To be Argued by:
DAVID M. COOPER
(Time Requested: 15 Minutes)

APL-2018-00143
NYS Unemployment Insurance Appeal Board Nos. 588563, 588564
Third Department No. 525233

Court of Appeals

of the

State of New York

LUIS A. VEGA,

Respondent,

– against –

POSTMATES, INC.,

Respondent,

– and –

COMMISSIONER OF LABOR,

Appellant.

BRIEF FOR RESPONDENT POSTMATES, INC.

DAVID M. COOPER
ROLLO C. BAKER
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
Attorneys for Respondent
Postmates, Inc.
51 Madison Avenue, 22nd Floor
New York, New York 10010
Tel.: (212) 849-7000
Fax: (212) 849-7100

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), Postmates Inc. declares that it has no parent corporation. Postmates Inc. has four subsidiary companies wholly owned by Postmates: Curated.by Inc., a Delaware corporation, which in turn has one subsidiary, Kuwalu Limited (an English and Welsh corporation); Postmates Ltd. (a Canadian corporation); Postmates Servicios, S. de R.L. de C.V. (a Mexican corporation); and Postmates, S. de R.L. de C.V. (a Mexican corporation).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutory Authorities

Additional Authorities

INTRODUCTION

The Third Department correctly determined that Claimant Luis Vega and similarly situated delivery providers ("Delivery Providers") are independent contractors based on the undisputed facts that Delivery Providers: (1) exercise unfettered discretion to accept or reject any delivery opportunities presented to them by Postmates, (2) enjoy complete freedom to work for competitors, and (3) decide if, when, and how they perform the deliveries they choose to complete. This Court and the Appellate Division have consistently reversed the Unemployment Insurance Appeal Board ("Board") and held claimants to be independent contractors based on *exactly* these same factors. Recently, in *Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y.3d 1013 (2016), this Court held yoga instructors were independent contractors where they made their own schedules and were not on payroll. Here, Postmates gives Delivery Providers all the freedoms this Court found supported independent-contractor status in *Yoga Vida*. In fact, Postmates exerts far *less* control than the business in *Yoga Vida*, which could terminate a working relationship with instructors if they advertised classes with competitors and which limited how and when yoga instructors could offer classes. Given that this case presents the exact same question addressed by this Court in *Yoga Vida,* which held that even greater control than Postmates exercises here did not support employee status, *Yoga Vida* requires affirmance of the Third Department in this case.

The Board, however, ignored *Yoga Vida* entirely. Instead, to support its decision, the Board provided a laundry list of supposed facts that this Court and the Third Department have repeatedly held are irrelevant or, at most, incidental to employment status. Indeed, none of the facts on which the Board relied speak directly to the applicable "control" test for worker classification. As the Third Department correctly found, the undisputed facts establish that Postmates does not control if, when, or how Delivery Providers perform deliveries.

In arguing for this Court to overturn the Third Department decision, the Commissioner repeatedly asks for deference to the Board. But rather than defend the factors relied upon by the Board, the Commissioner advances numerous supposed facts that the Board did not find and rationales that the Board did not adopt. In particular, the Commissioner's argument relies almost entirely on the idea—never mentioned by the Board and unsupported by the record—that Postmates controls the timing of deliveries. However, as a matter of well-established law, an agency decision cannot be affirmed based on reasons the agency never articulated.

In short, based on the undisputed evidence on the record, the Third Department correctly concluded that the Board performed the wrong analysis and erred as a matter of law in reversing the administrative law judge's finding of an independent contractor relationship. Under the correct analysis, this case falls well within the precedents establishing that there is no substantial evidence of control. This Court and the

Appellate Division have repeatedly held that delivery persons can be independent contractors. And if delivery persons are ever independent contractors, they are here, where they can turn down delivery opportunities at will, work for competitors *at the same time* they are using the Postmates app, and complete the deliveries they choose to undertake according to the manner and means they desire. This Court should affirm the Third Department's same conclusion based on well-established law.

In the alternative, regardless of whether there is substantial evidence to support the Board's decision (and there is not), the Board's decision still must be vacated because it is inconsistent with the decision of the New York Workers' Compensation Board. Applying the same law to exactly the same facts at issue here, the Workers' Compensation Board recently found in a 10-1 full board decision that a former Delivery Provider for Postmates was an independent contractor. This unexplained inconsistency between two boards within the Department of Labor is unsupportable as a matter of law.

QUESTIONS PRESENTED

1. Whether the Third Department correctly held that Postmates' Delivery Providers are independent contractors where they have total freedom to choose when they work, whether to work for others, and how to perform any deliveries they choose to undertake.
2. Whether this Court should reject the Commissioner's attempt to uphold the

Board's decision based on reasons and facts not adopted by the Board.

3. Whether, in the alternative, the Board's decision should be vacated where there is no explanation for its inconsistency with the Workers' Compensation Board's finding that Postmates' Delivery Providers are independent contractors.

STATEMENT OF THE CASE

A. The Postmates Platform

Postmates is a company that created and operates a web-based and mobile Platform. *See* A8:2-5; A18:24-A19:13. Unlike online retailers that ship items to customers from remote distribution centers, Postmates facilitates a marketplace of deliveries from local businesses through a network of freelance Delivery Providers. A18:24-A19:13; A20:20-24; A24:2-6. By connecting local customers, local merchants, and local Delivery Providers, the Postmates marketplace makes it possible for customers to search, view, purchase, and (as applicable) request delivery of their desired goods quickly while also supporting local businesses and offering Delivery Providers a convenient way to earn money.

Postmates' customers and Delivery Providers access the online marketplace through the Postmates Platform. A12:13-22. Once a customer makes a delivery request on the Platform, the Platform alerts Delivery Providers who are logged onto the system and are nearby the pickup location for the delivery. A21:18-25. Upon

receiving notification of the available delivery opportunity, Delivery Providers are free to accept, reject, or ignore the proposed delivery at their discretion. A24:2-6; *see* A117 at § 2(d). Postmates engages all of its Delivery Providers as independent contractors, and all Delivery Providers who use the Postmates Platform execute an Independent Contractor Acknowledgement Agreement. *See* A117 at § 2(a).

If a Delivery Provider chooses to accept a delivery request, he or she: (i) receives information on the specifics of the customer's request; (ii) picks up the requested item(s); and (iii) delivers the order to the customer. A17:3-17. The Delivery Provider then marks the order as complete on the Platform and the customer's credit card is charged for the order. A40:12-41:6. That charge includes a delivery fee. A71:21-72:2; A84:8-12.

Postmates does not create work schedules for Delivery Providers, nor does it set minimum or maximum delivery thresholds. A28:10-14; A64:24-65:3; A117 at § 2(d). Postmates does not punish Delivery Providers for rejecting or ignoring any particular delivery requests. A26:3-5; A117 at § 2(d). Moreover, if a Delivery Provider is unable to complete a particular delivery after accepting it, absent fraud or theft, he or she can drop a request and still remain active on the Platform. A48:20-49:8.

Delivery Providers also enjoy substantial autonomy when completing orders. Postmates does not require that Delivery Providers wear a uniform or display the company's logo. A32:4-8; A117 at § 2(g). Postmates also does not require that

Delivery Providers take any specific route or means of transportation to complete deliveries. A30:15-23; A59:23-60:4; A117 at § 2(f). Postmates does not reimburse Delivery Providers for the costs associated with making deliveries. A43:9-11; A117 at § 2(b). While the Platform does provide the customer with an estimated time of arrival for the delivery, Delivery Providers are not required to make the delivery within that timeframe. A46:2-8; A47:11-15. Delivery Providers are also free to offer their services to Postmates' competitors and may even complete deliveries placed through a competing service at the same time they are completing deliveries placed through Postmates. A28:18-24.

Assuming a Delivery Provider passed the background check, they were invited to attend a brief information session on how to operate the Postmates app. A15:17-21; A68:22-69:3.[1] During that information session, Delivery Providers were also given a PEX card (along with information about that card), which they can use to purchase customer orders in situations where a merchant requires on-location payment. A52:7-20; A53:4-13; A53:20-54:11. Even after Delivery Providers begin accepting delivery requests, they are never subjected to direct supervision by anyone at Postmates, nor are they required to file any reports. A64:11-19.

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[1] Shortly after Mr. Vega's time as a Delivery Provider, this informational session was presented to prospective Delivery Providers via a video on the Postmates website. Today, Postmates does not conduct any information sessions, online or offline, for Delivery Providers.

Postmates does not provide Delivery Providers with hourly wages or salaries and does not maintain an ordinary payday for them. A84:22-23; A117 at §§ 2(e), (h). Instead, Postmates pays Delivery Providers a delivery fee for completed orders on a rolling basis. A84:24-25; A117 at § 2(e).

B. Claimant Luis Vega

Mr. Vega used the Platform over the course of one week, during which time he sporadically accepted delivery opportunities during self-selected windows of time on six non-consecutive days. *See* A120. Postmates eventually blocked Mr. Vega from accessing its Platform following customer complaints regarding his failure to deliver requested items in contravention of the terms he accepted in his Independent Contractor Agreement. A109:6-9.

C. The ALJ Decision

On August 28, 2015, following Postmates removing Mr. Vega from its Platform, the New York State Department of Labor notified Postmates of its decision to classify Mr. Vega as an employee of Postmates for purposes of the New York State Unemployment Insurance Law. *See* A118-19. Postmates appealed this decision, and on November 20, 2015, participated in a hearing on the merits at which live witness testimony and documentary evidence was offered. *See* A1-116.

On November 27, 2015, Administrative Law Judge ("ALJ") Wendy Pichardo issued an opinion holding that Mr. Vega was not an employee of Postmates. *See*

A121-A126 (ALJ Opinion). The ALJ found that Postmates did not exercise sufficient supervision, direction, and control over Mr. Vega to make him an employee because he: (i) was free to reject, ignore, or accept deliveries at his discretion; (ii) was free to work for other companies and set his own schedule; (iii) was free to choose his own mode of transportation for making deliveries and was not reimbursed for his out-of-pocket delivery expenses; (iv) was not required to make a minimum or maximum number of deliveries; (v) was not required to report to Postmates or submit any paperwork to the company; and (vi) was not provided with Postmates business cards or decals. *See* A122.

D. The Board Decision

The Department of Labor appealed, and the Board reversed. *See* A127 (Board Decision). The Board's decision held that Postmates was "akin" and "similar" to traditional delivery businesses. *See* A126. The Board did not dispute or set aside the ALJ's key factual findings supporting the ALJ's independent contractor determination. *See id.* Instead, the Board focused on other factors entirely, providing the following list of supposed facts upon which it relied:

> Postmates [1] advertised for and screened on-demand couriers via an online application and criminal background check; [2] it provided and educated the drivers regarding its proprietary software and PEX cards; [3] it controlled the amount of information passed along to its couriers before and after accepting a request; [4] it chose which couriers to offer a request; [5] it kept track of a courier's rate of acceptance; [6] it handled replacement of couriers; [7] it calculated and provided an estimated time of delivery; [8] it procured

> and sent the courier's photo to the consumer; [9] it deposited the requisite amount of money onto the provided PEX card; [10] it established the delivery fee and the courier's non-negotiable rate of pay; [11] it handled collections and paid couriers on a regular basis even if a delivery fee was uncollected; [12] it provided a monetary referral incentive; [13] it retained liability for incorrect or damaged deliveries; and [14] it fielded complaints and monitored consumer satisfaction ratings.

Id. (adding numbering to facts cited).

E. The Third Department Decision

Postmates appealed, and the Third Department reversed. The majority (Egan, Jr., J.P., joined by Devine and Mulvey, JJ.) held that there was no substantial evidence to support the Board's employee determination. The majority explained that Delivery Providers:

- Have "no application and no interview";
- do not "report to any supervisor";
- "unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work";
- are "free to work as much or little as he or she wants";
- "may accept, reject or ignore a delivery request, without penalty";
- "maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors";
- "are free to choose the mode of transportation they wish to use for deliveries";
- "provide and maintain their own transportation";
- "choose the route they wish to take for the delivery";

- "are not required to wear a uniform";
- "are not provided any identification card or logo";
- "are only paid for the deliveries they complete"; and
- "are not reimbursed for any of their delivery-related expenses."

Matter of Vega (Postmates Inc.—Comm'r of Labor), 162 A.D.3d 1337, 1338-39 (3d Dep't 2018). The Third Department further explained that other facts relied upon by the Board do "not constitute substantial evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia of Postmates' control over the means by which these couriers perform their work." *Id.* at 1339 (citing *Yoga Vida*, 28 N.Y.3d at 1016).

Judge Lynch (joined by Clark, J.) dissented, accepting the Board's decision because Postmates "sets the fees, provides financing for the transaction through the PEX cards, as necessary, handles customer complaints, bears liability for defective deliveries and actually tracks the delivery." *Id.* at 1341.

STANDARD OF REVIEW

A decision of the Board should be reversed if it is not supported by substantial evidence. *Matter of Yoga Vida NYC, Inc. (Comm'r of Labor)*, 28 N.Y.3d 1013, 1015 (2016). "Substantial evidence" means "proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached factfinder that, from that proof as a premise, a conclusion or ultimate fact may be extracted

reasonably—probatively and logically." *Id.* (quotation marks omitted).

Contrary to the Commissioner's suggestion (Br. 26-27), this is exactly the test applied by the Third Department here, *see* 162 A.D.3d at 1338-39, in exactly the same manner that this Court has applied it. In particular, the Commissioner ignores the meaning of the substantial-evidence standard in the context of reviewing the employee determination of the Board. In this context, where "the record as a whole does not demonstrate that the employer exercises control over the results produced ... [and] the means used to achieve the results, the Board's determination that the company exercised sufficient direction, supervision and control over the instructors to demonstrate an employment relationship is unsupported by substantial evidence." *Yoga Vida*, 28 N.Y.3d at 1015 (internal citations and quotation marks omitted; brackets in original). "Incidental control over the results produced—without further evidence of control over the means employed to achieve the results—will not constitute substantial evidence of an employer-employee relationship." *Matter of Hertz Corp. (Comm'r of Labor)*, 2 N.Y.3d 733, 735 (2004).

The Commissioner asserts (Br. 27 n.5) that "this Court in *Matter of Haug* [*v. State University of New York at Potsdam*, 32 N.Y.3d 1044, 1046 (2018)] confirmed that *Yoga Vida* had not altered the basic principles of the substantial evidence inquiry." But *Haug* did not even mention *Yoga Vida*, and this framing of the issue mischaracterizes *Yoga Vida*; it did not purport to alter the substantial-evidence

standard, but to show how it applies in the context of the independent-contractor inquiry. Moreover, to the extent the Commissioner suggests that the issue is purely one of fact (Br. 24-25), the question whether there is substantial evidence is a question of law. *See Matter of Barrier Window Sys., Inc. (Comm'r of Labor)*, 149 A.D.3d 1373, 1375 (3d Dep't 2017) ("Whether [the Board's] determination is shored up by substantial evidence is a question of law to be decided by the courts.") (quoting *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 N.Y.2d 176, 181 (1978)). Indeed, if otherwise, there would be no jurisdiction in this case. *See* CPLR § 5601(a) ("An appeal may be taken to the court of appeals as of right . . . where there is a dissent by at least two justices on a *question of law* in favor of the party taking such appeal.") (emphasis added).[2]

[2] The Commissioner also suggests (Br. 61) that close cases should be resolved in favor of employment, but this Court has never applied such a "close case" rule in deciding whether a claimant is an employee. The lone case the Commissioner cites also did not apply such a rule, and in fact did not address the employee/independent-contractor issue at all. *See Matter of Ferrara (Catherwood)*, 10 N.Y.2d 1 (1961).

ARGUMENT

I. THE THIRD DEPARTMENT CORRECTLY HELD THAT THERE IS NO SUBSTANTIAL EVIDENCE TO SHOW THAT POSTMATES CONTROLS THE RESULTS OR MEANS USED BY DELIVERY PROVIDERS

"An employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results. However, control over the means is the more important factor to be considered." *Matter of Empire State Towing and Recovery Ass'n, Inc. (Comm'r of Labor)*, 15 N.Y.3d 433, 437 (2010) (internal citations and quotation marks omitted). Here, there is no substantial evidence of control. Rather, as the Third Department recognized, Delivery Providers enjoy unfettered freedom to choose if, how, and when they work, which makes them independent contractors as a matter of law.

A. Delivery Providers Using Postmates Meet All The Factors Identified By This Court To Support Independent-Contractor Status

"Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Bynog v.*

Cipriani Group, 1 N.Y.3d 193, 198 (2003).[3] All five factors weigh entirely in favor of the Third Department's decision that Delivery Providers are independent contractors.

1. Delivery Providers Work At Their Own Convenience

Delivery Providers unquestionably work at their convenience. They have complete discretion as to whether and when to log in to the Platform. A27:22-28:3; A61:10-13; A65:24-66:8; A83:15-84:4. The contract is unequivocal on this point: "I understand I am permitted to determine my own work schedule …." A117 at § 2(d); *see also* A64:24-65:3; A83:15-84:7. There is no rule concerning how long or how often Delivery Providers must be logged in to the Platform, and Mr. Vega logged in on only six days total. A26:25-27:3; A33:6-8; A120; *see also* A33:13-35:21. Delivery Providers do not require Postmates' knowledge or approval to take "time off" since they are *never* required to sign into the Platform in the first place. A61:5-9; A69:4-6. As the Commissioner concedes (Br. 12), "[c]ouriers log in and out of the Postmates platform at their discretion and are considered available to handle on-demand requests only when logged in." Furthermore, even when they are logged in,

[3] *Bynog* was not an Unemployment Insurance Appeal Board case, but it was deciding whether a person was an employee under the Labor Law, it applied the test of "control," it cited an Unemployment Insurance Appeal Board case, and there has never been any suggestion that the test should be different depending on whether evaluating unemployment insurance or other consequences of independent-contractor status. The same is true for other case law discussed below applying the "control" test outside the Unemployment Insurance Appeal Board context.

Delivery Providers can decline or ignore a proposed delivery opportunity at will. A24:2-6; *see* A117 at § 2(d) ("I understand that I am permitted to … reject or accept any particular job offered on the platform."). The Commissioner recognizes (Br. 13) that couriers can "decide whether to accept, reject, or ignore the request based on the information provided." The Board did not dispute these facts (*see* A125) and did not even attempt to explain why this factor could be disregarded.

2. Delivery Providers Are Free To Work For Others

The undisputed evidence also establishes that Delivery Providers have the unfettered ability to work for other companies, *including Postmates' competitors*. A28:18-24 (unrefuted testimony of Hugo Durand, Postmates' East Coast Regional Manager: "Q. And can he -- could he make deliveries on other platforms? A. He could have, yes. … Q. Meaning he could work for other companies at the same time? A. Yes."). This freedom continues even when the Delivery Provider is in the midst of performing a delivery opportunity obtained on Postmates' Platform. A28:15-24; A29:8-16; A63:16-22; A72:18-73:4; A117 at § 2(c). The Commissioner does not dispute this fact and concedes (Br. 15) that "Postmates allows its couriers to deliver for other companies, including while logged on to the Postmates platform."[4] Likewise,

[4] The Commissioner argues (Br. 15) only that "when couriers deliver an item for Postmates, they are advised not to accept payment from the customer for any services not requested through the Postmates platform." However, the Board did not rely on this point, and it therefore cannot be the basis for affirming the Board's decision. *See*

the Board recognized that Postmates "imposed no restriction to work elsewhere or for competitors," A126, but provided no explanation of why it disregarded this factor in its analysis.

3. Delivery Providers Receive No Fringe Benefits

The undisputed evidence establishes that Delivery Providers do not receive fringe benefits. They are responsible for their own expenses and equipment (A32:2-3; A43:9-11), and receive no benefits of any kind (A51:21-23; A70:5-8; *see also* A26:6-14). Indeed, the Commissioner concedes (Br. 17) that Delivery Providers are not "reimbursed for delivery-related expenses, nor are they provided with fringe benefits, uniforms, telephones, or business cards." The Board noted that there was no expense reimbursement, A126, but again ignored this point in its analysis. Moreover, while the Commissioner asserts (Br. 58) that the lack of fringe benefits shows only Postmates' "economic leverage," the Board made no such finding and the Commissioner's unsupported theory is therefore inapposite. *See infra* at 40-41.

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infra at 40-41. Regardless, this limitation applied only while the delivery was being made and for the particular customer who made the delivery request. This degree of control is negligible by any measure. Similarly, the Commissioner's suggestion (Br. 51) that Delivery Providers do not have time to perform other delivery work while completing a delivery for Postmates was not found by the Board and is entirely unsupported by the record.

4. Delivery Providers Are Not On Postmates' Payroll

Delivery Providers do not receive a salary from Postmates; they are paid based only on the deliveries they choose to undertake. A84:18-85:3. The Independent Contractor Agreement states: "I understand that I will be paid for jobs 7 days after such jobs are completed, and not on any specific, regularly scheduled payday." A117 at § 2(e); *see also id.* at § 2(h) ("I understand that I get compensated per delivery, and not on an hourly or salary basis."). The Commissioner does not dispute this point. The Board also did not mention the lack of salary in its decision.

Instead, the Board relied on the uncited proposition that Postmates "paid couriers on a regular basis even if a delivery fee was uncollected." A126; *see also* 162 A.D.3d at 1340 (dissenting opinion making the same point). However, this statement is true only to the extent it means that Delivery Providers are paid based on the particular delivery after each delivery is completed. A40:9-20; A42:8-43:8; A84:18-85:3. The record is clear and undisputed that Postmates does not pay Delivery Providers a set hourly rate or on scheduled paydays. A84:18-23 ("Q. Now, you indicated about payments that… they're paid after each job with just the ACH delay. Is that correct? A. That is correct. Q. So there are no scheduled paydays? A. There are no scheduled paydays."). The Commissioner does not argue otherwise.

5. Delivery Providers Are Not On A Fixed Schedule

Delivery Providers have the very opposite of a fixed schedule: as discussed *supra* at 4-5, 14-15, they can work at any time, as much or as little as they want. Once again, the Commissioner concedes (Br. 13) the point: "couriers are not subject to a minimum or maximum number of Deliveries." The Board also recognized the entirely flexible schedule and the fact that "Postmates imposed no minimum or maximum number of requests to accept or reject …." A126. But the Board once again ignored this factor in its analysis.

B. Other Relevant Factors Further Establish That Delivery Providers Are Independent Contractors

Two other factors also support the Third Department's conclusion that Delivery Providers are independent contractors.

First, all Delivery Providers execute an Independent Contractor Acknowledgement Agreement specifying that they are independent contractors, not employees. *See* A117 at § 2(a). This factor, while not dispositive, *must* be considered. *Carlson v. Am. Int'l Grp., Inc.*, No. 47, 2017 WL 5557948 (N.Y. Nov. 20, 2017) ("[T]he fact that the cartage agreement labels MVP an 'independent contractor' is not dispositive of the issue of control, but is a factor to be weighed with others.") (internal citation omitted). However, the Board and Commissioner's brief fail to consider this factor at all.

Second, Delivery Providers have complete control over how they perform the deliveries. Workers who exercise sole discretion over how they perform work are independent contractors. *See, e.g.*, *Empire State Towing*, 15 N.Y.3d at 437 (rejecting Board finding of employee status and holding that attorney who "enjoyed autonomy and discretion" was independent contractor); *Matter of Bogart (LaValle Transp., Inc.—Comm'r of Labor)*, 140 A.D.3d 1217, 1219 (3d Dep't 2016) (reversing the Board and holding that delivery drivers were independent contractors where they "were not required to lease their vehicles from LaValle," "there was no dress code," "[n]o one from LaValle supervised the drivers," and drivers "were free to choose whatever routes they desired in transporting loads").

This factor applies fully here. Delivery Providers alone determine what equipment to buy and utilize for the delivery (A31:24-32:3): Mr. Vega used his own phone (A86:2-7) and made his own decision as to whether to go on foot, to pay for a subway or cab ride, or to buy and use a bicycle or vehicle. A43:9-11; A57:24-25; A58:9-15; A117 at §§ 2(b), (c), (g). Moreover, the choice as to what clothing to wear was the Delivery Providers' alone, as Mr. Vega was not required to wear a uniform or identifier. A32:4-8; A60:18-21; A117 at § 2(g). Finally, Delivery Providers use whatever mode of transportation they wish (A30:15-18; A31:16-23; A58:9-15), take whatever route suits them, make any stops they desire (A30:19-23), and take as long as they want (A30:19-21; A47:11-15; A83:4-14). Delivery Providers' exclusive

control over mode, route, stops, and timing—exactly like the delivery workers in *Bogart*—weighs heavily in favor of independent-contractor status. Once again, the Board did not dispute these facts or explain why it chose to disregard their importance.

C. The Lack Of Control For All Of The Factors Discussed Above Makes Delivery Providers Independent Contractors As A Matter Of Law

As discussed above, all of the factors this Court has established as germane to an analysis of independent-contractor status—the five factors in *Bynog* and the two discussed *supra* Part I.B—support the Third Department's determination that Postmates does not exercise any meaningful control over the means or results of the delivery, and that Delivery Providers are therefore independent contractors. The reason is simple: a business does not "control" a person's work if the individual need not accept the company's work assignments at all, can work for competitors, and can determine how to complete the assignments they choose.

1. This Court's Precedents Establish That A Person Is An Independent Contractor Based On The Factors Present Here

This Court has held that the *exact* set of factors discussed above (or even a subset thereof) requires reversal of a Board decision that a worker is an employee. *Yoga Vida* is directly on point. In *Yoga Vida*, this Court reversed the Board and held that non-staff yoga instructors were independent contractors. The bases for this decision were: the instructors "make their own schedules," "the studio does not place

any restrictions on where the non-staff teachers can teach," and they are not on payroll. 28 N.Y.3d at 1015. Delivery Providers enjoy *all* of the same freedoms cited by *Yoga Vida*.[5] Indeed, *Yoga Vida* was a much closer case because, as Justice Fahey noted in dissent, "Yoga Vida determines the class schedule," along with the "length of the class, the type of class taught, [and] the difficulty level," and "although non-staff instructors are free to tell their students about other locations at which they teach, Yoga Vida considers whether a non-staff instructor has advertised for a class directly conflicting with a Yoga Vida class in determining whether to continue its relationship with that instructor." *Id.* at 1017. Here, in contrast, Postmates does not control the schedule or how the task is performed and does not punish Delivery Providers for working with competitors.

Similarly, in *Ted Is Back*, this Court reversed the Board and held that the salespeople were independent contractors where they "worked at their own convenience, were free to hold outside employment[,]," "were not reimbursed for expenses and received no salary or drawing account," and "were paid strictly on a commission basis." 64 N.Y.2d at 726. And in *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429 (1995), this Court held summary judgment was correctly granted that an

[5] The only other factor this Court mentioned in *Yoga Vida* is that the instructors are not "required to attend meetings or receive training," 28 N.Y.3d at 1015, and the same is true here with the sole exception of a one-time information session, which plainly does not constitute control. *See infra* at 31-32.

insurance agent was an independent contractor because she "was responsible for financing her own operating expenses and support staff, was paid by performance rather than a salary, did not have Federal, State or local taxes withheld from her pay, could sell competitors' products and had agreed by contract to operate as an independent contractor." *Id.* at 433-34. Just like *Yoga Vida*, *all* of the factors relied upon in *Ted is Back* and *Scott* are also present here. In short, this Court's precedents establish that the claimant's control over whether, when, how, and for whom he or she performs services requires reversal of a Board decision that the claimant is an employee.

2. The Board's Attempt To Distinguish This Court's Precedents On Grounds Not Mentioned By The Board Is Meritless

The Board and the dissenting opinion ignore *Yoga Vida*, *Ted Is Back*, and *Scott* entirely. The Commissioner attempts (Br. 59-60) to distinguish *Yoga Vida* and *Ted Is Back* because they involved a yoga instructor and a salesperson rather than a delivery person. But this attempt fails for several reasons.

First, this reasoning was *not* adopted by the Board, and therefore cannot be the basis for affirming its decision. *See infra* at 40-41. Indeed, the Commissioner does not cite any Board decision *ever* holding there is a different analysis depending on the nature of the business.

Second, *Yoga Vida* and *Ted Is Back* never suggested the nature of the business as the basis for deciding independent-contractor status. The Commissioner cites no case—from this Court or any other—suggesting that the nature of the work (rather than the control thereof) is relevant to the inquiry. Thus, the Commissioner's suggestion that certain kinds of business are categorically or presumptively excluded from having independent contractors is legally baseless.

The only citation the Commissioner provides (Br. 60) to support its theory is Restatement (Second) of Agency § 220, cmt. i, but the New York courts have never adopted Section 220. And the Restatement test, which expressly considers the "kind of occupation" and the "skill required" in addition to the "extent of control," Restatement (Second) of Agency § 220, is plainly inconsistent with this Court's repeated holdings that the test is solely one of "control."

Third, the Commissioner's theory—by relying on the supposed nature of the business rather than the control it exercises over particular workers—is inconsistent with the test of control. In *Yoga Vida* itself, this Court recognized that staff instructors (who were paid regardless of whether anyone attends a class and cannot work for competitors) were employees and non-staff instructions were not. 28 N.Y.3d at 1015. Likewise, whether a business exercises control over a delivery person depends on the actual control it exercises, not an assumption about the supposed nature of the delivery business.

The Commissioner's attempts to distinguish the businesses is also unavailing. The Commissioner asserts (Br. 60) that "[f]ees and timing … are a much less significant part of the yoga and sales businesses than they are of the delivery business," but there is no factual basis to believe that yoga instructors care any less about how much they are paid and when they work than do Postmates' delivery workers. Similarly, the Commissioner's suggestion (Br. 60) that "Postmates' couriers perform unskilled labor that involves little to no discretion" is factually unsupported, and ignores the freedom in *choosing* assignments and *how* to complete those assignments.

Fourth, this Court has held that workers whose tasks are seemingly just as "unskilled" as delivery persons are independent contractors. For instance, this Court held that banquet waiters are independent contractors where (as here) they "worked at their own discretion" and "worked for other caterers, including … competitors, without restriction." *Bynog*, 1 N.Y.3d at 198-99. Similarly, in *Ferber v. Waco Trucking, Inc.*, 36 N.Y.2d 693, 694 (1975), this Court held that a delivery company "was an independent contractor, and not an employee," where it "provide[d] for a fee, the manpower necessary to unload … trucks upon its arrival in New York City." *Id.* at 694.

Finally, to the extent the nature of the business matters, the crucial consideration here is that Postmates is an on-demand platform, *not* a delivery company. The Third Department has repeatedly reversed the Board and held that on-

demand platforms that simply match people who want to perform a service with those people looking for the service to be performed—where those service providers could choose which assignments to take—do *not* give rise to employment relationships. *See Matter of Walsh (TaskRabbit Inc.—Comm'r of Labor),* 168 A.D.3d 1323, 1324-25 (3d Dep't 2019) (on-demand odd jobs); *Matter of Courto (SCA Enters. Inc.—Comm'r of Labor),* 159 A.D.3d 1240, 1241 (3d Dep't 2018) (on-demand appraisers); *Matter of TMR Security Consultants, Inc. (Comm'r of Labor)*, 145 A.D.3d 1402, 1403-04 (3d Dep't 2016) (on-demand security guards); *Bogart*, 140 A.D.3d at 1219 (on-demand delivery drivers); *Matter of Chan (Confero Consulting Assoc., Inc.–Comm'r of Labor)*, 128 A.D.3d 1124, 1125-26 (3d Dep't 2015) (on-demand "mystery shopper"). This case law recognizes that such platforms function as a matching service, benefitting the people on both sides of the transaction by helping them find each other efficiently, but not *controlling* the provision of services. Once again, the Board ignores these cases, and with the exception of *Bogart*, discussed *infra* at 26-27, so does the Commissioner.

3. The Case Law Specific To Delivery Persons Also Establishes That The Delivery Providers Here Are Independent Contractors

Even if the relevant case law were inexplicably limited to delivery persons, this Court has recognized them as independent contractors where, as here, there was at most incidental control. In *Shapiro v. Robinson*, 102 A.D.2d 822 (2d Dep't 1984), the Appellate Division held that summary judgment should have been granted that a

courier was not an employee where the courier "furnished his own truck, set his own route, was paid by the job, had his own business and worked for Scodek only on specific jobs." *Id.* at 822.[6] This Court affirmed, holding that "[w]e agree with the Appellate Division that there is no tender of evidence sufficient to support the contention that Robinson was an employee of Scodek." *Shapiro v. Robinson*, 63 N.Y.2d 896, 897 (1984).

Furthermore, notwithstanding the Commissioner's erroneous assertion (Br. 59) that only three cases have found delivery persons to be independent contractors, the Appellate Division frequently holds that delivery persons are independent contractors where, as here, they are free to accept or reject assignments, are not paid a salary, and do not have set delivery times. In the unemployment insurance context, there are several such cases. *Bogart*, 140 A.D.3d at 1219-20; *Matter of Werner (CBA Indus.—Hudacs)*, 210 A.D.2d 526, 526-28 (3d Dep't 1994); *Matter of Jennings (Am. Delivery Sol., Inc.—Comm'r of Labor)*, 125 A.D.3d 1152, 1153 (3d Dep't 2015); *Claim of Pavan*, 173 A.D.2d 1036, 1038 (3d Dep't 1991). The Commissioner attempts (Br. 59) to distinguish these cases principally because the drivers could negotiate their pay, but this Court held as a matter of law that fixed fees do not establish control. *See Yoga Vida*, 28 N.Y.3d at 1016 ("[T]hat Yoga Vida generally determines what fee is charged

[6] While this was not an unemployment insurance case, the court applied the same legal standard of "control." 102 A.D.2d at 822.

and collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Mace v. Morrison & Fleming*, 293 N.Y. 844, 844-45 (1944). Indeed, this is a much *stronger* case for independent-contractor status than *Bogart*, where the drivers leased trucks from the business, there were restrictions on use of the trucks, and the claimant was bound by a noncompete agreement. 140 A.D.3d at 1221-22 (Rose, J., dissenting).

Outside the unemployment insurance context, but still applying the same test of "control," numerous cases have likewise held delivery persons independent contractors. *See, e.g.*, *Chaouni v. Ali*, 105 A.D.3d 424 (1st Dep't 2013) (holding Supreme Court should have found on summary judgment that driver was an independent contractor because "[t]he undisputed evidence showed that Dial 7's drivers own their own vehicles, were responsible for the maintenance thereof, paid for the insurance, and had unfettered discretion to determine the days and times they worked … and are even permitted to work for other livery base stations"); *see also Zeng Ji Liu v. Bathily*, 145 A.D.3d 558, 558-59 (1st Dep't 2016); *Alves v. Petik*, 136 A.D.3d 426, 427 (1st Dep't 2016); *Barak v. Chen*, 87 A.D.3d 955, 957-58 (2d Dep't 2011); *Abouzeid v. Grgas*, 295 A.D.2d 376, 377-79 (2d Dep't 2002).

The Commissioner relies (Br. 28-31, 51-56) heavily on a one-paragraph memorandum opinion from this Court in three consolidated cases. *See Matter of Rivera (State Line Delivery Serv.—Roberts)*, 69 N.Y.2d 679 (1986). But this Court's

opinion did not discuss *any* of the facts or *any* of the factors that bore on its decision. Moreover, to the extent that some of the facts can be culled from the decisions below, they demonstrate ample basis for distinguishing the outcome. In the first case, "the employer, at its pleasure, daily dispensed delivery assignments—most of which had time deadlines for completion" and "workers like claimant were responsible for completing bills of lading displaying, not theirs, but the employer's letterhead." *Claim of Rivera*, 120 A.D.2d 852, 854 (3d Dep't 1986) (Yesawich, Jr., J., dissenting), *rev'd*, *Matter of Rivera*, 69 N.Y.2d 679 (1986). In the second case, scheduling choice was strictly limited: "Claimants were *required* to call the Majestic dispatcher to find out what work was available. Claimants could turn down assignments but rarely did so. … They were *required* to check with dispatcher for any additional pickups or deliveries on their route." *Matter of Ross (Roberts)*, 119 A.D.2d 857, 857 (3d Dep't) (Mikoll, J., dissenting), *aff'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986) (emphases added). And in the third case, "[t]he Board concluded that claimant was required to make pickups and deliveries at certain times" and the business "carried workers' compensation coverage on the drivers." *Claim of Fox*, 119 A.D.2d 868, 870 (3d Dep't), *rev'd sub nom. Matter of Rivera*, 69 N.Y.2d 679 (1986). In short, all three

consolidated cases involved couriers who were required to get assignments or complete deliveries in a particular manner.[7]

The Commissioner lists in an addendum and sprinkles throughout the brief Third Department cases to support the idea that a particular fact matters in deciding employee status, while ignoring the other facts that were critical to the results in those cases. The vast majority of the cases concerned delivery persons who were *required* to accept assignments, which is a clear exercise of control not present here.[8] Of the remaining cases, in one, the business would take away the delivery person's leased

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[7] The Commissioner briefly mentions (Br. 29, 33, 41) two other cases from this Court, both of which concerned delivery persons who were—unlike the Delivery Providers here—*required* to make assigned deliveries. *See Matter of Charles A. Field Delivery Service, Inc. (Roberts)*, 66 N.Y.2d 516, 517 (1985); *Matter of Wells (Utica Observer-Disptach & Utica Daily Press, Inc.—Roberts)*, 87 A.D.2d 960, 960 (3d Dep't 1982), *aff'd*, *Matter of Di Martino (Buffalo Courier Express Co., Inc.—Ross)*, 59 N.Y.2d 638 (1983).

[8] *See Matter of Crystal (Medical Delivery Services—Comm'r of Labor)*, 150 A.D.3d 1595, 1597 (3d Dep't 2017); *Matter of Garbowski (Dynamex Operations East, Inc.—Comm'r of Labor)*, 136 A.D.3d 1079, 1080 (3d Dep't 2016); *Matter of Gill (Strategic Delivery Sols. LLC—Comm'r of Labor)*, 134 A.D.3d 1362, 1363-64 (3d Dep't 2015); *Matter of Voisin (Dynamex Operations E., Inc.—Comm'r of Labor)*, 134 A.D.3d 1186, 1187 (3d Dep't 2015); *Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep't 2015); *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015); *Matter of Youngman (RB Humphreys Inc.—Comm'r of Labor)*, 126 A.D.3d 1225, 1226 (3d Dep't 2015); *Matter of McKenna (Can Am Rapid Couier—Sweeney)*, 233 A.D.2d 704, 704-05 (3d Dep't 1996); *Matter of Caballero (Reynolds Transp., Inc.—Hudacs)*, 184 A.D.2d 984, 984 (3d Dep't 1992); *Matter of Gray (Glens Falls Newspapers—Roberts)*, 134 A.D.2d 791, 791 (3d Dep't 1987); *Matter of Webley (Graphic Transmissions, Inc.—Roberts)*, 133 A.D.2d 885, 886 (3d Dep't 1987).

truck if he refused assignments. *See Matter of Wilder (RB Humphreys Inc.—Comm'r of Labor)*, 133 A.D.3d 1073, 1073-74 (3d Dep't 2015). In another, there was a noncompetition requirement. *See Matter of Scott (CR England Inc.—Comm'r of Labor)*, 133 A.D.3d 935, 938-39 (3d Dep't 2015). And in the rest, the business exercised control over the timing of deliveries. *See Matter of Kelly (Frank Gallo, Inc.—Comm'r of Labor)*, 28 A.D.3d 1044, 1044 (3d Dep't 2006) (also noting that the supposed independent contractors were treated exactly the same as the business's acknowledged employees); *Matter of Varrecchia (Wade Rusco, Inc.—Sweeney)*, 234 A.D.2d 826, 826 (3d Dep't 1996); *Matter of CDK Delivery Serv., Inc. (Harnett)*, 151 A.D.2d 932, 932 (3d Dep't 1989); *Matter of Alfisi (BND Messenger Serv.—Harnett)*, 149 A.D.2d 883, 883 (3d Dep't 1989). In short, there is a clear line in the case law—consistent with the plain meaning of control—whereby a delivery person is an employee only if the business requires taking assignments, prevents work for others, or dictates timing. The absence of such control establishes an independent contractor relationship.

D. The Board Erroneously Relied On Factors Irrelevant To The Issue Of Control

Rather than considering the factors and case law discussed above, the Board relied on a laundry list of purported facts, *see supra* at 8-9, that—as the Third Department correctly held—do not constitute substantial evidence of control as a

matter of law. Instead, they concern steps that businesses would take equally for employees or independent contractors.

1. Postmates' Administrative And Safety Practices (Facts 1, 2, And 8)

The first fact cited by the Board—placing ads to attract Delivery Providers to use its Platform—clearly does not constitute control over means or results. *See Werner*, 210 A.D.2d at 528 (holding that whether workers were "solicited through advertising … [is] neutral in its implications"). Similarly, Postmates' performing a criminal background check (fact number 8) is a basic safety measure (A37:2-8) that has nothing to do with whether the worker is an employee. *See, e.g.*, *Yoga Vida*, 28 N.Y.3d at 1013 (licensing requirement showed merely "incidental control" consistent with an independent-contractor relationship); *Zeng Ji Liu*, 145 A.D.3d at 559 ("All Taxi's background check of Bathily" is "indicative of mere incidental or general supervisory control that does not rise to the level of an employer-employee relationship.") (quotation marks omitted). The Commissioner cites no case law to the contrary.

Furthermore, with respect to the second fact cited by the Board—that Postmates offers a one-time information session to Delivery Providers on how to use its technology (and no further training), A26:6-14—initial training or informational sessions are inconsequential to the classification determination. *See, e.g.*, *Hertz Corp.*,

2 N.Y.3d at 735 ("That Hertz gave claimant instruction on what to wear, what products to promote and how to make a presentation does not support the conclusion that claimant was an employee."); *Werner*, 210 A.D.2d at 528 ("The information supplied would have to have been given to an independent contractor in the same measure as to an employee."); *see also, e.g.*, *Matter of Holleran (Jez Enters., Inc.—Comm'r of Labor)*, 98 A.D.3d 757, 758 (3d Dep't 2012); *Simonelli*, 286 A.D.2d at 806. Indeed, this Court has held even "regular company meetings … are not inconsistent with [a person's] status as an independent contractor." *Scott*, 86 N.Y.2d at 434. The sole cases the Commissioner cites (Br. 45) on this issue relied principally on the fact that the delivery persons were *required* to accept delivery assignments, a key indicator of control not present here. *See Matter of Mitchum (Medifleet, Inc.—Comm'r of Labor)*, 133 A.D.3d 1156, 1157 (3d Dep't 2015); *Matter of Watson (Partsfleet Inc.—Comm'r of Labor)*, 127 A.D.3d 1461, 1462 (3d Dep't 2015).

