KEKER, VAN NEST & PETERS LLP
RACHAEL E. MENY - # 178514
rmeny@keker.com
R. JAMES SLAUGHTER - # 192813
rslaughter@keker.com
IAN A. KANIG - # 295623
ikanig@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Plaintiff
LYFT, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYFT, INC., a Delaware corporation,

Plaintiff,

v.

WARREN POSTMAN, an individual citizen of Virginia, and KELLER LENKNER LLC, an Illinois limited liability corporation,

Defendants.

Case No. 3:18-cv-06978

PLAINTIFF LYFT, INC.'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

FILED CONCURRENTLY WITH PLAINTIFF'S COMPLAINT

Hearing Date: TBD
Hearing Time: TBD

Date Filed: November 16, 2018

Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, as soon as counsel may be heard at a hearing date and time to be determined once this case is assigned, Plaintiff Lyft, Inc. ("Lyft") will and hereby does move this Court for a preliminary injunction enjoining Defendants Warren Postman ("Postman") and his law firm Keller Lenkner LLC ("Keller Lenkner") (together, "Defendants") from representing any client against Lyft on any claims alleging that Lyft misclassifies drivers on the Lyft Platform (or claims that relate to or depend upon misclassification or alleged employment), and from using or disclosing in any way whatsoever Lyft's privileged and confidential information that Postman acquired from Lyft's in-house legal team while he served as an attorney for the U.S. Chamber of Commerce during common-interest litigation. The injunction should thus preclude Defendants from representing any client in the arbitrations recently filed by Keller Lenkner alleging that Lyft misclassifies drivers on its platform.

Lyft's Motion for a Preliminary Injunction is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, Lyft's Complaint for Declaratory and Injunctive Relief and Damages, the Declarations of Steven Lehotsky, Loni Mahanta, Lucas Muñoz, and R. James Slaughter, filed concurrently herewith, the Proposed Order, the complete files and records in this action, and such other evidence that the Court may allow at the hearing on this Motion for a Preliminary Injunction.

Respectfully submitted,

Dated: November 16, 2018

KEKER, VAN NEST & PETERS LLP

By: /s/ *Rachael E. Meny*
RACHAEL E. MENY
R. JAMES SLAUGHTER
IAN KANIG

Attorneys for Plaintiff
LYFT, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The attorney-client privilege is a bedrock of American law. It is the fundamental safeguard that allows attorneys to communicate confidentially with their clients. In California, the common-interest doctrine enshrines a critical application of the attorney-client privilege. It allows attorneys for one client to collaborate with attorneys for another client in joint-defense groups and in affirmative litigation against a shared adversary. Without the common-interest doctrine, an ally's attorney could promise confidential collaboration, acquire your confidential information and your attorney's core work product, and then sue you using precisely that information. Obviously, that would constitute an unacceptable breach of confidence warranting condemnation. That is precisely what Defendant Warren Postman has done to Lyft here.

From December 2015 until June 2018, Postman—a senior attorney for the Litigation Center of the U.S. Chamber of Commerce (the "Chamber")—worked closely with senior members of Lyft's in-house legal team to address numerous common-interest legal issues, including litigation that the Chamber filed to vindicate the interests of Lyft and several other members of the Chamber against the City of Seattle. A key issue in City of Seattle litigation was the Chamber's and Lyft's position that drivers that use the Lyft Platform are properly classified as independent contractors, not employees.

To protect the confidentiality of their discussions, Lyft and the Chamber entered into a common-interest agreement providing that communications between one another would remain privileged and confidential. Pursuant to that common-interest agreement, Lyft's in-house legal team provided Postman with privileged and confidential information about its non-public business operations, driver-classification practices, driver-misclassification claims, areas of legal risk, and core legal strategies related to driver classification litigation. There is no question that misclassification issues were critical to the City of Seattle litigation. Indeed, Postman's former supervisor at the Chamber, Steven Lehotsky, unambiguously attests:

> [T]he question of whether Lyft drivers were independent contractors or employees was at the center of numerous arguments in the Seattle litigation and formed the

> basis for the Chamber's arguments that the City of Seattle ordinance was improper.

Lehotsky Decl. ¶ 34. Nor is there any question that Lyft shared its core work product with Mr. Postman. Again, Mr. Lehotsky:

> I know that I received confidential information from Lyft. I know that Mr. Postman received confidential information from Lyft. And I know that information provided insight into the company's core legal strategy on independent-contractor classification issues and its business model, and that it would be unfair for a litigation opponent to have it.

Lehotsky Decl. ¶ 45. Lyft's in-house counsel agree. Muñoz Decl. ¶ 9-10; Mahanta Decl. ¶ 5.

In June of 2018, Postman left the Chamber and joined the law firm of Defendant Keller Lenkner, LLC (together, Postman and Keller Lenkner are "Defendants"). Shortly thereafter, Defendants began pursuing misclassification claims against Lyft. On October 26, 2018, Defendants filed numerous arbitration demands against Lyft for California and Massachusetts drivers, alleging that Lyft misclassifies them as independent contractors instead of as employees.

Under basic and fundamental conflict of interest rules, Postman cannot represent a party against Lyft in driver-misclassification cases because he possesses confidential information about Lyft's classification practices and legal theories which Lyft provided him under a common-interest agreement. The fact that Lyft was not his client is of no moment. For decades, California law uniformly has held that where, as here, there is a reasonable expectation of confidentiality and a "substantial relationship" between (1) a matter in which confidential information was disclosed to an attorney by a non-client and (2) a subsequent matter prosecuted by that attorney against the non-client, "access to confidential information is presumed and disqualification of the attorney's representation . . . is mandatory; indeed, the disqualification extends vicariously to the entire firm." *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 69 Cal. App. 4th 223, 238 (1999). Even if the Court were to conclude that the matters were not substantially related, California law requires disqualification where, as here, the evidence shows that the attorney actually possesses confidential information. *Med-Trans Corp., Inc. v. City of California City*, 156

Cal. App. 4th 655, 664 (2007).[1]

For these reasons and those set forth below, Lyft respectfully requests that the Court preliminarily enjoin Defendants from representing any client against Lyft on any claims related to allegations that Lyft misclassifies drivers on the Lyft Platform (or claims that relate to or depend upon misclassification or alleged employment), and from using or disclosing Lyft's privileged and confidential information in any way whatsoever.

This injunction will protect Lyft from Defendants' gross breach of confidence, and will ensure that the arbitrations pursued by drivers against Lyft proceed without the taint of a conflict of interest, which could form a basis for appeal and reversal of any arbitration award.

II. FACTUAL BACKGROUND

A. Until June 2018, Postman was an attorney for the Chamber of Commerce.

Lyft is a member of the United States Chamber of Commerce. Mahanta Decl. ¶ 2; Lehotsky Decl. ¶ 22. The Chamber is a non-profit organization that seeks to benefit the business community in the United States. Lehotsky Decl. ¶ 2. The Litigation Center is an affiliate of the Chamber that functions as its in-house litigation team.[2] *Id.* ¶ 3. The Litigation Center is responsible for filing affirmative litigation and amicus briefs on behalf of the Chamber and its members in cases that implicate the business community, including cases addressing class action, arbitration, and labor and employment law issues. *Id.* ¶¶ 3-4.

Postman worked as an in-house attorney for the Chamber from April 2014 until June 2018. *Id.* ¶¶ 8, 43. Steven Lehotsky, who is a Senior Vice President and Chief Counsel for the Chamber, worked closely with Postman at the Chamber during Postman's entire tenure at the Chamber. *Id.* ¶ 10. Postman and Lehotsky were the two attorneys at the Chamber who were responsible for, and most directly involved in, the City of Seattle litigation. Lehotsky Decl. ¶ 34; Mahanta Decl. ¶ 11. Postman developed a particularly close-knit relationship with Lyft's in-house counsel through these common ventures. According to Lehotsky, "although [Postman] was

[1] *See also Acacia Patent Acquisition, LLC v. Super. Ct.*, 234 Cal. App. 4th 1091, 1098-99 (2015) ("A conflict of interest can . . . arise because of specific obligations, such as the obligation to hold information confidential, that the lawyer has assumed to a nonclient.").

[2] The Chamber of Commerce and the Litigation Center are referred to as "the Chamber."

never an attorney for Lyft, Lyft's counsel trusted and had great confidence in Mr. Postman due to our mutual common interests on independent contractor litigation matters." Lehotsky Decl. ¶ 39. There is no issue or case Postman worked on more during his tenure at the Chamber than the independent contractor issues at the heart of the City of Seattle litigation. *Id.*

B. The Chamber and Lyft entered into a common-interest agreement.

In 2015, the City of Seattle passed an "Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers" (the "Ordinance"). Lehotsky Decl. ¶¶ 11-12; Mahanta Decl. ¶¶ 3, 9-10. The Ordinance, which was enacted as Section 6.310.110 of the Seattle Municipal Code on January 22, 2016, established a collective bargaining scheme for independent contractor, "for-hire" drivers. Lehotsky Decl. ¶ 11.

In late 2015, as it became apparent that the Ordinance was going to become law, the Chamber began preparing to challenge its legality. *Id.*; *see also* Mahanta Decl. ¶¶ 9-10. In December 2015, the Chamber reached out to Lyft, given that the Ordinance would directly affect Lyft's business operations, and began coordinating efforts regarding the litigation. Lehotsky Decl. ¶ 11; Mahanta Decl. ¶ 10. From the outset, the Chamber and Lyft agreed to share privileged and confidential information to further their common legal interests and entered into a common-interest agreement to maintain the privileged and confidential nature of that information. Lehotsky Decl. ¶ 15; Mahanta Decl. ¶ 12.

The common-interest agreement between Lyft and the Chamber required both parties to maintain their communications as privileged and confidential. Lehotsky Decl. ¶ 15; Mahanta Decl. ¶¶ 4-6; Muñoz Decl. ¶ 3. From the beginning and for years after, Postman personally and repeatedly affirmed to Lyft's in-house counsel that their communications with him and other attorneys at the Chamber were protected by this common-interest agreement. Lehotsky Decl. ¶¶ 15-17; Mahanta Decl. ¶¶ 4-6; Muñoz Decl. ¶ 3. Indeed, Postman's communications with Lyft's counsel were often designated by Postman himself as "PRIVILEGED & CONFIDENTIAL," "ATTORNEY-CLIENT PRIVILEGED," "ATTORNEY-WORK PRODUCT," and "COMMON-INTEREST PRIVILEGED." Lehotsky Decl. ¶ 15; Mahanta Decl. ¶ 5; Muñoz Decl. ¶ 4.

Even in the absence of an explicit common-interest agreement with a member, the

Chamber requires its attorneys to accord confidential treatment to non-public information provided by its members. Lehotsky Decl. ¶ 19. Under the terms of the Chamber's confidentiality policy, Chamber lawyers never have permission to disclose or use information contained in confidential communications with a member without its consent. *Id*. Chamber's attorneys are required to certify that will comply with the policy every year, which Postman did. *Id*.

Lyft's in-house legal team would never have shared privileged and confidential information with Postman without his assurance that he would keep Lyft's information confidential. Mahanta Decl. ¶ 28; Muñoz Decl. ¶ 20. Furthermore, neither Lyft nor the Chamber ever gave Postman permission to use or disclose the privileged and confidential information that he learned from Lyft. Mahanta Decl. ¶ 28; Muñoz Decl. ¶ 20; Lehotsky Decl. ¶ 20. Postman's duty to maintain the confidentiality of these common-interest communications, and to refrain from using or disclosing their contents, remains in place to this day. *See* Lehotsky Decl. ¶ 18; Malhanta Decl. ¶ 7; Muñoz Decl. ¶ 7.

C. The classification of drivers was critical to the *City of Seattle* litigation.

1. *City of Seattle I* raised driver classification issues.

On March 3, 2016, the Chamber filed a complaint against the City of Seattle, captioned *Chamber of Commerce v. City of Seattle*, No. 2:16-cv-00322 (W.D. Wash.) ("*City of Seattle I*"). Lehotsky Decl. ¶ 21; Mahanta Decl. ¶ 9; Slaughter Decl. ¶ 6 & Ex. C. The action references Lyft several times and, among other things, sought an injunction preventing the City of Seattle from enforcing the Ordinance, and sought a declaratory judgment that the Ordinance violates and is preempted by the Sherman Antitrust Act and is preempted by the National Labor Relations Act ("NLRA"). Lehotsky Decl. ¶ 21; Slaughter Decl. ¶ 6 & Ex. C. Both Postman and Lehotsky were counsel for the Chamber in this action. Lehotsky Decl. ¶ 21; Slaughter Decl. ¶ 6 & Ex. C.

Several key issues in the Chamber's *City of Seattle I* litigation depended upon the question of whether drivers on the Lyft Platform are properly classified as independent contractors or as employees. For instance:

- The *City of Seattle I* complaint alleged that the NLRA preempted the Ordinance because it subjected drivers classified as independent contractors to collective

bargaining rules, a zone of activity that the NLRA left unregulated by the National Labor Relations Board ("NLRB").[3] Slaughter Decl. ¶ 6 & Ex. C; Lehotsky Decl. ¶ 30; Mahanta Decl. ¶ 15. As this preemption argument would not apply if drivers on the Lyft Platform were employees, Lyft's in-house counsel provided Postman with privileged and confidential information about its driver-classification practices and legal strategy. *Id.*[4]

- The lawsuit also alleged that the NLRA preempted the Ordinance under a related preemption doctrine set forth in *San Diego Building Trades 7 Council v. Garmon*, 359 U.S. 236 (1959). Slaughter Decl. ¶ 6 & Ex. C; Lehotsky Decl. ¶¶ 30-31; Mahanta Decl. ¶ 16. The Chamber argued that the Ordinance improperly required the City of Seattle to determine whether drivers for transportation network companies like Lyft were employees under the NLRA (and thus exempt from the Ordinance) or if they are independent contractors (and thus regulated by the Ordinance), a decision that is assigned to the NLRB's exclusive jurisdiction. *Id.* To support this argument, Lyft's in-house counsel provided Postman with confidential information about NLRB proceedings on such issues and confidential business information about Lyft's classification of drivers on the Lyft Platform as independent contractors. *Id.*
- The Chamber's lawsuit also alleged that the federal antitrust laws preempted the Ordinance because drivers on the Lyft Platform were independent contractors, not employees, and thus were independent economic actors who could not collude to set prices through collective bargaining. Slaughter Decl. ¶ 6 & Ex. C; Lehotsky Decl. ¶ 29; Mahanta Decl. ¶ 17. Because the Ordinance permitted drivers to form a collective organization to collude in negotiating the price of their services vis-à-

[3] This is known as "*Machinists* preemption." *See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) ("*Machinists*").

[4] By filing this motion Lyft does not waive privilege over attorney-client communications and attorney work product. Rather, it brings this motion to protect them.

vis Lyft and the terms and conditions of their services, the Chamber alleged that the Ordinance was unlawful under federal antitrust law. *Id.* If drivers on the Lyft Platform were properly classified as employees, and not as independent contractors, then the Chamber's antitrust claims would not apply to the Ordinance. *Id.* Lyft shared privileged and confidential information with the Chamber to support this argument.

On August 9, 2016, the district court dismissed the *City of Seattle I* lawsuit on standing grounds, including because the court found that the Chamber's represented members (like Lyft) could not show injury-in-fact until putative for-hire driver representatives began the statutory process for collectively bargaining with Chamber's members. Lehotsky Decl. ¶ 21.

2. *City of Seattle II* also raised driver classification issues.

On December 29, 2016, the City of Seattle promulgated regulations to implement the Ordinance and designated January 17, 2017, as the Ordinance's effective date. In February 2017, the International Brotherhood of Teamsters Local 117 became a qualified representative of "for-hire" drivers under the Ordinance and, in March 2017, Teamsters Local 117 gave notice to Lyft that it would seek to represent drivers operating on the Lyft Platform under the Ordinance. In light of this, the Chamber approached Lyft about a second challenge to the Ordinance and Lyft agreed to help.

As the *City of Seattle II* litigation ramped up, Lyft re-confirmed that its communications with the Chamber were privileged and confidential under the common-interest doctrine. Muñoz Decl. ¶ 8. Postman also sent over a proposal marked "PRIVILEGED & CONFIDENTIAL," "COMMON-INTEREST PRIVILEGE," and "ATTORNEY-WORK PRODUCT" that asked Lyft to help finance the City of Seattle litigation, which Lyft agreed to do. *Id.*

On January 19, 2017, Postman met with Lyft's in-house counsel at its headquarters in San Francisco. Muñoz Decl. ¶ 11; Lehotsky Decl. ¶ 23; Mahanta Decl. ¶¶ 22-23. Before the meeting, Postman signed a non-disclosure agreement ("NDA") confirming that the information shared during the meeting was confidential and could not be disclosed. Muñoz Decl. ¶ 11 & Ex. A ¶¶ 1-5. Based on this agreement, and Lyft's ongoing common-interest agreement with the Chamber,

Lyft understood that their communications with Postman during this meeting were privileged and confidential. Mahanta Decl. ¶ 23. During the January 2017 meeting, Postman and Lyft discussed confidential, non-public information about Lyft's business operations and legal strategy, including information related to its classification of drivers and information related to its arbitration provision. Muñoz Decl. ¶ 11.

On March 9, 2017, the Chamber filed its complaint and preliminary injunction motion, along with a supporting declaration from Lyft, in *Chamber of Commerce v. City of Seattle*, No. 2:17-cv-00370 (W.D. Wash.) ("*City of Seattle II*"). Lehotsky Decl. ¶ 34 & Ex. 3; Slaughter Decl. ¶ 7 & Ex. D (declaration of Lyft in support of preliminary injunction motion). The complaint explicitly identified that the Chamber was bringing the action to vindicate the interests of Lyft and several other of its members because drivers on the Lyft Platform would be specifically and immediately impacted by the Ordinance as independent contractors. Lehotsky Decl., Ex. 3 ¶¶ 17, 25, 29, 36, 52-53, 56. Postman was counsel for the Chamber in this lawsuit, *id.* at 30, and was "deeply involved" in preparing the complaint, *id.* ¶ 24.

The *City of Seattle II* complaint sought to cure the standing issue that defeated the *City of Seattle I* action. To do so, the Chamber alleged that the Ordinance would injure Lyft by requiring it to publicly disclose a list of its drivers, even though the list was "confidential, proprietary, trade secret information[.]" *Id.* ¶ 53; Muñoz Decl. ¶ 13; Lehotsky Decl. ¶ 26. The complaint further contended that Lyft had "created an innovative business model that depends on partnering with independent contractors" and that "[t]he Ordinance essentially requires driver coordinators to treat independent contractors as employees—a change so disruptive that it could cause these companies to become unprofitable in Seattle." The Chamber's allegations were the public byproduct of privileged and confidential communications with Lyft regarding its driver list and the impact that the Ordinance (and similar proposed ordinances in California and Massachusetts) would have on Lyft's business operations. Muñoz Decl. ¶ 12.[5]

[5] The *City of Seattle II* complaint also argued, as in *City of Seattle I*, that the Ordinance was subject to preemption under the NLRA and under federal antitrust law, arguments directly involving the question of whether drivers on the Lyft Platform are properly classified as independent contractors. Lehotsky Decl. ¶ 34 & Ex. 3.

On March 21, 2017, the City of Seattle again moved to dismiss the complaint, claiming that the Chamber had failed to show associational standing and that its claims were not ripe. On August 1, 2017, the district court granted the City's motion to dismiss and entered judgment in favor of the City of Seattle shortly thereafter.

On August 8, 2017, the Chamber filed a notice of appeal. Lehotsky Decl. ¶ 42. The Chamber's appeal, which was written by Postman and financed in part by Lyft, addressed the precise factual and legal issues that Defendants now raise in their arbitration demands against Lyft. Lehotsky Decl. ¶ 34 & Ex. 1. Specifically, the Chamber argued that: (1) "Lyft do[es] not transport passengers from one place to another and therefore [is] not transportation services; they instead provide referral services that connect for-hire drivers with passengers, and the drivers then provide the transportation services"; (2) "Seattle's Ordinance not only could force . . . Lyft to abandon [its] Seattle operations but also place at risk the independent-contractor model in a host of business enterprises, including the burgeoning market of platform services that use smartphones to instantly connect buyers and sellers"; and (3) "The drivers who use the . . . Lyft app[] are independent contractors . . . Lyft do[es] not employ these drivers and do not own or operate the drivers' vehicles." *Id.* These claims were the public byproduct of privileged and confidential discussions with Lyft's in-house counsel. Muñoz Decl. ¶ 16; Lehotsky ¶ 42.

In May 2018, the Ninth Circuit reversed the district court's order granting the City of Seattle's motion to dismiss, finding that the Ordinance violated and is preempted by the federal antitrust laws. Lehotsky Decl. ¶ 37. The City of Seattle's Ordinance is permanently enjoined.

D. In 2017 and 2018, Lyft shared privileged and confidential information about *Dynamex* with Postman pursuant to their common-interest agreement.

In addition to the numerous times that Lyft provided Postman with confidential and privileged information about classification issues during the *City of Seattle* litigation as shown above, Lyft also provided Postman with confidential and privileged information about classification issues related to a then-pending California Supreme Court case.

During 2017 and 2018, the California Supreme Court was considering what classification standards should be applied to independent contractors in a case called *Dynamex Operations West*

v. Superior Court. 4 Cal. 5th 903 (2018) ("*Dynamex*"). The Chamber filed an amicus brief in support of the petitioner-business, arguing that the existing test for classifying workers as independent contractors should remain in force and defending the importance of independent contractors in California. Slaughter Decl. ¶ 8 & Ex. E. As part of the Chamber's amicus brief drafting process in *Dynamex*, Lyft's in-house legal team and Postman exchanged privileged and confidential communications about Lyft's classification practices—information that the Chamber (and Postman) gathered to support its amicus briefing process. Mahanta Decl. ¶ 25.

On April 30, 2018, the California Supreme Court issued its opinion in *Dynamex*, changing the standard governing certain employee or independent contractor classification issues in California. *Dynamex*, 4 Cal. 5th at 903. After *Dynamex* issued, Postman had privileged and confidential conversations with Lyft's in-house counsel regarding the *Dynamex* decision's potential impact on Lyft's business operations. Mahanta Decl. ¶ 26-27.

E. In June 2018, Postman left the Chamber, joined Keller Lenkner, and sued Lyft for allegedly misclassifying drivers.

On June 7, 2018, Postman withdrew as counsel for the Chamber in the *City of Seattle II* action. Postman then quit the Chamber and joined Keller Lenkner.

In October 2018, Postman informed outside counsel for Lyft that he intended to serve numerous arbitration demands against Lyft on behalf of certain California and Massachusetts drivers, alleging that Lyft misclassified drivers as independent contractors. Slaughter Decl. ¶ 2. Outside counsel for Lyft responded on October 25, 2018 with a letter to Keller Lenkner that detailed the basis for Lyft's assertion that Defendants had a conflict precluding them from representing clients on misclassification issues against Lyft and demanding that they immediately withdraw from any such representation. *Id.* ¶ 3 & Ex. A. Keller Lenkner responded the next day, October 26, 2018, refusing to withdraw. *Id.* ¶ 3 & Ex. B. On the same day, Defendants filed numerous arbitration demands on behalf of drivers on the Lyft Platform they claim to represent, alleging that Lyft misclassifies drivers in California and Massachusetts as independent contractors. *Id.* ¶ 4.

III. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Court must find "a certain threshold showing is made on each factor." *Leiva–Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). But if Lyft can demonstrate the requisite likelihood of irreparable harm, and show that an injunction is in the public interest, a preliminary injunction may issue so long as there are serious questions going to the merits and the balance of hardships tips sharply in Lyft's favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

IV. ARGUMENT

Lyft more than meets the *Winter* test for a preliminary injunction.

First, there is a strong likelihood that Lyft will succeed on the merits of its injunctive relief claims. Postman has plainly breached the duty of confidence that he owes to Lyft (based on the common-interest agreement between Lyft and the Chamber, the NDA he signed with Lyft, and their shared understanding of trust and confidence that arose during their long common-interest relationship) by filing driver-misclassification claims against Lyft that require him to use Lyft's privileged and confidential information. This unethical conduct is also actionable under the unlawful prong of the California's unfair competition law.

Second, California and Ninth Circuit law uniformly agree that the disclosure of attorney-client privileged communications is a severe and irreparable harm warranting preliminary relief. Postman himself repeatedly promised Lyft that its communications would be kept confidential and were protected by a common-interest agreement. He also agreed in a January 2017 non-disclosure agreement to keep any information he learned in connection with his January 2017 meeting confidential and agreed that his disclosure of any such confidential information would constitute irreparable harm requiring equitable relief.

Third, the balance of the equities weighs heavily in Lyft's favor. Lyft would incur irreparable harm if its confidential information is used against it. Defendants cannot identify any

counter-balancing harm to them. In any case, Defendants' conduct is grossly unethical and deserves condemnation, while Lyft has acted equitably at all times by honoring its duty of confidentiality to the Chamber.

Fourth, the requested preliminary injunction is decidedly in the public interest. California has extraordinarily strong public policies protecting attorney-client relationships, preventing conflicts of interest, and ensuring that common-interest litigation groups can function properly.

At a minimum, under Ninth Circuit law, because Lyft can show a likelihood of irreparable harm, that an injunction is in the public interest, and that the balance of hardships tips sharply in its favor, Lyft need only show that there are "serious questions" going to the merits for the requested preliminary injunction to issue. But there is no real question that Lyft will prevail.

A. Lyft is likely to prevail on the merits of its breach of confidentiality claim.

"California courts specifically recognize the tort of breach of confidence." *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002) (citations omitted). "This tort is based upon the concept of an implied obligation or contract between the parties that confidential information will not be disclosed." *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1226-27 (9th Cir. 1997). "To prevail on a claim for breach of confidence, a plaintiff must demonstrate that: (1) the plaintiff conveyed 'confidential and novel information' to the defendant; (2) the defendant had knowledge that the information was being disclosed in confidence; (3) there was an understanding between the defendant and the plaintiff that the confidence be maintained; and (4) there was a disclosure or use in violation of the understanding." *Berkla*, 302 F.3d at 917.

