this record that the failure to undertake those different measures – a general relinquishment of certain means by which Defendant exercises control over Pros and impedes Pros from taking work off of the app – is causing a significant and ongoing harm. Defendant, in turn, focuses on the harm that would flow from complying with the injunction as requested.[26] Defendant argues, however, that an injunction requiring it only to comply with Labor Code § 2777 would be less disruptive. (Opposition, 41.)[27]

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[24] On the present record, Plaintiff has not suggested that if the requirements of Labor Code § 2777 were satisfied, Pros would remain independent contractors under *Borello*.

[25] At oral argument, Plaintiff argued that an amendment to the proposed injunction that modified the first paragraph to incorporate the statutory standard could cure these deficiencies. At the outset, the second paragraph is equally problematic. More to the point, Plaintiff's proposed preliminary injunction shapes the briefing. Defendant was not afforded notice and an opportunity to respond to a request for a different preliminary injunction in writing.

[26] This focus is proper – Defendant properly looks to the potential harm caused by an erroneous interim decision. (*Uber*, 56 Cal.App.5th at 307.) This is one reason that changing the requested relief at the hearing deprives Defendant of a fair opportunity to respond to the modified request for relief, at least where there are significant substantive differences in the original request and the modified request.

[27] Of course, Defendant made this argument in a brief where it took the position that it already complied with Labor Code § 2777. Defendant's view of the disruption that is entailed by complying with Labor

Fourth, the Court finds the direct harms identified by the parties credible and the downstream effects of a preliminary injunction uncertain. Similar to *Uber*, the Court finds the record adequate to infer that Defendant's operation is of large scale and that Defendant does not provide the full benefits of employee status to its Pros, such that the harms from misclassification as articulated by Plaintiff are credible. (See *Uber*, 56 Cal.App.5th at 309-10.)[28] At the same time, the Court credits Defendant's evidence regarding the immediate impacts of the proposed injunction – Defendant will have to pause the line of business at issue in California and, if it chooses to do so, may reopen business under a restructured employment model after substantial expenditures and delays. (See DeGracia Decl. ¶¶ 29-32.)[29] The Court lacks sufficient information about the labor market and/or insight into future events – i.e., Defendant's competitors, alternative means by which Pros may secure business in the absence of Defendant, and the like – to ascertain what Defendant's temporary or permanent departure from the market would mean for the public. In that vein, the Court takes guidance from the Legislature's decision to curtail Defendant's business model.[30]

Fifth, pursuant to the foregoing points, the Court finds the relative harms as follows. The harm shown by Plaintiff is uncertain. To the extent that the harm is measured by the difference between

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Code § 2777 may be contingent, to some extent, on its view of the substantive analysis of the relevant factors.

[28] Defendant's own irreparable harm arguments depend on the scope of its operations and the burdens of treating its workers as employees. If Defendant is not servicing a significant number of Pros and customers in California, then the disappearance of its service would be no great loss to Pros or customers in California. But, of course, Defendant argues that it provides a vital service. (See Opposition, 37-38.) Indeed, Defendant submits evidence that it has a nationwide operation and that restructuring its operations in California would take months and cost millions of dollars. (DeGracia Decl. ¶¶ 29-32.) Moreover, Defendant has offered evidence that it would reduce the scope of its services if it was required to treat Pros as employees due to the "overhead costs" of employees. (*Id.* at ¶ 31.)

[29] Plaintiff argues that the costs of complying with the law should not be considered. Plaintiff misunderstands the preliminary injunction analysis. First, the Court must consider the possibility that its preliminary assessment of the merits is wrong, such that Defendant is already in compliance with the law and any order issued by the Court will therefore impose costs on Defendant that were not necessary to comply with the law. (See *Uber*, 56 Cal.App.5th at 302, 307.) Second, if the Court is right on the merits, as explained above, there are multiple pathways to compliance. The Proposed Injunction improperly dictated the pathway that Defendant must take to comply with the law – the burdens of imposing restrictions that go beyond those necessary to comply with the law are properly raised. Accordingly, the burden of reclassifying its workforce may be an unnecessary burden, to the extent Defendant could come into legal compliance through alternative means.

[30] The Court has some difficulty transposing the Legislature's intent to the preliminary injunction context. Ultimately, of course, an entity that is operating a business that is not in compliance with the pertinent law would likely be subject to an injunction that foreclosed it from operating in California until it brought itself into compliance, one way or the other. The question here is whether to do so before a final adjudication on the merits, taking into consideration the relevant factors.

treating Pros as employees and treating Pros as independent contractors, while holding everything else constant, the harm is significant.[31] To the extent that the harm is measured by the difference between the world as it would most likely exist during the pendency of this litigation with and without the proposed injunction – i.e., with Defendant operating its business as-is versus with Defendant pausing its operations in California, subject to potentially reopening those operations in a different form down the road – it is unclear whether the most directly impacted parties would be in a better or worse position. To the extent that the harm is measured by the difference between complying with Labor Code § 2777 and the current state of affairs, while holding everything else constant, the record does not divulge significant harm to the Pros or the public beyond the *IT Corp.* presumption.[32] The irreparable harm to Defendant, should the injunction be erroneously issued as proposed, is substantial and direct. However, Defendant has acknowledged that it may be much less burdensome for Defendant to take a period of 120 days to bring itself into compliance with Labor Code § 2777, suggesting that a more appropriately tailored preliminary injunction may be less burdensome. (Opposition, 41.)