2. The Information And Opportunities Passed On To Delivery Providers (Facts 3 and 4)

The third and fourth facts cited by the Board are that Postmates controls the information and opportunities passed along to Delivery Providers. But the Board provided no explanation as to how these facts have any bearing on the level of Postmates' control over the results produced by Delivery Providers or the means they used to achieve those results. Since Delivery Providers can drop an opportunity even

after accepting it (A69:18-23), the fact that they receive full information about the request only after accepting does not indicate any control by Postmates. And in *Yoga Vida*, the yoga studio hand-picked the finite group of yoga instructors to whom it offered teaching opportunities. 28 N.Y.3d at 1016. The Board cites no case law to the contrary, and instead posits (Br. 35-36, 49) that Postmates did not provide all information so that "couriers could not reject delivery jobs that were undesirable or unprofitable." But the Board made no such finding, and it conflicts with the undisputed fact that Delivery Providers could always choose not to perform a delivery, in which case Postmates simply would choose another Delivery Provider (if one was available).

3. Keeping Track Of Acceptance Rates And Consumer Satisfaction (Facts 5 And 14)

That Postmates "kept track" of the acceptance rates of Delivery Providers and customer satisfaction also has nothing to do with any supposed exercise of control. "The requirement that the work be done properly is a condition just as readily required of an independent contractor as of an employee and not conclusive as to either." *Yoga Vida*, 28 N.Y.3d at 1016 (quotation marks omitted). Accordingly, "that [the business] received feedback about the instructors from the students does not support the Board's conclusion" that they were employees. *Id.*; *see also, e.g.*, *Hertz Corp.*, 2 N.Y.3d at 735 (requirement that work be done properly is a condition equally applicable to

independent contractors and employees). The Commissioner ignores this clear language in *Yoga Vida* and *Hertz*, and the Third Department cases she cites (Br. 41) all concerned situations where the delivery person was required to accept deliveries (among other exercises of control not present here). Absent this key factor, the Third Department has recognized that keeping track of quality does not indicate that the claimant is an employee. *See Werner*, 210 A.D.2d at 528 ("[T]he spot checks made by the distributor as to delivery of the flyers [were] a wise business decision" that did "not support a finding of control over the means to achieve the results" because the distributor "was entitled to know if its deliverers were doing their work."); *Chan*, 128 A.D.3d at 1126 ("The fact that claimant was required to submit a questionnaire to [respondent's] editorial staff upon completing an assignment, which was then reviewed for completeness and scored, amounts to no more than a requirement that the assignment be done properly[.]"). The Commissioner argues (Br. 36-37) that "a reasonable factfinder could infer that Postmates gathered this information for the purpose of penalizing couriers whose rate of acceptance was too low." But the factfinder was the Board, and it found no such fact. The Commissioner's attempt to invent such a fact is therefore improper. *See infra* at 40-41.

4. Replacement of Delivery Providers (Fact 6) And Liability For Incorrect Or Damaged Deliveries (Fact 13)

That Postmates supposedly replaces Delivery Providers is also irrelevant. The record is clear and undisputed that if no Delivery Providers accept a delivery request, the request is unfulfilled. A24:2-14 ("Q. What if no delivery professional takes the request? A. The request at that point is considered lost."); *see also* Comm'r Br. 13. Regardless, this Court has held that providing a replacement is something businesses would do equally for independent contractors as for employees. *Yoga Vida*, 28 N.Y.3d at 1016; *see also TMR*, 145 A.D.3d at 1403. The Commissioner cites (Br. 37, 46) three cases where the ability to delegate was briefly mentioned as *supporting independent-contractor status*, but no case relying on the inability to delegate as a factor (let alone a dispositive factor) in treating a person as an employee. Indeed, there is nothing remotely unusual about a company wanting the independent contractor of its choice to do the job rather than allowing anyone to do it.

Similarly, the Board's statement that Postmates retained liability for incorrect or damaged deliveries (fact 13) is irrelevant. The record establishes that liability is determined on a case-by-case basis. A61:16-24; A74:24-75:5. The Commissioner previously recognized at much. *See* Comm'r Letter Br. 6 (Postmates "assumes liability in at least certain cases"). And there is no legal or logical basis for treating a case-by-case assessment of liability as an exercise of control. The Commissioner now

does an about-face and asserts (Br. 40) that Postmates claimed it was responsible for lost and damaged deliveries. However, the pages of the record she cites state expressly that responsibility is decided on a "case-by-case basis." A61-62. Regardless, the Commissioner fails to explain how Postmates' alleged responsibility for lost or damages deliveries is an exercise of control over the Delivery Provider.

5. Estimated Time Of Delivery (Fact 7)

Postmates' providing an estimated time of delivery, and thereby giving customers an idea as to when a delivery might arrive, is irrelevant in showing that Postmates *controls* the deliveries. The Commissioner cites no case law supporting the relevance of providing a non-binding estimate to customers. Indeed, even far greater control over timing is not indicative of an employment relationship. *See Yoga Vida*, 28 N.Y.3d at 1016 ("The proof of incidental control relied upon by the Board, including that Yoga Vida . . . published the master schedule on its website . . . does not support the conclusion that the instructors are employees.").

6. Postmates' Payment Arrangements (Facts 9, 10, 11, And 12)

That Postmates provides Delivery Providers with prepaid expense cards (PEX cards) is inconsequential. As the Commissioner recognizes (Br. 11), the Delivery Provider had the choice of whether to use the PEX card or pay with his own money and get reimbursed later. And the Commissioner provides no argument as to why the

PEX cards indicate control. An independent contractor, as much as an employee, can be provided with a means to perform the task more efficiently, which is all that PEX cards do. *See Hertz Corp.*, 2 N.Y.3d at 735 (client marketing materials provided to sales representative to assist in promoting client's services were not reflective of control); *Shapiro*, 63 N.Y.2d at 898 ("The fact that Scodek's president … gave Robinson a credit card (which was never used) to enable him to obtain repairs to the tractor trailer cannot serve to create a[n employment] relationship.").

Postmates' determining Delivery Providers' rate of pay also does not support an employment relationship. Since Delivery Providers have complete discretion in determining whether to accept any particular delivery request, they can reject the fee arrangement if they desire. In any event, having the rate of pay determined by the business does not render the provider an employee. *Yoga Vida*, 28 N.Y.3d at 1016 ("[T]hat Yoga Vida generally determines what fee is charged and collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Chan*, 128 A.D.3d at 1126 (holding that worker was independent contractor where "claimant was paid a nonnegotiable fixed fee that was set by [Appellant]"); *Matter of John Lack Assoc., LLC (Comm'r. of Labor)*, 112 A.D.3d 1042, 1043 (3d Dep't 2013) (holding that worker was independent contractor where claimant had no input into pay rate); *Best*, 95 A.D.3d at 1537 (subcontractors held to be independent contractors where contractor would "give [subcontractors] the

particulars of the job, including what the job would pay"). The Board's argument to the contrary (Br. 30) relies on the premise that "[i]f Postmates were truly an online marketplace mediating between customers and delivery professionals, its couriers could set their own fees." But the question is not whether Postmates' model fits within the Commissioner's definition of an online marketplace, but rather whether Postmates exercises control over the results and the means used to achieve them—and payment has nothing to do with either. Indeed, it would be a dramatic and inexplicable change in the law if a business could never choose how much to pay an independent contractor.

As for the Board finding that Postmates "pays couriers on a regular basis," as noted *supra* at 17, this means only that Delivery Providers are paid based on the particular deliveries they choose to undertake. And the Commissioner does not defend this finding as evidence of control.

Similarly, that Postmates "handle[s] collections" is irrelevant because the exact same form of collection took place in *Yoga Vida*. 28 N.Y.3d at 1016 ("[T]hat Yoga Vida … collects the fee directly from the students … does not supply sufficient indicia of control over the instructors."); *see also Zeng Ji Liu v. Bathily*, 145 A.D.3d at 559. And while the Commissioner mentions this finding (Br. 21, 43), she provides no argument or case law to show why it indicates control.

Finally, it is irrelevant to the question of control that there is a $50 monetary referral incentive to encourage other delivery people to engage the Postmates Platform. A85:20-25. The Commissioner does not even attempt to defend the relevance of this finding.

II. THE BOARD'S DECISION CANNOT BE UPHELD BASED ON THE REASONS THE COMMISSIONER PROVIDES NOT MENTIONED BY THE BOARD

A. The Commissioner Errs In Relying Extensively On Facts Not Found By The Board

Rather than rely on the fourteen facts cited by the Board, the Commissioner creates her own list of seven facts (Comm'r Br. 1-2, 27-47) that largely depart from the Board's reasoning. In particular, of the seven facts, only three were relied upon by the Board: Postmates did not reveal all information to Delivery Providers before a request was accepted, handled replacement of couriers if one could be found, and set the fees for Delivery Providers. *See* A126 (Board factors 3, 6, and 10); Comm'r Br. 1-2 (Commissioner factors 3, 4, and 1). The Commissioner does not argue—nor could she—that these three factors alone suffice to treat a claimant as an employee.

The other four factors concern factual findings not made by the Board and not cited as the basis for the Board's decision: that Postmates supposedly "controlled the timing of deliveries" (Commissioner factor 2); "possessed the right to unilaterally terminate couriers for poor performance" (Commissioner factor 5); "handled all

aspects of marketing and customer relations" (Commissioner factor 6); and "bore the risk of loss when customers failed to pay for delivered items" (Commissioner factor 7). And beyond the seven listed factors, the Commissioner also relies upon several other supposed facts not mentioned by the Board: Postmates could modify its delivery platform (Comm'r Br. 28); Postmates constrained Delivery Providers' choice of route and mode of transportation (Comm'r Br. 50); and Delivery Providers reported when they picked up and delivered items (Comm'r Br. 46-47).

Indeed, Postmates' supposed control over timing is the *principal* basis for the Commissioner's argument here, given the Commissioner's repeated reliance on it. In particular, the Commissioner asserts (Br. 29) that "Postmates unilaterally controlled the two most important aspects of any delivery business: cost and speed." The Commissioner likewise asserts (Br. 30) that "as in all three *Rivera* appeals, Postmates unilaterally controlled the other most critical aspect of the delivery process—timing." Thus, the Commissioner's entire argument depends on the proposition—not adopted by the Board—that Postmates controls the timing of deliveries.

However, the Board's decision cannot, as a matter of law, be affirmed on grounds not stated in the Board's opinion. "A fundamental principle of administrative law long accepted by this court limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by

substituting what it deems a more appropriate or proper basis." *Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 (1982). Thus, this Court cannot substitute the Commissioner's new facts and arguments for those adopted by the Board. And the Board's own facts and arguments are—under the well-established case law discussed above—insufficient to constitute substantial evidence of employee status.

Furthermore, the Commissioner's new grounds for decision fail on their own terms.

First, there is no evidence to suggest that Postmates controlled the timing of deliveries. According to the Commissioner (Br. 32-33), because Postmates marketed itself based on fast delivery and provided an estimated time of delivery, it implicitly required fast delivery—or else the Delivery Provider might receive negative customer reviews and he might then be terminated. The problem with this string of hypotheticals is that it comes with no citation to the record. There is simply nothing to suggest that Postmates treats immediate delivery as a requirement, that customers commonly give negative reviews for failing to meet the estimated time, or that Postmates terminates Delivery Providers for this reason. Indeed, the unrefuted evidence establishes that there was no time requirement, and the estimates were non-binding. A66:22-67:2; A82:23-83:14.

Second, the Commissioner errs in relying (Br. 44) on the idea that Postmates had the right to terminate couriers, and in particular for poor performance. As an initial matter, the Commissioner conflates termination with not providing additional delivery opportunities. And it is perfectly consistent with the status of an independent contractor for a company not to continue to utilize them if they do not perform the work. *See Yoga Vida*, 28 N.Y.3d at 1016. The Commissioner cites two cases for the idea that the power to discharge reflects employee status, but one does not mention the power of discharge at all, *Matter of Rivera*, 69 N.Y.2d at 682, and the other mentions it only because it was used as a tool for an extremely detailed level of control over how the work was performed, *In re Electrolux Corp.*, 288 N.Y. 440, 446 (1942). Here, there is no evidence to suggest that the right to take a Delivery Provider off of the Postmates app was used to exercise control over how the work was performed.

Third, there is no evidence that Postmates handled all aspects of marketing and customer relations. To begin with, Delivery Providers obviously engaged with customers when making deliveries. Regardless, whatever Postmates does in marketing and customer relations does not control the work of Delivery Providers, and thus has no bearing on whether they are employees. The Commissioner cites no case to the contrary.

Fourth, the Commissioner's reliance (Br. 42) on the idea that Postmates assumed the risk of non-payment is also misplaced. There is no sense in which

Postmates exercises control over a Delivery Provider or makes him or her more of an employee by paying him or her even where the customer does not pay. The cases the Commissioner cites (Br. 42) are the same ones discussed above, where there was much greater exercise of control, and little (if any) reliance placed on this factor.

Finally, the Commissioner's additional supposed facts (beyond her own seven-factor list and the Board's fourteen-factor list) are likewise unsupported and irrelevant. That Postmates could modify its delivery platform ignores that the freedom for Delivery Providers is established in the Independent Contractor Agreement. Regardless, the Commissioner's theory would essentially abolish independent contractors because any company can change how it conducts business over time, and there is no evidence that Postmates at any time intended to exercise more control over Delivery Providers.[9] Furthermore, there is no evidence that Postmates controlled Delivery Providers' choice of route or mode of transportation. The unrefuted evidence was to the contrary:

> Q. Um, now, how did Mr. Vega figure out how to get there, where to go and what motor transportation to take?
>
> A. That was up to him.

[9] Plaintiff cites (Br. 43) one case mentioning a "right of control," *In re Morton*, 284 N.Y. 167, 172-73 (1940), but *Morton* did not remotely suggest that the mere possibility that a business could change to exercise more control sufficed; rather, it analyzed employee status based on the actual control exercised by the company, *id.* at 173-74.

Q. Um, can he take a longer route if he wanted to drop off a sweater at -- where his child goes to school?

A. Yeah, sure.

Q. Could he stop for lunch?

A. He could have, yes.

A30:15-23; *see also* A59:23-60:1 ("Q. And so are these delivery people limited -- are -- are they given a designated, um, route? A. Nope."). The Independent Contractor Agreement said the same: "I understand that I am permitted to take any route in order to complete a delivery . . . ." A117 at § 2(f). And the ALJ found (in a finding not mentioned by the Board) that "[t]he delivery professionals are free to choose the mode of transportation utilized for deliveries." A122. As to the Commissioner's suggestion that Delivery Providers reported pick-ups and deliveries, this is not an exercise of control over results or means, and would be equally true for an independent contractor as for an employee.

B. The Commissioner Errs In Relying On Policy Arguments Not Addressed By The Board

The Commissioner's policy argument for treating Delivery Providers as independent contractors is improper and erroneous on the merits. To begin with, the Board never addressed such a policy argument or suggested in any way that gig economy workers should be treated differently than any other workers for purposes of

determining whether they are employees. Thus, just like the facts discussed *supra* Part II.A, this argument *cannot* be the basis for affirming the Board's decision and should be wholly rejected for this reason alone.

Furthermore, any policy issue here is a matter for the legislature, not the courts. When the legislature wants to treat certain businesses as categorically or presumptively requiring treatment of their workers as employees, it does so explicitly. *See* Labor Law § 511(1). The legislature has made no such special category for couriers or gig economy workers. Thus, the same legal standard applies here as in the usual case: Delivery Providers are employees if and only if there is control over means or results, and here, there is none (or at most *de minimis*, incidental control).

To the extent policy arguments are relevant here, they strongly support treating Postmates' Delivery Providers as independent contractors. The Commissioner's policy argument rests on a mistaken premise (Br. 67) that Postmates advocates a *per se* rule that gig economy workers are independent contractors. But Postmates has advocated no such thing, and the Third Department's decision holds no such thing. Rather, Postmates has consistently argued and the Third Department held based on the specific facts here that Postmates' Delivery Providers have an extraordinary degree of freedom that makes them independent contractors. Other gig economy workers may not have the same freedom—for instance, if they cannot work for competitors, if they cannot turn down assignments, or if the company controls how they perform the work.

And if there is such control, then they may reasonably be treated as employees. Similarly, there is no bright-line rule for couriers, and certainly there are companies that exercise much greater control over couriers, which makes them employees. The Third Department has had no difficulty in recognizing such cases. *See, e.g.*, *Matter of Jung Yen Tsai (XYZ Two Way Radio Service, Inc.—Comm'r of Labor)*, 166 A.D.3d 1252, 1254 (3d Dep't 2018) (affirming Board finding of employee status where "XYZ established detailed written Daily Guidelines prescribing driver dress code, hygiene, code of conduct, procedure and language to be used in interacting with clients and claimant was subject to monetary fines and dismissal for violating XYZ's rules").

In contrast, the Commissioner effectively advocates for a *per se* rule of employee status for gig economy workers. That is apparent from the policy arguments the Commissioner makes concerning the supposed and unsubstantiated harm to workers from the gig economy. It is also apparent from the fact that if Postmates' Delivery Providers are not independent contractors, despite the freedoms afforded them, then seemingly every gig economy worker is an employee. The Commissioner's only response (Br. 65-66) to its advocacy of a bright-line rule is that it is simply giving discretion to the Board. But as discussed above, that argument is disingenuous given that the Commissioner does not support the reasoning provided by the Board here. It also ignores the need for consistency in administrative judgments, which is plainly absent here. *See infra* at 48-49.

Finally, even if this case were wrongly treated as a referendum on gig economy workers, this Court should recognize that where such workers have the freedom afforded to Postmates' Delivery Providers, they are properly treated as independent contractors. Gig economy workers like Postmates' Delivery Providers benefit from substantial freedom that an employee never has: the freedom to work or not work whenever they wish, to turn down assignments, to work for competitors, and to work without the company dictating how the work is performed. Those benefits are often crucial for individuals that cannot work on a set schedule or that wish to work for more than one company.

While the Commissioner posits that the treatment of gig economy workers is simply a function of companies' economic leverage, the fact is that there is enormous competition among companies in the gig economy, and that competition extends to how workers are treated and paid. The Commissioner relies (Br. 61-62) on a lone article, not in the administrative record or considered by the Board, for the proposition that Postmates' Delivery Providers generally also work for other companies. But the idea that Delivery Providers often work part-time for Postmates, and use it as a supplement to other income, shows that the freedom of this work is crucial to thousands of people—not that this option should be abolished by the Commissioner's order.

III. IN THE ALTERNATIVE, THE BOARD'S DECISION SHOULD BE VACATED GIVEN THE UNEXPLAINED INCONSISTENCY WITH THE DECISION OF THE WORKERS' COMPENSATION BOARD

Even assuming there were substantial evidence to support the Board's decision—and there is not—the Board's decision still must be vacated because it is inconsistent with the decision of the Workers' Compensation Board. The New York Workers' Compensation Board, in a 10-1 full board decision, decided that a former Delivery Provider for Postmates was an independent contractor and not an employee based on the very same facts:

> The claimant was free to turn down delivery jobs, was able to work for other companies, and was not required to sign into Postmates software application. With the exception of the insulated bag, Postmates provided no equipment and did not instruct the claimant on how to complete his delivery jobs. Moreover, the claimant was not directly supervised and not given feedback on his performance from Postmates nor was he restricted from working his full-time job. As such, the preponderance of the evidence in the record supports the finding that the claimant was an independent contractor who controlled his own work and hours rather than an employee of Postmates.

Postmates Inc., N.Y. Work. Comp. Bd. Case No. G191 7469, 2019 WL 496350, at *4 (Jan. 31, 2019); *see also* Comm'r Br. 65 (recognizing that the Workers' Compensation Board reached a conflicting decision "after weighing many of the same factors that were considered here"). Moreover, the Workers' Compensation Board applies the exact same legal test of control applied by the Unemployment Insurance Appeal

Board. *See, e.g.*, *Claim of Campbell (TDA Indus., Inc.—Comm'r of Labor)*, 143 A.D.3d 1026, 1027 (3d Dep't 2016).

The inconsistency between the Unemployment Insurance Appeal Board and Workers' Compensation Board is legally unsupportable. As this Court has explained, "[t]he policy reasons for consistent results, given essentially similar facts, are . . . largely the same whether the proceeding be administrative or judicial—to provide guidance for those governed by the determination made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice." *Matter of Charles A. Field Delivery Service, Inc. (Roberts)*, 66 N.Y.2d 516, 519 (1985) (internal citations omitted). Thus, "in administrative, as in judicial, proceedings 'justice demands that cases with like antecedents should breed like consequences.'" *Id.* This Court accordingly held:

> [W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made.

Id. at 520.

Here, the decisions of the Unemployment Insurance Appeal Board and the Workers' Compensation Board are inconsistent on their face and no explanation was offered for the inconsistency. Indeed, there could be no explanation because the Workers' Compensation Board decision post-dated the Unemployment Insurance Appeal Board decision, and the Workers' Compensation Board had no need to explain any inconsistency because the Third Department had already reversed the Unemployment Insurance Appeal Board. But if the Third Department decision were itself reversed, then there would be a clear and unexplained inconsistency between the two administrative decisions. The proper course, then, would be to vacate and remand to the Board to provide such an explanation.

The Commissioner argues (Br. 64-66) that inconsistent administrative decisions are not a problem. But the Commissioner cites no precedent for this proposition. The Commissioner's theory (Br. 65-66) is that "[t]he possibility of divergent outcomes is part and parcel of an administrative system under which different agencies are authorized to determine a worker's employment status for the purpose of specific statutory protections based on the specific administrative records before them." However, this theory disregards the fact that the Unemployment Insurance Appeal Board and Workers' Compensation Board are part of the *same* agency: the New York

State Department of Labor. And it likewise disregards that both are applying the *same* legal test for employee status under the Labor Law.[10]

Moreover, even if the Commissioner were correct that inconsistency is acceptable, the point remains that *unexplained* inconsistency is not. If unemployment insurance should be provided to workers even where workers' compensation is not, then the Department of Labor should provide an explanation for this discrepancy. That is especially true because seemingly it would be important to provide workers' compensation more broadly given that a worker might need such compensation for an injury even if he has worked only part-time or for a short time and was thus ineligible for unemployment insurance. In short, the Board decision here cannot be affirmed without an explanation for why the same agency applying the same law to the same facts reached the opposite conclusion.[11]

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[10] The Third Department has held that a workers' compensation decision is not binding for purposes of unemployment insurance, *Matter of Simonelli v. Adams Bakery Corp.*, 286 A.D.2d 805, 806 (3d Dep't 2001), but the only precedent it cited in support of this holding concerned whether one agency could bind "another agency," not inconsistency between boards of the same agency. And while *Simonelli* noted that the boards in the Department of Labor function autonomously, *id.* at 806 n.*, that does not suggest that they can also function inconsistently without explanation.

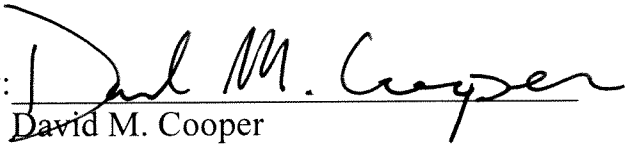
[11] While largely ignoring the decision of the Workers' Compensation Board, the Commissioner relies (Br. 32 n.6, 65) upon a 2016 advice memorandum from the National Labor Relations Board's (NLRB) Office of General Counsel regarding Postmates. However, that memorandum is irrelevant because it was not mentioned by the Board (*see supra* at 40-41) and does not concern New York law, but rather a host of factors that have nothing to do with New York's test of control. *See* Advice Mem.,

CONCLUSION

The decision of the Third Department should be affirmed. In the alternative, and at a minimum, the Board decision should still be vacated with an instruction to address the inconsistency with the decision of the Workers' Compensation Board.

Dates: October 4, 2019

Respectfully submitted,

By: 

David M. Cooper
Rollo C. Baker
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
davidcooper@quinnemanuel.com

Attorneys for Respondent Postmates Inc.

NLRB Case No. 13-CA-163079 (Sept. 19, 2016), at 10, *available at* apps.nlrb.gov/link/document.aspx/09031d45826e0080. In any event, the NLRB case against Postmates was ultimately withdrawn and dismissed with no finding against Postmates. *See* Order Approving Withdrawal Request, Dismissing Complaint, and Withdrawing Notice of Hearing, NLRB Case No. 13-CA-163079 (Dec. 22, 2017).

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(l), David M. Cooper, attorney for Postmates Inc., hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,300 words, which complies with the limitations stated in § 500.13(c)(1).

By: /David M. Cooper/

David M. Cooper
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
davidcooper@quinnemanuel.com

Attorney for Respondent Postmates Inc.