There is no doubt that Postman breached his duty to not use or disclose the privileged and confidential information that he learned from Lyft pursuant to their mutual understanding that this information was to be maintained in confidence. Unless enjoined, Postman will necessarily and in fact be required by his fiduciary duties to his new clients to use and disclose Lyft's privileged and confidential information against it in the numerous arbitrations that he filed against Lyft. And Keller Lenkner will knowingly and necessarily continue to aid and abet that tortious conduct. Lyft explicitly put Keller Lenkner on notice that it had a conflict, but the firm chose to proceed.

1. Postman received confidential information from Lyft.

Lyft conveyed confidential, privileged information to Postman during the course of their common-interest work. As described above, both *City of Seattle* litigations required an in-depth examination of Lyft's driver-classification practices and legal theories. The Chamber's claims and arguments in the litigations, including about antitrust preemption, *Machinists'* preemption, *Garmon* preemption, and standing, required the Chamber to understand Lyft's driver classification practices and procedures and its business operations. Thus, during nearly two-and-a-half years of common-interest communications, Lyft's in-house counsel gave Postman confidential information related to its core legal strategies and business operations on these issues. Lyft's in-house counsel shared more of the same when the *Dynamex* decision came down from the California Supreme Court. Specifically, according to both Lyft's in-house counsel and the Chamber, Lyft shared with Postman the following:

- Core legal strategy and litigation tactics. Lehotsky Decl. ¶¶ 16, 17, 18, 32, 34, 45; Mahanta Decl. ¶¶ 8 (Lyft shared "privileged legal strategy" on "misclassification and arbitration issues" with Postman "in confidence"), 13 (Lyft also provided the Chamber with non-public information about Lyft's business operations, including non-public information regarding classification.), 14 (regarding associational standing), 15 (regarding *Machinists'* preemption); 16 (regarding *Garmon* preemption); Muñoz Decl. ¶¶ 9 ("I and other Lyft in-house lawyers repeatedly provided Mr. Postman and Mr. Lehotsky with . . . information on potential legal arguments and legal tactics in the litigation, including Lyft's thoughts and legal strategy on potential arguments related to Lyft's business practices and on independent contractor issues."), 12 (same).
- Confidential business operations. Lehotsky Decl. ¶¶ 17 (generally), 26 (regarding injuries to Lyft from the Ordinance to establish associational standing), 37 (same); Mahanta Decl. ¶¶ 3 (generally), 8 (same), 13 (regarding drivers and driver classification), 14 (regarding Lyft's injury from the Ordinance), 15 (regarding *Machinists*' preemption), 16 (regarding *Garmon* preemption), 25 (regarding the impact of *Dynamex* on Lyft's business operations), 27 (same); Muñoz Decl. ¶¶ 3

(generally), 9 (same), 10 (regarding confidential business information and data on drivers), 11 (regarding Lyft's business operations in Seattle and its classification of drivers), 12 (same), 14 (regarding Lyft's "extremely competitively sensitive" driver data), 16 (regarding the confidential business impact on Lyft from laws like the Ordinance), 19 (regarding driver classification and Lyft's arbitration program).

- Potential claims and defenses. Lehotsky Decl. ¶¶ 16, 26, 30; Mahanta Decl. ¶ 14; Muñoz Decl. ¶ 15.

Indeed, according to Mr. Lehotsky, Mr. Postman's supervisor at the Chamber, "there is no single matter on which Mr. Postman spent more time over the relevant two and a half years than the Seattle litigation" and "there is no set of in-house lawyers at a chamber member that he spent more time with than the counsel for the members involved in the Seattle litigation." *Id.* ¶ 39. And, as Mr. Lehotsky attests in no uncertain terms: "I know that ***I received confidential information from Lyft***. I know that ***Mr. Postman received confidential information from Lyft***. And I know ***that information provided insight into the company's core legal strategy on independent-contractor classification issues and its business model, and that it would be unfair for a litigation opponent to have it.***" Lehotsky Decl. ¶ 45 (emphasis added).

Accordingly, it is indisputable that Lyft shared privileged and confidential information with Postman pursuant to their common-interest agreement and understanding of confidentiality.

2. Postman knew that the information Lyft provided was confidential.

Postman knew that the privileged information Lyft shared with him was disclosed to him in confidence. Postman and Lehotsky, on the Chamber's behalf, promised Lyft that all communications between the Chamber and Lyft's in-house counsel were subject to a common-interest agreement before and during the pendency of the *City of Seattle* litigation and would be kept confidential at all times and for all purposes. Lehotsky Decl. ¶ 15 ("Counsel for the Chamber and Lyft mutually agreed to share confidential information pursuant to those common interests [in connection with the City of Seattle litigation] and thus enter into a common-interest agreement."); Mahanta Decl. ¶ 4 ("Mr. Postman and Mr. Lehotsky each repeatedly and expressly assured Lyft that Lyft's communications related to the Chamber's litigation and legal efforts

would be treated as confidential and were privileged and protected, including pursuant to a common interest privilege agreement between Lyft and the Chamber."); Muñoz Decl. ¶ 3 (same). Postman himself recognized that Lyft's information was confidential and privileged when he marked his emails to Lyft. Lehotsky Decl. ¶ 15; Mahanta Decl. ¶ 5; Muñoz Decl. ¶ 4. Separately, the Chamber maintained a uniform policy that required all Chamber employees to keep member information confidential. Postman agreed to the policy in writing annually. Lehotsky Decl. ¶ 19. Indeed, Postman was required to certify annually that he had read, understood, and would comply with the Chamber's confidentiality policy. *Id.* During his visit to Lyft's offices in San Francisco, Postman also signed an NDA pursuant to which he agreed to keep all information he learned in connection with the meeting confidential. Muñoz Decl. ¶ 11 & Ex. A ¶¶ 1-5. There simply can be no dispute that Postman knew that he had a duty to keep the information he learned from Lyft in confidence and not to use or disclose it.

3. Postman knew that Lyft expected him to maintain its privileged information in confidence for all times and for all purposes.

Postman knew that Lyft (as well as the Chamber) expected that the parties would maintain the confidentiality of the information that Lyft's in-house counsel shared. Multiple members of Lyft's in-house legal team repeatedly confirmed with Postman that a common interest privilege existed between Lyft and the Chamber (including Postman) and that Lyft's non-public information would be kept as privileged and confidential, a fact he confirmed. *E.g.*, Mahanta Decl. ¶¶ 6 ("[O]n or about March 15, 2017, I sought, on behalf of Lyft, to confirm that Lyft's in-house counsel's communications with the Chamber's attorneys regarding to common-interest litigation and discussions about legal issues affecting Lyft were privileged and confidential."), 12 (confirmed confidentiality with Postman during *City of Seattle I*), 20 (same for *City of Seattle II*); Muñoz Decl. ¶¶ 7-8 (confirmed confidentiality with Postman during *City of Seattle II*); Lehotsky Decl. ¶ 25 (Postman and Lehotsky confirmed confidentiality to Lyft's in-house counsel). Neither Lyft nor the Chamber have since given Postman permission to use or disclose the privileged and confidential information that he learned from Lyft's in-house counsel. Lehotsky Decl. ¶ 20; Mahanta Decl. ¶ 12; Muñoz Decl. ¶ 7. Accordingly, Postman's duty of confidence thus remains

in place to this day, as he knows. Lehotsky Decl. ¶ 18; Malhanta Decl. ¶ 7; Muñoz Decl. ¶ 7.

4. Postman has and will necessarily in the future use Lyft's confidential information and may have already disclosed this information to others.

Postman has necessarily used and may have already improperly disclosed Lyft's confidential information to his law firm, Keller Lenkner, and those working with them, to file numerous demands for arbitration against Lyft all premised on driver misclassification claims. If Defendants are permitted to proceed, Postman will continue to use Lyft's privileged and confidential information. Indeed, California law presumes that an attorney possessing an actual conflict of interest arising from the acquisition of confidential information from a non-client will use and share that information in a subsequent and substantially-related action against the non-client. *Acacia*, 234 Cal. App. 4th at 1106 ("[I]t is unnecessary for a party seeking disqualification to pinpoint precise privileged documents as the basis for a potential unfair advantage" because "it is not within the power of the [party seeking disqualification] to prove what is in the mind of the attorney.").

For decades, California law has uniformly held that where there is a "substantial relationship" between (1) a matter in which confidential information was disclosed to an attorney by a non-client and (2) a subsequent matter prosecuted by that attorney against the non-client, as here, "access to confidential information is *presumed* and disqualification of the attorney's representation . . . is mandatory; indeed, the disqualification extends vicariously to the entire firm." *Morrison Knudsen*, 69 Cal. App. 4th at 238 (emphasis original); *accord Acacia*, 234 Cal. App. 4th at 1102 ("[D]isqualifying conflicts with nonclients can arise . . . [i]f an attorney is deemed to have a duty of confidentiality to a nonclient arising out of such a past representation."). In other words, if Postman's prior common-interest relationship with Lyft is substantially related to Defendants' current misclassification claims against Lyft, Defendants must be disqualified from representing drivers against Lyft on misclassification issues (or claims relating to or depending upon misclassification or alleged employment), and the Court must presume both that Postman has acquired Lyft's confidential information and will improperly use and share Lyft's confidential information.

Whether matters are substantially related "entails an inquiry into the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases." *Morrison Knudsen*, 69 Cal. App. 4th at 234. Matters are substantially related if the facts support a "rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 713 (2003).[6] "The attorney is conclusively presumed to possess confidential information if the subject matter of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel." *Khani v. Ford Motor Co.*, 215 Cal. App. 4th 916, 920 (2013).

Applying this standard, the City of Seattle litigation, as well as *Dynamex*-related issues discussed in common-interest communications between Lyft and Postman, are substantially related to Postman's current representation of drivers on the Lyft Platform who are asserting misclassification claims against Lyft. In both the *City of Seattle* litigation and here, the same set of actors was involved: Lyft and drivers on the Lyft Platform. *See supra* at 5-9. The same issues are also involved: misclassification claims and Lyft's operations vis-a-vis drivers. *Id.* Each of the Chamber's preemption claims in the Seattle litigations raised the issue of whether drivers operating on the Lyft Platform are properly classified as independent contractors or employees. To establish *Machinists'* preemption under the NLRA, the Chamber needed to show that drivers that were properly classified as independent contractors because the NLRB left unregulated that zone of economic activity. To establish that *Garmon* preemption applied, the Chamber needed to show that the Ordinance improperly required the City of Seattle to determine whether drivers for transportation network companies like Lyft were employees under the NLRA (and who are thus

[6] "Courts have counseled against construing the 'substantial relationship' test too narrowly." *Oliver v. SD-3C, LLC*, Case No. C 11-01260, 2011 WL 13156460, at *2 (N.D. Cal. Aug. 4, 2011) (discussing California law). Courts instead ascribe "a broader definition than the discrete legal and factual issues involved in the compared representations." *Jessen*, 111 Cal. App. 4th at 712.

exempt from the Ordinance), or if they are independent contractors (and thus regulated by whom the Ordinance), an decision that is assigned to the NLRB's exclusive jurisdiction. And to establish federal antitrust preemption, the Chamber needed to show that drivers were independent economic actors, *i.e.*, independent contractors, because collusion through collective bargaining would then constitute an improper restraint on trade. As a factual matter, the Chamber also needed to show that the Ordinance would directly injure Lyft's operations in order to maintain associational standing. All of this required Lyft to detail its driver-classification practices and legal theories to the Chamber. *See supra* at 5-7. Further, in response to the California Supreme Court's request for supplemental briefing in *Dynamex*, the standard Defendants now allege governs their recently filed misclassification claims against Lyft, Lyft's in-house counsel provided Postman with core opinion work-product about *Dynamex*-related issues. Indeed, Mr. Lehotsky has declared that driver classification issues were "central" to the *City of Seattle* litigation. Lehotsky Decl. ¶ 34.

Quite simply, Lyft's driver classification practices and legal theories were "information material to the evaluation, prosecution, settlement or accomplishment of the former representation" and are "also material to the evaluation, prosecution, settlement or accomplishment of" Defendants' current misclassification actions against Lyft. *Jessen*, 111 Cal. App. 4th at 712. At a minimum, the confidential information shared by Lyft with Postman was the type of information that "normally have been imparted to counsel" as part of the parties' common-interest communications. *Khani*, 215 Cal. App. 4th at 920. That is more than sufficient to show that the *City of Seattle* litigation (as well the other matters in which Lyft and Postman shared confidential information for years such as the *Dynamex*-related matters) are substantially related to the misclassification claims Defendants are now pursing. Therefore, "access to confidential information is presumed and disqualification of the attorney's representation . . . is mandatory; indeed, the disqualification extends vicariously to the entire firm." *Morrison Knudsen, 69 Cal. App. 4th at 238; accord Acacia, 234 Cal. App. 4th at 1102.*

Even if Lyft had not proved that Postman's work at the Chamber was substantially related to Defendant's misclassification claims against Lyft, the Court must enjoin and disqualify

Defendants because Lyft has proven that Postman actually received confidential information from Lyft regarding its classification practices and legal theories related to drivers and classification. *See supra* at 5-10. Accordingly, Lyft is likely to prevail on its breach of confidence claim.

B. Lyft is also likely to prevail on the merits of its unfair competition claim.

California's unfair competition law proscribes "any unlawful, unfair, or fraudulent business act or practice. Cal. Bus. & Prof. Code § 17200 ("UCL"). By filing misclassification claims on behalf of drivers operating on the Lyft Platform, despite the breach of confidence that this entails, Defendants have and will violate the UCL's "unlawful" prong.

"The 'unlawful' practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 838–39 (1994). In this way, the unlawful prong "borrows violations of other laws and treats them as unlawful practices independently actionable under section 17200, et seq." *Id.* "This includes common law torts." *FlatWorld Interactives LLC v. Apple Inc.*, No. 12-CV-01956, 2013 WL 6406437, at *8 (N.D. Cal. Dec. 6, 2013). Defendants' use of Lyft's privileged and confidential information violates the unlawful prong in two ways.

First, Postman's tortious breach of confidence, for which Keller Lenkner is also liable, automatically gives rise to liability under the unlawful prong. *FlatWorld Interactives*, 2013 WL 6406437, at *8; *see also Zhang v. Super. Ct.*, 57 Cal. 4th 364, 384 (2013) (holding that common law torts are actionable under the unlawful prong); *CRST Van Expedited, Inc. v. Werner Enters., Inc.* 479 F.3d 1099, 1107 (9th Cir. 2007) (same). Injunctive relief under the UCL is thus proper.

Second, Defendants' decision to prosecute driver-misclassification claims against Lyft despite their conflict of interest constitutes unethical attorney conduct that is separately actionable under the unlawful prong. Section IV.A.4, *supra* (setting forth the basis for Defendants' conflict of interest). An attorney's violation of his ethical obligations is separately actionable under the unlawful prong, even if no private right of action to enforce those ethical obligations otherwise exists in the law. *People ex re. Herrera v. Stender*, 212 Cal. App. 4th 614, 632 (2012) (affirming a preliminary injunction enjoining attorney's ethical violations); *see also Saunders*, 27 Cal. App. 4th at 838-39 ("It is not necessary that the predicate law [underlying an unlawful prong claim]

provide for private civil enforcement."). Attorneys in California have an ethical duty to refuse conflicted representations based on duties owed to third persons. Cal. R. Prof. Conduct 1.7 ("A lawyer shall not . . . represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests."). Further, Rule 1.2.1 provides that "[a] lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is . . . a violation of any law, rule, or ruling of a tribunal." Because Defendants have pursued driver-misclassification claims against Lyft despite their disqualifying conflict of interest, Defendants have violated their ethical duties and the UCL.

Accordingly, Lyft is likely to prevail on its claim under the UCL's unlawful prong.

C. Lyft will suffer irreparable harm.

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The use or disclosure of Lyft's privileged and confidential information will cause it irreparable harm unless enjoined.

In the Ninth Circuit, "extraordinary" relief is warranted to protect the confidentiality of privileged materials "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy[.]" *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th Cir. 1989). Similarly, under California law, the impending "loss of a privilege against disclosure" is a threat which "threatens immediate harm" and "for which there is no other adequate remedy." *Seahaus La Jolla Owners Ass'n v. Super. Ct.*, 224 Cal. App. 4th 754, 766 (2014). The California Supreme Court has held that "extraordinary relief" is warranted to maintain privileged information because "the fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client, and the primary harm in the discovery of privileged material is the disruption of that relationship." *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725, 740-41 (2009).

Lyft's confidential communications with Postman are attorney-client privileged and work-

product protected communications under the common-interest doctrine.[7] Under California law, the common-interest doctrine is not an independent privilege, but protects an attorney's otherwise privileged or protected communications with a third person, so long as the communication would "reasonably necessary to further the interests of both parties in concluding their transaction." *OXY Res. Cal. LLC v. Super. Ct.*, 115 Cal. App. 4th 874, 898-99, *as modified* (Mar. 4, 2004); *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 981 (2009) (the common-interest doctrine shields attorney-work product as well); *see Seahaus*, 224 Cal. App. 4th at 766 (communications between an association's attorneys and non-client members were privileged and protected because the association's members shared common interest with the association). Thus, the materials Lyft shared under a common-interest agreement receive the same protection as traditional attorney client privileged and work product materials.

Lyft established above that there is a presumption that Defendants will use and disclose Lyft's privileged and confidential information against it in the misclassification claims the now assert in their arbitration demands. And because Defendants will necessarily use and disclose Lyft's attorney-client privileged and work-product protected communications in these cases, Lyft will incur irreparable harm as a matter of law. *See Costco*, 47 Cal. 4th at 740-41 (disclosure of information subject to the attorney-client privilege is a disruption of the attorney-client relationship that constitutes irreparable harm). Moreover, Postman agreed in the NDA that he signed with Lyft before his January 2017 that any breach of the agreement that resulted in the disclosure of confidential information that he learned in connection with that meeting would be irreparable and require equitable relief to resolve. Muñoz Decl. ¶ 11 & Ex. A.

Morrison Knudsen is a highly instructive example of how California law requires courts to preliminarily enjoin and disqualify an attorney who has received privileged and confidential information from a non-client from handling a substantially related, subsequent matter. 69 Cal. App. 4th at 228. There, the Contra Costa Water District sued a contractor, Centennial, over a botched road construction project, in which Centennial had used acidic sand that was corroding

[7] This doctrine has been "variously referred to as the 'joint defense' doctrine, the 'common interest' doctrine, and the 'pooled information' doctrine, among other terms." *OXY Resources*, 115 Cal. App. 4th at 888. Common-interest doctrine is now the settled term under California law.

the metal substructures in the roadway. *Id.* at 227-29. The law firm retained to evaluate potential claims for the Water District had previously represented Centennial's parent company, Morrison Knudsen, on various matters, but had never represented Centennial. *Id.* at 227. Hancock had also served as monitoring counsel for Morrison Knudsen's insurer. *Id.* at 228. Upon hearing about Hancock's involvement in the construction dispute, Morrison Knudsen put Hancock on notice of its conflict and, when Hancock refused to withdraw, filed a complaint alleging that Hancock and its attorney were violating their duty of confidentiality to Morrison Knudsen and moved for a preliminary injunction to disqualify them. *Id.* The trial court granted the motion. *Id.* at 229.

The Court of Appeals affirmed the preliminary injunction. First, the court confirmed decades of California law by holding that "an attorney's receipt of confidential information from a nonclient may lead to the attorney's disqualification." *Id.* at 232-33. Second, whether disqualification is proper depends on whether there was a "substantial relationship" between the successive representations. *Id*. at 234. If so, "access to confidential information is presumed and disqualification … is mandatory." *Id*. at 238.

Under that standard, the court found a substantial relationship between the representations and that Morrison Knudsen had provided material and confidential information to Hancock and its attorney in the prior representations. *Id.* at 235-38. Even though there was "no evidence that Hancock was ever involved in the defense of a negligence claim concerning the use of acidic sand," the court found that the confidential information Morrison Knudsen provided to Hancock was material to the Water District dispute. *Id.* at 235. It reasoned that the prior representations had "involved duty of care issues arising from professional services rendered in connection with construction projects[,]" and that was enough because "the facts of cases are never entirely alike, and no cases would ever be 'substantially related' if they could be distinguished on such narrow grounds." *Id.* at 235. What mattered was that "attorneys at Hancock discussed litigation strategy with Morrison's officers and defense counsel, conducted defense research, and participated in settlement discussions and mediations." *Id.* at 235-36. "Hancock had considerable exposure to Morrison's litigation policies and strategies" and had "been privy to . . . the identity of all the key decision makers in the Company, the litigation philosophy of Morrison, the legal and

organizational structure of [Morrison], and the financial impact of pending and existing claims against [Morrison]." *Id.* at 236. The court viewed as especially important the declaration of Morrison Knudsen's associate general counsel, who attested that "I would not have exchanged information or confided with the various [Hancock] attorneys over the past 4 years and discussed with them my approach to handling claims had I believed that any [Hancock] attorney could represent a client in a matter adverse to [Morrison's] interests and position." *Id.* at 237. Based on that record, the court found the substantial relationship test was satisfied, "access to confidential information is *presumed* and disqualification of the attorney's representation ... is mandatory; indeed, the disqualification extends vicariously to the entire firm." *Id.* at 238 (emphasis original).

Lyft's motion is significantly stronger than that in *Morrison Knudsen* because the confidentiality obligation is clearer here and the evidence that the matters are substantially related is more direct. Postman's ***own supervisor*** at the Chamber attests that Postman received confidential information from Lyft that "provided insight into the company's core legal strategy on independent-contractor classification issues and its business model" and "it would be unfair for a litigation opponent to have it." Lehotsky Decl. ¶ 45. That statement is akin to a Hancock attorney siding with Morrison Knudsen in support of its preliminary injunction motion. Indeed, Lehotsky attests that Postman did not work on any issue during that time at the Chamber as much as Postman worked on the *City of Seattle* litigation. *Id.* ¶ 39. For its part, Lyft's in-house legal team has submitted declarations attesting to the same facts as Morrison Knudsen's associate general counsel (and that the California courts found critical), including that each of them "never would have shared any of the information . . . with Mr. Postman without his assurance that he would keep that information in confidence." Mahanta Decl. ¶ 28; Muñoz Decl. ¶ 20.

That is more than sufficient to demonstrate that Lyft is likely to prevail on the merits of its claim, and that a preliminary injunction should enjoin to disqualify Defendants from litigating their arbitration demands against Lyft on behalf of drivers operating on the Lyft Platform.

D. The irreparable harm that Lyft will incur in the absence of a preliminary injunction drastically outweighs any possible hardship to Defendants.

When analyzing the third *Winter* factor, courts "must balance the competing claims of

injury and must consider the effect on each party of the granting or withholding of the requested relief." 555 U.S. at 24. Because Lyft has shown that it will incur irreparable harm from the use and disclosure of its confidential and attorney-client privileged information, Defendants must come forward with a countervailing irreparable injury to show the equities are in their favor.

Defendants cannot make that showing. ***First***, Defendants themselves would suffer no injury whatsoever if the requested preliminary injunction issues, except for any minimal harm brought upon themselves by violating Postman's obligations to Lyft. ***Second***, California law is clear that Defendants' clients would also not suffer irreparable injury if the Court preliminarily disqualifies Defendants from representing them in their claims against Lyft. *Meza*, 176 Cal. App. 4th at 979 (attorney disqualification is not irreparable harm). Moreover, that Defendants' clients are entitled to fair proceedings, not proceedings tainted by their attorneys' conflicts, is yet another reason why the balance of the equities tips exclusively in favor of Lyft.

E. Public policy weighs heavily in favor of the requested preliminary injunction.

Lyft's requested preliminary injunction should also be granted as it will vindicate two important public interests.

First, prohibiting Defendants from using or disclosing the privileged information that Postman acquired from Lyft's in-house counsel would shield Lyft's attorney-client privilege from a catastrophic disruption. The California Supreme Court has made clear that the attorney-client privilege is a fundamental element of the legal system that warrants extraordinary protection from courts. "The privilege has been a hallmark of Anglo–American jurisprudence for almost 400 years." *Costco*, 47 Cal. 4th at 732. "[T]he public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451, 457 (2001). If this policy did not apply with equal force to common-interest litigation, an ally's attorney could walk in the front door of your attorney's office promising confidential assistance, acquire your attorney's core work on your case, and then walk out the door and sue you using precisely that information.

Second, California also has a strictly enforced public interest in preventing attorneys from taking representations that present a conflict of interest. This public policy is set out in both caselaw and the Professional Rules of Conduct, which recognize that courts have an inherent obligation to weed out conflicted representations. Enforcing an attorney's duty of confidentiality, even where that duty is owed to a nonclient, is "[o]ne of the basic duties of an attorney[.]" *Acacia* at 1097. Indeed, Rule 1.7 of the California Rules of Professional Conduct makes clear that avoiding conflicts of interest that are based on duties to third parties benefits not only the third party (here, Lyft), but also the clients of the conflicted attorneys (here, the drivers whom Keller Lenkner represents) ("A lawyer shall not, without informed written consent from each affected client … represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests."). Like Lyft, those persons are entitled to a fair proceeding, and not one tainted by their counsel's conflict.

There is no countervailing public policy that weighs in Defendants' favor. Their actions violate the most fundamental duties that attorneys are required to perform in their occupation.

V. CONCLUSION

For the foregoing reasons, Lyft respectfully requests that the Court enjoin Defendants from representing any client against Lyft on any claims that Lyft misclassifies drivers on the Lyft Platform (or claims that relate to or depend upon misclassification), and from using or disclosing in any way whatsoever Lyft's privileged and confidential information that Postman acquired from Lyft's in-house legal team while he served as an attorney at the Chamber.

Dated: November 16, 2018

KEKER, VAN NEST & PETERS LLP

By: /s/ *Rachael E. Meny*
RACHAEL E. MENY
R. JAMES SLAUGHTER
IAN KANIG

Attorneys for Plaintiff
LYFT, INC.