Balancing the weighty issues presented by this record and the relevant legal and equitable considerations, the Court finds the best course to be as follows. Defendant is not presently restrained from conducting business in California. The Court will admit supplemental briefing as to whether to

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[31] In *Uber*, the Court of Appeal described the following "real harms" to "real working people" arising from independent contractor misclassification: low pay for long hours, no access to overtime pay, breaks, health insurance or sick leave, and being forced to pay business expenses. (*Uber*, 56 Cal.App.5th at 310.) Defendant points to evidence that the hourly rates, as calculated by dividing the payment for a job by the time window in which the on-site work was to be completed, frequently exceeds Defendant's understanding of the state minimum wage and that most Pros do not book a large volume of work through the app. (See Bradford Decl. ¶¶ 4-8.) But the declaration relies on percentage rates, obscuring the absolute impacts being discussed. Moreover, the declaration concedes that a meaningful percentage of the total hours worked by Pros would be overtime hours, implicating both overtime and break issues, and does not address reimbursement for business expenses. (See *id.* at ¶ 8 [by negative implication, 2-3% of the time spent by Pros on jobs booked using Handy would have been considered overtime, as the declarant understands the term].)

[32] The Court does not on the present record find harm to competition under any framework of conceptualizing the harm. The Court simply lacks sufficient information about the market dynamics. If there are competitors offering a similar service under an employee model, then the Court understands the general logic of Plaintiff's argument that such competitors will be at a disadvantage because they face higher labor costs. If there are presently no competitors at all, then a similar logic may be persuasive. But if Defendant's competitors use the same model as Defendant, then the Court finds it difficult to ascribe weight to the harm such competitors are allegedly experiencing. Moreover, if such facts existed, there may be grounds for concern that a preliminary injunction would do nothing more than cause Defendant to cede market share to competitors who engage in the same practices, impacting Defendant during the pendency of this action without providing any of the sought salutary benefits. Again, the record here is insufficient to fully consider or address these issues.

issue a preliminary injunction that requires Defendant to either comply with Labor Code § 2777 with respect to the Pros at issue or classify the Pros at issue as independent contractors within 120 days of September 22, 2021.[33] The injunction must be crafted in a way that clearly identifies the line of business at issue and the means by which Defendant's compliance will be measured. Plaintiff will provide an amended proposed injunction to Defendant on or before October 1, 2021. The parties will meet and confer regarding the amended proposed injunction on or before October 6, 2021. Plaintiff may further amend its proposal in light of the meet and confer process until October 8, 2021. On October 15, 2021, the parties will submit simultaneous supplemental briefs regarding the propriety of the amended preliminary injunction and the manner in which that preliminary injunction may mitigate and/or cause harm during the pendency of this action. On October 29, 2021, the parties will submit simultaneous reply briefs. A continued hearing is set for November 8, 2021 at 2:00 p.m.

CONCLUSION AND ORDER

The matter is continued for a further hearing.

Plaintiff will provide an amended proposed injunction to Defendant on or before October 1, 2021. The parties will meet and confer regarding the amended proposed injunction on or before October 6,

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[33] At oral argument, Plaintiff argued that the Court should modify the proposed preliminary injunction as necessary and issue it without delay consistent with the Court's findings that Plaintiff is likely to prevail on the merits by showing that the Pros at issue are presently misclassified and that, measuring the harm as the difference between being classified as an employee and being classified as an independent contractor, there is significant harm. First, this line of argument ignores salient points regarding the propriety of the preliminary injunction sought and the balancing of the harms, as set forth above. Indeed, Plaintiff has essentially conceded that the injunction proposed in connection with the motion was improper because it would have prevented Defendant from modifying its conduct in a way that complied with the law. Second, the Court is not persuaded by Plaintiff's attempt to analogize this action to *Uber*. In *Uber*, a decision that was issued before the enactment of Proposition 22 gave the defendants a means of coming into compliance without classifying their workforce as employees or satisfying the ABC test, the trial court issued an injunction on August 10, 2020. (*Uber*, 56 Cal.App.5th at 282.) The trial court stayed its injunction for ten days to allow the defendants to seek appellate relief. (*Ibid.*) The defendants petitioned the Court of Appeal for a writ of supersedeas, which the Court of Appeal granted. (*Ibid.*) The Court of Appeal initially stayed the injunction indefinitely, pursuant to an expedited schedule for resolution of the appeal. (*Id.* at 282 n.15.) After ruling on the appeal, the Court of Appeal left the stay in place for at least a further 60 days from the issuance of remittitur. (*Id.* at 317.) Shortly thereafter, Proposition 22 passed. After remittitur, this Court entered an order granting a joint request to dissolve the preliminary injunction in that action, made on the basis of the defendants' contention that they complied with Proposition 22. Thus, there are three important observations regarding *Uber*. One, the Court of Appeal reversed the trial court's determination with respect to the exigency with which the preliminary injunction was to go into effect. Two, neither the trial court nor the Court of Appeal were presented with the argument, such as the one at issue here, that the defendants could meet the requirements of a specific carve out that rendered the ABC test inapplicable. Third, unlike in the present case, there was no suggestion from defendants as to how an injunction could be tailored to minimize the interim harm. (See *id.* at 314.)

2021. Plaintiff may further amend its proposal in light of the meet and confer process until October 8, 2021. On October 15, 2021, the parties will submit simultaneous supplemental briefs regarding the propriety of the amended preliminary injunction and the manner in which that preliminary injunction may mitigate and/or cause harm during the pendency of this action. On October 29, 2021, the parties will submit simultaneous reply briefs. A continued hearing is set for November 8, 2021 at 2:00 p.m.

IT IS SO ORDERED.

Dated: September 23 2021

Anne-Christine Massullo
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On SEP 23 2021, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: SEP 23 2021

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk