16-2750 (L)

(consolidated with 16-2752)

United States Court of Appeals
for the Second Circuit

SPENCER MEYER, Individually and on behalf of this similarly situated,

Plaintiff-Counter Defendant-Appellee,

v.

TRAVIS KALANICK,

Defendant-Appellant,

UBER TECHNOLOGIES, INC.,

Defendant-Counter Claimant-Appellant,

ERGO,

Third-Party Defendant.

On Appeal From The United States District Court
For The Southern District Of New York, No. 15-cv-09796

APPELLANTS' APPENDIX VOLUME 1 of 2

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U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:15-cv-09796-JSR

Meyer v. Kalanick
Assigned to: Judge Jed S. Rakoff
Cause: 15:1 Antitrust Litigation (Monopolizing Trade)

Date Filed: 12/16/2015
Jury Demand: Both
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

Plaintiff

Spencer Meyer
Individually and on behalf of those similarly situated

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ThirdParty Defendant

Ergo

Counter Claimant

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V.

Counter Defendant

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Date Filed	#	Docket Text
12/16/2015	1	COMPLAINT against Travis Kalanick. (Filing Fee $ 400.00, Receipt Number 0208-11742572)Document filed by Spencer Meyer.(Schmidt, Andrew) (Entered: 12/16/2015)
12/16/2015	2	CIVIL COVER SHEET filed. (Schmidt, Andrew) (Entered: 12/16/2015)
12/16/2015	3	MOTION for Andrew Arthur Schmidt to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-11742720. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Spencer Meyer. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Text of Proposed Order)(Schmidt, Andrew) (Entered: 12/16/2015)
12/16/2015		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 3 MOTION for Andrew Arthur Schmidt to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-11742720. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb)** (Entered: 12/16/2015)
12/16/2015	4	REQUEST FOR ISSUANCE OF SUMMONS as to Travis Kalanick, re: 1 Complaint. Document filed by Spencer Meyer. (Schmidt, Andrew) (Entered: 12/16/2015)
12/17/2015		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Jed S. Rakoff. Please download and review the Individual Practices of the assigned District Judge, located at http://nysd.uscourts.gov/judges/District. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at http://nysd.uscourts.gov/ecf_filing.php. (dgo) (Entered: 12/17/2015)
12/17/2015		Magistrate Judge James L. Cott is so designated. (dgo) (Entered: 12/17/2015)
12/17/2015		Case Designated ECF. (dgo) (Entered: 12/17/2015)
12/17/2015	5	ELECTRONIC SUMMONS ISSUED as to Travis Kalanick. (dgo) (Entered: 12/17/2015)
12/18/2015	6	ORDER FOR ADMISSION PRO HAC VICE granting 3 Motion for Andrew Schmidt to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 12/17/2015) (spo) (Entered: 12/18/2015)

12/18/2015	7	NOTICE OF COURT CONFERENCE: Initial Conference set for 1/6/2016 at 11:00 AM in Courtroom 14B, 500 Pearl Street, New York, NY 10007 before Judge Jed S. Rakoff. (Signed by Judge Jed S. Rakoff on 12/18/2015) (spo) (Entered: 12/18/2015)
12/23/2015		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 12/23/2015. (Kotowski, Linda) (Entered: 01/08/2016)
01/04/2016	8	NOTICE OF APPEARANCE by Brian Marc Feldman on behalf of Spencer Meyer. (Feldman, Brian) (Entered: 01/04/2016)
01/04/2016	9	NOTICE OF APPEARANCE by Jeffrey A. Wadsworth on behalf of Spencer Meyer. (Wadsworth, Jeffrey) (Entered: 01/04/2016)
01/05/2016	10	NOTICE OF CHANGE OF ADDRESS by Brian Marc Feldman on behalf of Spencer Meyer. New Address: Harter Secrest & Emery LLP, 1600 Bausch & Lomb Place, Rochester, New York, USA 14604, (585) 232-6500. (Feldman, Brian) (Entered: 01/05/2016)
01/05/2016	11	NOTICE OF APPEARANCE by Peter M. Skinner on behalf of Travis Kalanick. (Skinner, Peter) (Entered: 01/05/2016)
01/05/2016	12	MOTION for Karen L. Dunn to Appear Pro Hac Vice . Filing fee $ 200.00. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Travis Kalanick. (Attachments: # 1 Appendix 1 - Proposed Order, # 2 Appendix 2 - Certificate of Good Standing (DC), # 3 Appendix 3 - Certificate of Good Standing (NY))(Skinner, Peter) Modified on 1/6/2016 (sdi). Modified on 1/7/2016 (sdi). (Entered: 01/05/2016)
01/05/2016	13	MOTION for William A. Isaacson to Appear Pro Hac Vice . Filing fee $ 200.00. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Travis Kalanick. (Attachments: # 1 Appendix 1 - Proposed Order, # 2 Appendix 2 - Certificate of Good Standing)(Skinner, Peter) Modified on 1/6/2016 (sdi). Modified on 1/7/2016 (sdi). (Entered: 01/05/2016)
01/05/2016	14	NOTICE OF APPEARANCE by Edwin Michael Larkin, III on behalf of Spencer Meyer. (Larkin, Edwin) (Entered: 01/05/2016)
01/06/2016		**>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice re: Document No. 12 MOTION for Karen L. Dunn to Appear Pro Hac Vice . Filing fee $ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff., 13 MOTION for William A. Isaacson to Appear Pro Hac Vice . Filing fee $ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff... The filing is deficient for the following reason(s): the filing fee was not paid;.. Pay the filing fee using the event Pro Hac Vice Fee Payment found under the event list Other Documents. (sdi)** (Entered: 01/06/2016)
01/06/2016		Pro Hac Vice Fee Payment: for 12 MOTION for Karen L. Dunn to Appear Pro Hac Vice . Filing fee $ 200.00. **Motion and supporting papers to be reviewed by Clerk's Office staff.**. Filing fee $ 200.00, receipt number 0208-11805902.(Skinner, Peter) (Entered: 01/06/2016)
01/06/2016		Pro Hac Vice Fee Payment: for 13 MOTION for William A. Isaacson to Appear Pro Hac Vice . Filing fee $ 200.00. **Motion and supporting papers to be reviewed by Clerk's Office staff.**. Filing fee $ 200.00, receipt number 0208-11805971.(Skinner, Peter) (Entered: 01/06/2016)
01/06/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Initial Pretrial Conference held on 1/6/2016. (Kotowski, Linda) (Entered: 02/08/2016)

01/07/2016		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 13 MOTION for William A. Isaacson to Appear Pro Hac Vice . Filing fee $ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff., 12 MOTION for Karen L. Dunn to Appear Pro Hac Vice . Filing fee $ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (sdi)** (Entered: 01/07/2016)
01/07/2016	15	CASE MANAGEMENT PLAN: The case is to be tried by a jury. 1. Documents: First request for production of documents, if any, must be served by 2/17/2016. Further document requests may be served as required, but no document request may be served later than 30 days prior to the date of the close of discovery as set forth in item 6 below. Responses due on March 1, 2016. 2. Interrogatories pursuant to Rule 33.3(a) of 33.3(a) of the Local Civil Rules of the Southern District of New York must be served by 2/17/2016. No other interrogatories need be served with respect to disclosures automatically required by Fed. R. Civ. P. 26(a). Responses due on March 1, 2016. Moving papers due: 1-15-2016. Answering papers due: 1-29-2016. Reply papers: 2-4-2016. Argument: 2-10-2016 4:00 pm. (As further set forth in this Order.) (Amended Pleadings due by 5/2/2016. Joinder of Parties due by 5/2/2016. Motions due by 6/8/2016. Responses due by 6/22/2016 Replies due by 6/29/2016. Deposition due by 6/1/2016. Discovery due by 6/1/2016. Oral Argument set for 2/10/2016 at 04:00 PM before Judge Jed S. Rakoff. Final Pretrial Conference set for 7/6/2016 at 04:00 PM before Judge Jed S. Rakoff.) (Signed by Judge Jed S. Rakoff on 1/6/2016) (cdo) (Entered: 01/07/2016)
01/07/2016		Set/Reset Deadlines: Ready for Trial by 7/6/2016. (cdo) (Entered: 01/14/2016)
01/08/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 1/8/2016. (Kotowski, Linda) (Entered: 01/12/2016)
01/11/2016	16	ORDER FOR ADMISSION PRO HAC VICE granting 13 Motion for William A. Isaacson to Appear Pro Hac Vice. (As further set forth in this Order.) (Signed by Judge Jed S. Rakoff on 1/5/2016) (adc) (Entered: 01/11/2016)
01/11/2016	17	ORDER FOR ADMISSION PRO HAC VICE granting 12 Motion for Karen L. Dunn to Appear Pro Hac Vice. (As further set forth in this Order.) (Signed by Judge Jed S. Rakoff on 1/5/2016) (adc) (Entered: 01/11/2016)
01/11/2016	18	NOTICE OF APPEARANCE by Ryan Young Park on behalf of Travis Kalanick. (Park, Ryan) (Entered: 01/11/2016)
01/15/2016	19	TRANSCRIPT of Proceedings re: CONFERENCE held on 1/6/2016 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Vincent Bologna, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/8/2016. Redacted Transcript Deadline set for 2/19/2016. Release of Transcript Restriction set for 4/18/2016.(McGuirk, Kelly) (Entered: 01/15/2016)
01/15/2016	20	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a CONFERENCE proceeding held on 1/6/16 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 01/15/2016)
01/15/2016	21	NOTICE OF APPEARANCE by Karen L. Dunn on behalf of Travis Kalanick. (Dunn, Karen) (Entered: 01/15/2016)

/15/2016	22	MOTION to Dismiss . Document filed by Travis Kalanick. Responses due by 1/29/2016 Return Date set for 2/10/2016 at 10:00 AM.(Dunn, Karen) (Entered: 01/15/2016)
01/15/2016	23	MEMORANDUM OF LAW in Support re: 22 MOTION to Dismiss . . Document filed by Travis Kalanick. (Dunn, Karen) (Entered: 01/15/2016)
01/15/2016	24	DECLARATION of Michael Colman in Support re: 22 MOTION to Dismiss .. Document filed by Travis Kalanick. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2)(Dunn, Karen) (Entered: 01/15/2016)
01/19/2016	25	NOTICE OF APPEARANCE by William A. Isaacson on behalf of Travis Kalanick. (Isaacson, William) (Entered: 01/19/2016)
01/19/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 1/19/2016. (Kotowski, Linda) (Entered: 01/20/2016)
01/28/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 1/28/2016. (Kotowski, Linda) (Entered: 02/01/2016)
01/29/2016	26	FIRST AMENDED COMPLAINT amending 1 Complaint against Travis Kalanick with JURY DEMAND.Document filed by Spencer Meyer. Related document: 1 Complaint filed by Spencer Meyer.(Schmidt, Andrew) (Entered: 01/29/2016)
02/08/2016	27	MOTION to Dismiss *The First Amended Complaint*. Document filed by Travis Kalanick. Responses due by 2/18/2016 Return Date set for 3/7/2016 at 05:30 PM.(Park, Ryan) (Entered: 02/08/2016)
02/08/2016	28	MEMORANDUM OF LAW in Support re: 27 MOTION to Dismiss *The First Amended Complaint*. . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 02/08/2016)
02/08/2016	29	DECLARATION of Michael Colman in Support re: 27 MOTION to Dismiss *The First Amended Complaint*.. Document filed by Travis Kalanick. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Park, Ryan) (Entered: 02/08/2016)
02/08/2016	30	DECLARATION of Ryan Y. Park in Support re: 27 MOTION to Dismiss *The First Amended Complaint*.. Document filed by Travis Kalanick. (Attachments: # 1 Exhibit 1) (Park, Ryan) (Entered: 02/08/2016)
02/12/2016	31	NOTICE OF CHANGE OF ADDRESS by Peter M. Skinner on behalf of Travis Kalanick. New Address: Boies, Schiller & Flexner LLP, 575 Lexington Avenue, New York, New York, 10022, (212)446-2300. (Skinner, Peter) (Entered: 02/12/2016)
02/18/2016	32	DECLARATION of Brian M. Feldman in Opposition re: 27 MOTION to Dismiss *The First Amended Complaint*.. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Feldman, Brian) (Entered: 02/18/2016)
02/18/2016	33	MEMORANDUM OF LAW in Opposition re: 27 MOTION to Dismiss *The First Amended Complaint*. . Document filed by Spencer Meyer. (Schmidt, Andrew) (Entered: 02/18/2016)
02/22/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 2/22/2016. (Kotowski, Linda) (Entered: 02/29/2016)
02/25/2016	34	REPLY MEMORANDUM OF LAW in Support re: 27 MOTION to Dismiss *The First Amended Complaint*. . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 02/25/2016)
03/09/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 3/9/2016 re: 27 MOTION to Dismiss *The First Amended Complaint*. filed by Travis

		Kalanick. (Kotowski, Linda) (Entered: 03/10/2016)
03/23/2016	35	TRANSCRIPT of Proceedings re: argument held on 3/9/16 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Khristine Sellin, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/18/2016. Redacted Transcript Deadline set for 4/28/2016. Release of Transcript Restriction set for 6/24/2016.(McGuirk, Kelly) (Entered: 03/23/2016)
03/23/2016	36	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a argument proceeding held on 3/9/16 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 03/23/2016)
03/31/2016	37	OPINION AND ORDER #106358 re: 22 MOTION to Dismiss, filed by Travis Kalanick, 27 MOTION to Dismiss *The First Amended Complaint*, filed by Travis Kalanick. The Court denies defendant Kalanick's motion to dismiss. Concomitantly, the Court lifts the stay of discovery previously imposed pending the Court's decision on this motion. Counsel are directed to submit to the Court, by no later than April 7, 2016, a case management plan in the Court's Form D that will have this case ready for trial by November 1, 2016. The Clerk of Court is directed to close docket entries 22 and 27. (As further set forth in this Order.) (Signed by Judge Jed S. Rakoff on 3/31/2016) (Entered: 03/31/2016)
04/08/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 4/8/2016. (Kotowski, Linda) (Entered: 04/13/2016)
04/11/2016	38	NOTICE OF APPEARANCE by Alanna Cyreeta Rutherford on behalf of Travis Kalanick. (Rutherford, Alanna) (Entered: 04/11/2016)
04/11/2016	39	CIVIL CASE MANAGEMENT PLAN: Ready for Trial by 11/1/2016. The case may be tried to a jury. Joinder of Parties due by 7/12/2016. Depositions due by 9/21/2016. Discovery due by 9/21/2016. Final Pretrial Conference set for 11/9/2016 at 04:00 PM before Judge Jed S. Rakoff. (Signed by Judge Jed S. Rakoff on 4/8/2016) (spo) (Entered: 04/11/2016)
04/11/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 4/11/2016. (Kotowski, Linda) (Entered: 04/13/2016)
04/11/2016		Set/Reset Hearings: Oral Argument set for 11/9/2016 at 04:00 PM before Judge Jed S. Rakoff. (spo) (Entered: 05/20/2016)
04/14/2016	40	MOTION for Reconsideration re; 37 Memorandum & Opinion,, . Document filed by Travis Kalanick.(Park, Ryan) (Entered: 04/14/2016)
04/14/2016	41	MEMORANDUM OF LAW in Support re: 40 MOTION for Reconsideration re; 37 Memorandum & Opinion,, . . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 04/14/2016)
04/14/2016	42	ANSWER to 26 Amended Complaint. Document filed by Travis Kalanick.(Park, Ryan) (Entered: 04/14/2016)
04/21/2016	43	MEMORANDUM OF LAW in Opposition re: 40 MOTION for Reconsideration re; 37 Memorandum & Opinion,, . . Document filed by Spencer Meyer. (Feldman, Brian) (Entered: 04/21/2016)

/09/2016	44	OPINION AND ORDER #106454: For all these reasons, the Court denies defendant Kalanick's motion for partial reconsideration. The Clerk of Court is directed to close docket entry 40. (As further set forth in this Order.) (Signed by Judge Jed S. Rakoff on 5/7/2016) (cf) Modified on 5/12/2016 (ca). (Entered: 05/09/2016)
05/09/2016	45	LETTER addressed to Judge Jed S. Rakoff from Alanna Rutherford dated 4/25/2016 re: attached Reply Brief from Philliben for the Court's review. Document filed by Travis Kalanick.(cf) (Entered: 05/09/2016)
05/19/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 5/19/2016. (Kotowski, Linda) (Entered: 05/20/2016)
05/20/2016	46	MOTION for Joinder *of Uber Technologies, Inc.*. Document filed by Travis Kalanick. (Park, Ryan) (Entered: 05/20/2016)
05/20/2016	47	MEMORANDUM OF LAW in Support re: 46 MOTION for Joinder *of Uber Technologies, Inc.*. . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 05/20/2016)
05/20/2016	48	DECLARATION of Alanna C. Rutherford in Support re: 46 MOTION for Joinder *of Uber Technologies, Inc.*.. Document filed by Travis Kalanick. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Park, Ryan) (Entered: 05/20/2016)
05/20/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Discovery Hearing held on 5/20/2016. (Kotowski, Linda) (Entered: 06/10/2016)
05/23/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 5/23/2016. (Kotowski, Linda) (Entered: 06/10/2016)
05/24/2016	49	NOTICE OF APPEARANCE by John Christopher Briody on behalf of Spencer Meyer. (Briody, John) (Entered: 05/24/2016)
05/24/2016	50	NOTICE OF APPEARANCE by James Hartmann Smith on behalf of Spencer Meyer. (Smith, James) (Entered: 05/24/2016)
05/24/2016	51	NOTICE OF APPEARANCE by Joanna Christine Wright on behalf of Travis Kalanick. (Wright, Joanna) (Entered: 05/24/2016)
05/24/2016	52	**FILING ERROR - WRONG EVENT TYPE SELECTED FROM MENU -** MOTION for Leave to Appear Counsel for Uber Technologies, Inc. . Document filed by Uber Technologies, Inc..(Brodsky, Reed) Modified on 5/25/2016 (db). (Entered: 05/24/2016)
05/24/2016	53	MOTION for Theodore J. Boutrous, Jr. to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340851. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Uber Technologies, Inc..(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	54	MOTION for Daniel G. Swanson to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340858. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Uber Technologies, Inc..(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	55	MOTION for Cynthia E. Richman to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340862. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Uber Technologies, Inc..(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	56	MOTION for Joshua S. Lipshutz to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340866. **Motion and supporting papers to be reviewed by Clerk's**

		Office staff. Document filed by Uber Technologies, Inc..(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	57	MOTION for Nicola T. Hanna to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340869. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Uber Technologies, Inc..(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	58	MOTION to Intervene . Document filed by Uber Technologies, Inc.. Return Date set for 6/16/2016 at 05:00 PM.(Brodsky, Reed) (Entered: 05/24/2016)
05/24/2016	59	MEMORANDUM OF LAW in Support re: 58 MOTION to Intervene . . Document filed by Uber Technologies, Inc.. (Attachments: # 1 Exhibit Proposed Intervenor Uber Technologies, Inc.'s Notice of Motion and Motion to Compel Arbitration, # 2 Exhibit Proposed Intervenor Uber Technologies, Inc.'s Memorandum of Law in Support of Motion to Compel Arbitration, # 3 Exhibit Declaration of Vincent Mi in Support of Proposed Intervenor Uber Technologies, Inc.'s Motion to Compel Arbitration, # 4 Exhibit Exhibit A to Declaration of Vincent Mi)(Brodsky, Reed) (Entered: 05/24/2016)
05/25/2016		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 55 MOTION for Cynthia E. Richman to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340862. Motion and supporting papers to be reviewed by Clerk's Office staff., 53 MOTION for Theodore J. Boutrous, Jr. to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340851. Motion and supporting papers to be reviewed by Clerk's Office staff., 57 MOTION for Nicola T. Hanna to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340869. Motion and supporting papers to be reviewed by Clerk's Office staff., 54 MOTION for Daniel G. Swanson to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340858. Motion and supporting papers to be reviewed by Clerk's Office staff., 56 MOTION for Joshua S. Lipshutz to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12340866. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (sdi)** (Entered: 05/25/2016)
05/25/2016		***NOTICE TO ATTORNEY TO RE-FILE DOCUMENT - EVENT TYPE ERROR. Notice to Attorney Reed Michael Brodsky to RE-FILE Document 52 MOTION for Leave to Appear Counsel for Uber Technologies, Inc. . Use the event type Notice of Appearance found under the event list Notices. (db)** (Entered: 05/25/2016)
05/25/2016	60	NOTICE OF APPEARANCE by Reed Michael Brodsky on behalf of Uber Technologies, Inc.. (Brodsky, Reed) (Entered: 05/25/2016)
05/26/2016	61	NOTICE OF APPEARANCE by Matthew L. Cantor on behalf of Spencer Meyer. (Cantor, Matthew) (Entered: 05/26/2016)
05/26/2016	62	NOTICE OF APPEARANCE by David Alan Scupp on behalf of Spencer Meyer. (Scupp, David) (Entered: 05/26/2016)
05/26/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 5/26/2016. (Kotowski, Linda) (Entered: 06/10/2016)
05/27/2016	63	ORDER: Pursuant to the Court's directions at an in-court hearing held earlier today (May 27, 2016), the Court hereby narrows the scope of document subpoenas served by plaintiff on Uber Technologies, Inc. and Global Precision Research, LLC D/B/A Ergo, as indicated on the marked-up copies of those subpoenas,which will be docketed along with this Order. In addition, the Court narrows the time frame of these document requests to

		December 2015 through May 18, 2016.SO ORDERED. (Signed by Judge Jed S. Rakoff on 5/27/2016) (ama) (Entered: 05/27/2016)
05/27/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 5/27/2016. (Kotowski, Linda) (Entered: 06/10/2016)
05/27/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Discovery Hearing held on 5/27/2016. (Kotowski, Linda) (Entered: 06/10/2016)
05/31/2016	64	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE granting 53 Motion for Theodore J. Boutrous, Jr. to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 5/27/2016) (tn) (Entered: 05/31/2016)
05/31/2016	65	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE granting 54 Motion for Daniel G. Swanson to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 5/27/2016) (tn) (Entered: 05/31/2016)
06/01/2016	66	MOTION for Ellen Meriwether to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12364928. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Spencer Meyer. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order)(Meriwether, Ellen) (Entered: 06/01/2016)
06/01/2016	67	MOTION for Bryan L. Clobes to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12365013. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Spencer Meyer. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order)(Clobes, Bryan) (Entered: 06/01/2016)
06/01/2016		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 66 MOTION for Ellen Meriwether to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12364928. Motion and supporting papers to be reviewed by Clerk's Office staff., 67 MOTION for Bryan L. Clobes to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12365013. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb)** (Entered: 06/01/2016)
06/02/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/2/2016. (Kotowski, Linda) (Entered: 07/08/2016)
06/03/2016	68	TRANSCRIPT of Proceedings re: CONFERENCE held on 5/20/2016 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Sonya Ketter Huggins, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/27/2016. Redacted Transcript Deadline set for 7/8/2016. Release of Transcript Restriction set for 9/5/2016. (McGuirk, Kelly) (Entered: 06/03/2016)
06/03/2016	69	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a conference proceeding held on 5/20/16 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 06/03/2016)
06/03/2016	70	TRANSCRIPT of Proceedings re: conference held on 5/27/2016 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Michael McDaniel, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/27/2016. Redacted

		Transcript Deadline set for 7/8/2016. Release of Transcript Restriction set for 9/5/2016. (McGuirk, Kelly) (Entered: 06/03/2016)
06/03/2016	71	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a conference proceeding held on 5/27/16 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 06/03/2016)
06/06/2016	72	MOTION for Lewis Titus LeClair to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12381842. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Spencer Meyer. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Text of Proposed Order Proposed order)(LeClair, Lewis) (Entered: 06/06/2016)
06/06/2016		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 72 MOTION for Lewis Titus LeClair to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12381842. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (bcu)** (Entered: 06/06/2016)
06/06/2016	73	ORDER FOR ADMISSION PRO HAC VICE OF BRYAN L. CLOBES, ESQUIRE granting 67 Motion for Bryan L. Clobes to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/05/2016) (ama) (Entered: 06/06/2016)
06/06/2016	74	ORDER FOR ADMISSION PRO HAC VICE OF ELLEN MERIWETHER, ESQ.: granting 66 Motion for Ellen Meriwether to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/05/2016) (ama) (Entered: 06/06/2016)
06/06/2016	75	MEMORANDUM OF LAW in Opposition re: 46 MOTION for Joinder *of Uber Technologies, Inc.*., 58 MOTION to Intervene . *Plaintiff's Memorandum of Law In Opposition*. Document filed by Spencer Meyer. (Cantor, Matthew) (Entered: 06/06/2016)
06/07/2016	76	MEMORANDUM ORDER: For all these reasons, the Court confirms its denial of Uber's motion for reconsideration of the Court's order requiring Uber to produce documents for in camera review. (As further set forth in this Order) (Signed by Judge Jed S. Rakoff on 6/7/2016) (lmb) (Entered: 06/07/2016)
06/07/2016	77	LETTER addressed to Judge Jed S. Rakoff from Daniel G. Swanson dated 6/2/2016 re: Uber Technologies, Inc. respectfully requests that this Court reconsider its prior decision and require an evidentiary showing prior to invoking in camera review of Uber's documents. Document filed by Uber Technologies, Inc.(lmb) (Entered: 06/07/2016)
06/07/2016	78	LETTER addressed to Judge Jed S. Rakoff from Jeffrey A. Wadsworth dated 6/3/2016 re: We submit this letter in response to non-party Uber Technologies, Inc.'s ("Uber") request for reconsideration of the Court's Order concerning Ergo-related discovery that was issued in connection with hearings held on May 27, 2016 (the "May 27 Order"). Document filed by Spencer Meyer.(lmb) (Entered: 06/07/2016)
06/07/2016	79	LETTER addressed to Judge Jed S. Rakoff from Alanna C. Rutherford dated 5/20/2016 re: Per the Court's request, below please find the names of the people at Uber Technologies, Inc. who initiated an investigation concerning the plaintiff in this case at the request of Salle Yoo, Esq., General Counsel of Uber Technologies, Inc. Document filed by Travis Kalanick.(lmb) (Entered: 06/07/2016)
06/07/2016	80	MOTION to Compel Arbitration . Document filed by Travis Kalanick. Return Date set for 7/7/2016 at 04:00 PM.(Park, Ryan) (Entered: 06/07/2016)

/07/2016	81	MEMORANDUM OF LAW in Support re: 80 MOTION to Compel Arbitration . . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 06/07/2016)
06/07/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/7/2016. (Kotowski, Linda) (Entered: 06/08/2016)
06/09/2016	82	ORDER: In light of the forthcoming depositions relating to these matters, the Court has carefully reviewed in camera each and all of the submitted materials and, as a consequence of that review, makes the following rulings: (1) All claims of privilege and work-product protection as to materials submitted by Ergo are denied, and Ergo must produce to plaintiff's counsel by 5 p.m. on June 9, 2016 all of the materials that Ergo submitted for the Court's in camera review. (2) Uber's claims of privilege and work-product protection are affirmed as to certain materials and denied as to others. Specifically, Uber must produce to plaintiff's counsel by 5 p.m. (3) Plaintiff's application to take the deposition of Uber's General Counsel Salle Yoo regarding the Ergo matter is denied. A Memorandum setting forth the reasons for the Court's three rulings will issue in due course. SO ORDERED. (Signed by Judge Jed S. Rakoff on 6/08/2016) (ama) (Entered: 06/09/2016)
06/09/2016	83	ORDER FOR ADMISSION PRO HAC VICE granting 72 Motion for Lewis Titus LeClair to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/08/2016) (ama) (Entered: 06/09/2016)
06/09/2016	84	REPLY MEMORANDUM OF LAW in Support re: 58 MOTION to Intervene . . Document filed by Uber Technologies, Inc.. (Brodsky, Reed) (Entered: 06/09/2016)
06/09/2016	85	REPLY MEMORANDUM OF LAW in Support re: 46 MOTION for Joinder *of Uber Technologies, Inc.*. . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 06/09/2016)
06/13/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/13/2016. (Kotowski, Linda) (Entered: 07/01/2016)
06/14/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/14/2016. (Kotowski, Linda) (Entered: 06/15/2016)
06/15/2016	86	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE: granting 55 Motion for Cynthia E. Richman to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/14/2016) (ama) (Entered: 06/15/2016)
06/15/2016	87	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE: granting 56 Motion for Joshua S. Lipshutz to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/14/2016) (ama) (Entered: 06/15/2016)
06/15/2016	88	ORDER GRANTING MOTION FOR ADMISSION PRO HAC VICE granting 57 Motion for Nicola T. Hanna to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 6/14/2016) (ama) (Entered: 06/15/2016)
06/16/2016	89	PROTECTIVE ORDER...regarding procedures to be followed that shall govern the handling of confidential material... (Signed by Judge Jed S. Rakoff on 6/16/2016) (mro) (Entered: 06/17/2016)
06/16/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 6/16/2016 re: 46 MOTION for Joinder *of Uber Technologies, Inc.*. filed by Travis Kalanick, 58 MOTION to Intervene . filed by Uber Technologies, Inc.. (Kotowski, Linda) (Entered: 06/17/2016)
06/20/2016	90	MEMORANDUM ORDER granting 46 Motion for Joinder; denying as moot 58 Motion to Intervene. For all these reasons, the Court hereby grants defendant Kalanick's motion

		to join Uber pursuant to Fed. R. Civ. P. 19(a). The parties are directed to phone Chambers on Monday, June 20, 2016 to discuss scheduling for the motions to compel arbitration filed by defendant Kalanick and Uber. The Clerk of Court is directed to close docket entries 46 and 58, and to add Uber Technologies, Inc. as a defendant in this case. SO ORDERED. (Signed by Judge Jed S. Rakoff on 6/19/2016) (ama) (Entered: 06/20/2016)
06/20/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/20/2016. (Kotowski, Linda) (Entered: 06/23/2016)
06/21/2016	91	MOTION to Compel Arbitration . Document filed by Uber Technologies, Inc.. Return Date set for 7/14/2016 at 04:00 PM.(Brodsky, Reed) (Entered: 06/21/2016)
06/21/2016	92	MEMORANDUM OF LAW in Support re: 91 MOTION to Compel Arbitration . . Document filed by Uber Technologies, Inc.. (Attachments: # 1 Affidavit Declaration of Vincent Mi in Support of Uber Technologies, Inc.'s Motion to Compel Arbitration, # 2 Exhibit Exhibit A to Declaration of Vincent Mi)(Brodsky, Reed) (Entered: 06/21/2016)
06/22/2016	93	ORDER: In light of the approaching conclusion of the discovery permitted in connection with this inquiry, the Court invites plaintiff to indicate what relief, if any, plaintiff now seeks. Plaintiff's brief on the subject, not to exceed 15 double-spaced pages (not including any attachments from documents or deposition transcripts), is to be filed by June 29, 2016. Defendants' joint opposition, not to exceed 20 double-spaced pages (plus, again, any attachments) must be filed by July 6, 2016. Plaintiff may submit a reply, not to exceed 5 double-spaced pages, by July 8, 2016. The Court will hold oral argument on this matter on July 14, 2016, to coincide with already-scheduled oral argument on the motions to compel arbitration filed by defendants Kalanick and Uber. In light of this addition, the oral argument previously scheduled for 4 p.m.on July 14 is moved to 3:30 p.m., and counsel should anticipate that oral argument may continue into the early evening. SO ORDERED., (Motions due by 6/29/2016., Responses due by 7/6/2016, Replies due by 7/8/2016., Oral Argument set for 7/14/2016 at 03:30 PM before Judge Jed S. Rakoff.) (Signed by Judge Jed S. Rakoff on 6/21/2016) (ama) (Entered: 06/22/2016)
06/27/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/27/2016. (Kotowski, Linda) (Entered: 07/05/2016)
06/28/2016	94	TRANSCRIPT of Proceedings re: ARGUMENT held on 6/16/2016 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Martha Martin, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/22/2016. Redacted Transcript Deadline set for 8/1/2016. Release of Transcript Restriction set for 9/29/2016.(McGuirk, Kelly) (Entered: 06/28/2016)
06/28/2016	95	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ARGUMENT proceeding held on 6/16/2016 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 06/28/2016)
06/28/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/28/2016. (Kotowski, Linda) (Entered: 07/05/2016)
06/29/2016	96	MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, . Document filed by Spencer Meyer.(Smith, James) (Entered: 06/29/2016)
06/29/2016	97	MEMORANDUM OF LAW in Support re: 96 MOTION Related to the ERGO

		investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, . . Document filed by Spencer Meyer. (Smith, James) (Entered: 06/29/2016)
06/29/2016	98	DECLARATION of Brian Feldman in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, .. Document filed by Spencer Meyer. (Smith, James) (Entered: 06/29/2016)
06/29/2016	99	DECLARATION of James Smith in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y, # 26 Exhibit Z, # 27 Exhibit AA)(Smith, James) (Entered: 06/29/2016)
06/29/2016	100	DECLARATION of Spencer Meyer in Opposition re: 91 MOTION to Compel Arbitration ., 80 MOTION to Compel Arbitration .. Document filed by Spencer Meyer. (Feldman, Brian) (Entered: 06/29/2016)
06/29/2016	101	DECLARATION of JEFFREY A. WADSWORTH in Opposition re: 91 MOTION to Compel Arbitration ., 80 MOTION to Compel Arbitration .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit 1 (2015 User Agreement), # 2 Exhibit 2 (2016 User Agreement), # 3 Exhibit 3 (Excerpts of Interrogatories))(Feldman, Brian) (Entered: 06/29/2016)
06/29/2016	102	MEMORANDUM OF LAW in Opposition re: 91 MOTION to Compel Arbitration ., 80 MOTION to Compel Arbitration . . Document filed by Spencer Meyer. (Feldman, Brian) (Entered: 06/29/2016)
06/30/2016	105	Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 6/30/2016. (Kotowski, Linda) (Entered: 07/05/2016)
07/01/2016	103	MEMORANDUM OF LAW in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, . . Document filed by Spencer Meyer. (Smith, James) (Entered: 07/01/2016)
07/01/2016	104	DECLARATION of James Smith in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y, # 26 Exhibit Z, # 27 Exhibit AA)(Smith, James) (Entered: 07/01/2016)
07/06/2016	106	MEMORANDUM OF LAW in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, . . Document filed by Travis Kalanick, Uber Technologies, Inc.. (Hanna, Nicola) (Entered: 07/06/2016)
07/06/2016	107	DECLARATION of Nicola T. Hanna in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, .. Document filed by Travis Kalanick, Uber Technologies, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N) (Hanna, Nicola) (Entered: 07/06/2016)
07/06/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference

		held on 7/6/2016. (Kotowski, Linda) (Entered: 07/07/2016)
07/07/2016	108	MEMORANDUM OF LAW in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, . . Document filed by Travis Kalanick, Uber Technologies, Inc.. (Hanna, Nicola) (Entered: 07/07/2016)
07/07/2016	109	DECLARATION of Nicola T. Hanna in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, .. Document filed by Travis Kalanick, Uber Technologies, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B (1 of 2), # 3 Exhibit B (2 of 2), # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N)(Hanna, Nicola) (Entered: 07/07/2016)
07/07/2016	110	REPLY MEMORANDUM OF LAW in Support re: 80 MOTION to Compel Arbitration . . Document filed by Travis Kalanick. (Park, Ryan) (Entered: 07/07/2016)
07/07/2016	111	DECLARATION of Peter M. Skinner in Support re: 80 MOTION to Compel Arbitration .. Document filed by Travis Kalanick. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Park, Ryan) (Entered: 07/07/2016)
07/07/2016	112	MEMORANDUM OF LAW in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, . . Document filed by Ergo. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Bowker, David) (Entered: 07/07/2016)
07/07/2016	113	REPLY MEMORANDUM OF LAW in Support re: 91 MOTION to Compel Arbitration . . Document filed by Uber Technologies, Inc.. (Brodsky, Reed) (Entered: 07/08/2016)
07/07/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/7/2016. (Kotowski, Linda) (Entered: 07/12/2016)
07/08/2016	114	MEMORANDUM OF LAW in Opposition re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, . *(Redacted)*. Document filed by Ergo. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Bowker, David) (Entered: 07/08/2016)
07/08/2016	115	REPLY MEMORANDUM OF LAW in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, . . Document filed by Spencer Meyer. (Smith, James) (Entered: 07/08/2016)
07/08/2016	116	DECLARATION of James Smith in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Smith, James) (Entered: 07/08/2016)
07/08/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/8/2016. (Kotowski, Linda) (Entered: 07/12/2016)
07/11/2016	117	REPLY MEMORANDUM OF LAW in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, . . Document filed by Spencer Meyer. (Smith, James) (Entered: 07/11/2016)
07/11/2016	118	DECLARATION of James Smith in Support re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,, .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Smith, James) (Entered: 07/11/2016)
07/11/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/11/2016. (Kotowski, Linda) (Entered: 07/12/2016)

07/14/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 7/14/2016 re: 80 MOTION to Compel Arbitration . filed by Travis Kalanick, 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings,,,,,,,,, . filed by Spencer Meyer. (Kotowski, Linda) (Entered: 07/15/2016)
07/14/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 7/14/2016 re: 91 MOTION to Compel Arbitration . filed by Uber Technologies, Inc.. (Kotowski, Linda) (Entered: 07/15/2016)
07/22/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/22/2016. (Kotowski, Linda) (Entered: 07/27/2016)
07/25/2016	119	OPINION AND ORDER #106590 re: 96 MOTION Related to the ERGO investigation re: 93 Order, Set Deadlines/Hearings, . filed by Spencer Meyer. The Court, on consent, hereby enjoins defendants Uber and Mr. Kalanick from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same; enjoins both defendants and Ergo from undertaking any further personal background investigations of individuals involved in this litigation through the use of false pretenses, unlicensed investigators, illegal secret recordings, or other unlawful, fraudulent, or unethical means; and retains jurisdiction to enforce Uber's agreement to reimburse plaintiff in the sum agreed to by the parties. The Clerk of Court is directed to close docket entry 96. (Signed by Judge Jed S. Rakoff on 7/25/2016) (kgo) Modified on 7/25/2016 (kgo). Modified on 7/29/2016 (ca). (Entered: 07/25/2016)
07/25/2016	120	DECLARATION of BRIAN M. FELDMAN in Opposition re: 91 MOTION to Compel Arbitration ., 80 MOTION to Compel Arbitration .. Document filed by Spencer Meyer. (Attachments: # 1 Exhibit 1 (Redacted Indemnification Agreement))(Feldman, Brian) (Entered: 07/25/2016)
07/25/2016	121	LETTER addressed to Judge Jed S. Rakoff from David W. Bowker dated 6/16/2016 re: Ergo and its research analyst sought only to help Uber lawfully obtain information following the filing of a high-profile lawsuit against Uber's CEO. Document filed by Ergo. (kgo) (Main Document 121 replaced on 7/25/2016) (kgo). (Entered: 07/25/2016)
07/25/2016	122	LETTER addressed to Judge Jed S. Rakoff from Jeffrey A. Wadsworth dated 6/21/2016 re: Plaintiff respectfully submits that the Ergo Letter can be disregarded. Document filed by Spencer Meyer.(kgo) Modified on 7/25/2016 (kgo). (Main Document 122 replaced on 7/25/2016) (kgo). (Entered: 07/25/2016)
07/25/2016	123	LETTER addressed to Judge Jed S. Rakoff from David W. Bowker dated 6/23/2016 re: I respectfully submit this letter in response to Plaintiff's letter of June 21, 2016. Document filed by Ergo. (kgo) (Entered: 07/25/2016)
07/25/2016	124	TRANSCRIPT of Proceedings re: Hearing held on 7/14/2016 before Judge Jed S. Rakoff. Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/18/2016. Redacted Transcript Deadline set for 8/29/2016. Release of Transcript Restriction set for 10/27/2016.(Siwik, Christine) (Entered: 07/25/2016)
07/25/2016	125	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a Hearing proceeding held on 7/14/16 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no

		such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(Siwik, Christine) (Entered: 07/25/2016)
07/28/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/28/2016. (Kotowski, Linda) (Entered: 07/28/2016)
07/29/2016	126	OPINION AND ORDER #106596: re: 91 MOTION to Compel Arbitration filed by Uber Technologies, Inc. Consequently, defendant Uber may not enforce the arbitration clause against Mr. Meyer. As a result, even if defendant Kalanick were entitled to enforce this arbitration clause and had not waived such a right- issues that the Court does not now decide - he too would be unable to enforce the arbitration clause. The Court hence denies the motions to compel arbitration filed by both Mr. Kalanick and Uber. The Clerk of Court is directed to close docket entries 80 and 91. And as set forth herein. SO ORDERED. (Signed by Judge Jed S. Rakoff on 7/29/2016) (ama) Modified on 8/3/2016 (ca). (Entered: 07/29/2016)
07/29/2016	127	MOTION for Joinder *Pursuant to Federal Rule of Civil Procedure 20(a)(1)*. Document filed by Spencer Meyer.(Scupp, David) (Entered: 07/29/2016)
07/29/2016	128	ANSWER to 26 Amended Complaint with JURY DEMAND., COUNTERCLAIM against Spencer Meyer. Document filed by Uber Technologies, Inc..(Swanson, Daniel) (Entered: 07/29/2016)
07/29/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 7/29/2016. (Kotowski, Linda) (Entered: 08/09/2016)
08/01/2016	129	MEMORANDUM OF LAW in Support re: 127 MOTION for Joinder *Pursuant to Federal Rule of Civil Procedure 20(a)(1)*. . Document filed by Spencer Meyer. (Scupp, David) (Entered: 08/01/2016)
08/03/2016	130	ORDER: The parties have requested adjournment of various dates in the existing case management plan. Discovery due by 12/16/2016., Motions due by 1/9/2017., Responses due by 1/23/2017, Replies due by 1/30/2017., Final Pretrial Conference set for 2/10/2017 at 04:00 PM before Judge Jed S. Rakoff. And as set forth in this Order. SO ORDERED. (Signed by Judge Jed S. Rakoff on 8/02/2016) (ama) (Entered: 08/03/2016)
08/05/2016	131	NOTICE OF INTERLOCUTORY APPEAL from 126 Memorandum & Opinion,,. Document filed by Uber Technologies, Inc.. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Boutrous, Theodore) (Entered: 08/05/2016)
08/05/2016	132	NOTICE OF INTERLOCUTORY APPEAL from 126 Memorandum & Opinion,,. Document filed by Travis Kalanick. Filing fee $ 505.00, receipt number 0208-12620437. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Park, Ryan) (Entered: 08/05/2016)
08/05/2016		Appeal Fee Due: for 131 Notice of Interlocutory Appeal. $505.00 Appeal fee due by 8/19/2016. (nd) (Entered: 08/05/2016)
08/05/2016		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 131 Notice of Interlocutory Appeal. (nd) (Entered: 08/05/2016)
08/05/2016		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 131 Notice of Interlocutory Appeal filed by Uber Technologies, Inc. were transmitted to the U.S. Court of Appeals. (nd) (Entered: 08/05/2016)
08/05/2016		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 132 Notice of Interlocutory Appeal,. (nd) (Entered: 08/05/2016)
08/05/2016		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal

		Electronic Files for 132 Notice of Interlocutory Appeal, filed by Travis Kalanick were transmitted to the U.S. Court of Appeals. (nd) (Entered: 08/05/2016)
08/05/2016	133	JOINT MOTION to Stay *Pending Appeal*. Document filed by Travis Kalanick, Uber Technologies, Inc..(Boutrous, Theodore) (Entered: 08/05/2016)
08/05/2016	134	JOINT MEMORANDUM OF LAW in Support re: 133 JOINT MOTION to Stay *Pending Appeal*. . Document filed by Travis Kalanick, Uber Technologies, Inc.. (Boutrous, Theodore) (Entered: 08/05/2016)
08/05/2016	135	DECLARATION of Vincent Mi in Support re: 133 JOINT MOTION to Stay *Pending Appeal*.. Document filed by Travis Kalanick, Uber Technologies, Inc.. (Boutrous, Theodore) (Entered: 08/05/2016)
08/05/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 8/5/2016. (Kotowski, Linda) (Entered: 08/10/2016)
08/08/2016	136	NOTICE OF APPEARANCE by Ankur Kapoor on behalf of Spencer Meyer. (Kapoor, Ankur) (Entered: 08/08/2016)
08/08/2016		Appeal Fee Payment: for 131 Notice of Interlocutory Appeal. Filing fee $ 505.00, receipt number 0208-12624785. (Boutrous, Theodore) (Entered: 08/08/2016)
08/10/2016	137	MOTION for Nyran Rose Rasche to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12636121. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Spencer Meyer. (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order)(Rasche, Nyran) (Entered: 08/10/2016)
08/10/2016		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 137 MOTION for Nyran Rose Rasche to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number 0208-12636121. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb)** (Entered: 08/10/2016)
08/10/2016	138	JOINT MEMORANDUM OF LAW in Opposition re: 127 MOTION for Joinder *Pursuant to Federal Rule of Civil Procedure 20(a)(1)*. . Document filed by Travis Kalanick, Uber Technologies, Inc.. (Boutrous, Theodore) (Entered: 08/10/2016)
08/11/2016	139	AMENDED CIVIL CASE MANAGEMENT PLAN (ON CONSENT, BUT WITHOUT PREJUDICE TO PENDING STAY MOTION): Ready for Trial by 2/10/2017. After consultation with counsel for the parties, the following Case Management Plan, amending the Case Management Plan dated April 8, 2016 is adopted. This plan is also a scheduling order pursuant to Rules 16 and 26(f) of the Federal Rules of Civil Procedure. No further extensions of the deadlines set forth herein will be granted. This case may be tried by a jury. All Discovery due by 12/16/2016. Deposition due by 12/16/2016. Motions due by 10/28/2016. Responses due by 12/9/2016 Replies due by 12/30/2016. Final Pretrial Conference and or Oral Argument set for 2/10/2017 at 04:00 PM before Judge Jed S. Rakoff. SO ORDERED. (Signed by Judge Jed S. Rakoff on 8/10/2016) (ama) Modified on 8/11/2016 (ama). Modified on 9/28/2016 (ama). (Entered: 08/11/2016)
08/11/2016		Set/Reset Deadlines: Replies due by 12/30/2016. (ama) (Entered: 08/11/2016)
08/12/2016	140	ORDER FOR ADMISSION PRO HAC VICE OF NYRAN ROSE RASCHE, ESQUIRE: granting 137 Motion for Nyran Rose Rasche to Appear Pro Hac Vice. (Signed by Judge Jed S. Rakoff on 8/11/2016) (ama) (Entered: 08/12/2016)
08/17/2016	141	REPLY MEMORANDUM OF LAW in Support re: 127 MOTION for Joinder *Pursuant to Federal Rule of Civil Procedure 20(a)(1)*. . Document filed by Spencer Meyer. (Briody, John) (Entered: 08/17/2016)

/19/2016	142	MEMORANDUM OF LAW in Opposition re: 133 JOINT MOTION to Stay *Pending Appeal*. . Document filed by Spencer Meyer. (Cantor, Matthew) (Entered: 08/19/2016)
08/22/2016	143	ANSWER to 128 Counterclaim. Document filed by Spencer Meyer.(Larkin, Edwin) (Entered: 08/22/2016)
08/26/2016	144	MEMORANDUM ORDER granting 133 Letter Motion to Stay. Because of this additional factor, and for the foregoing reasons, the Court grants defendants' motion for a stay. The stay will take effect on August 27, 2016, in order to allow for the parties to complete taking discovery that they agreed to complete by close of business today. The stay will continue until the Second Circuit issues its decision in the pending appeal. The Clerk of Court is directed to close docket entry 133. SO ORDERED. (Signed by Judge Jed S. Rakoff on 8/26/2016) (ama) (Entered: 08/26/2016)
08/29/2016	145	INTERNET CITATION NOTE: Material from decision with Internet citation re: 126 Memorandum & Opinion. (Attachments: # 1 Internet Citation) (vf) (Entered: 08/29/2016)
08/29/2016		Minute Entry for proceedings held before Judge Jed S. Rakoff: Telephone Conference held on 8/29/2016. (Kotowski, Linda) (Entered: 08/31/2016)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK,

Defendant.

COMPLAINT

1:15 Civ. 9796

ECF Case

Jury Trial Demanded

Plaintiff Spencer Meyer, on behalf of himself and those similarly situated, by his counsel, Andrew Schmidt Law PLLC, brings this action against Defendant Travis Kalanick ("Kalanick"), the chief executive officer and co-founder of Uber Technologies, Inc. ("Uber"), alleging as follows:

NATURE OF THE SUIT

1. This is a civil antitrust action against Kalanick, the co-founder and CEO of Uber. Uber has a simple but illegal business plan: to fix prices among competitors and take a cut of the profits. Kalanick is the proud architect of that business plan and, as CEO, its primary facilitator. This lawsuit seeks injunctive and monetary relief on behalf of the Uber riders injured by Kalanick's actions.

2. Kalanick designed Uber to be a price fixer. Kalanick has long insisted that Uber is not a transportation company and that it does not employ drivers. Instead, Uber is a technology company, whose chief products are smartphone apps. Those apps match riders with drivers. The

apps provide a standard fare formula, the Uber pricing algorithm. Drivers using the Uber app do not compete on price. Rather, drivers charge the fares set by the Uber algorithm. Those fares surge at times to extraordinary levels, which are uniformly charged by drivers using the Uber app. Uber takes a cut of those price-fixed fares. Kalanick's business plan thus generates profit through price fixing.

3. Kalanick is not only the co-founder and CEO of Uber, but he is also a driver who has used the Uber app. Kalanick has live tweeted his own experience driving using the app. In charging fares to Uber riders, Kalanick charged prices he ultimately controlled. Every other driver using the Uber app — Kalanick's direct competitors — agreed to use the identical pricing algorithm. Through the Uber app, Kalanick's direct competitors thus empowered him to set his and their fares.

4. The price-fixing Kalanick has arranged among Uber drivers is an open secret. In September 2014, Uber conspired with hundreds of drivers to negotiate an effective hike in fares that would benefit them, collectively, at the expense of their riders. Uber had initially required drivers of SUVs and black cars to accept a lower fare for rides. Drivers, who should have been in direct competition with one another over price, instead banded together to ask Uber to reverse its decision and reinstitute higher fares. Uber colluded with those drivers and put the higher fares back in place. This collective agreement to fix prices among competitors illustrates Uber's essential role, as designed by Kalanick: to fix prices among competing drivers.

5. Ironically, Kalanick has touted Uber's business model as procompetitive. If Uber were to become a transportation company and employ drivers, it would be free to compete with other companies using its pricing algorithm. But Uber has refused to become a transportation company. Consequently, drivers using the app are independent firms, competing with each other

for riders. They should compete on price as do drivers using other ride-share platforms, like Sidecar. Instead, they have agreed to Kalanick's scheme to fix prices among direct competitors using Uber's pricing algorithm. Uber's price fixing is classic anticompetitive behavior.

6. Kalanick's conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340. In this action, Plaintiffs seek injunctive relief preventing Kalanick from continuing his conspiracy and money damages to all Uber riders injured by his actions. In accordance with N.Y. Gen. Bus. Law § 340(5), notice of commencement of this action is being served upon the New York State Attorney General.

PARTIES

7. Plaintiff Spencer Meyer is a resident of Connecticut. Plaintiff has used Uber car services on multiple occasions, including the uberX car service experience. In both New York City and elsewhere, Plaintiff paid surge pricing to drivers using UberX.

8. Plaintiff has paid higher prices for car service as a direct and foreseeable result of the unlawful conduct set forth below.

9. Upon information and belief, Defendant Travis Kalanick is a resident of California. Kalanick is the mastermind of the Uber pricing conspiracy. He is Uber's CEO and an Uber Board member. Kalanick is the public face of Uber, its co-founder and manager of its operations. Kalanick also acts on occasion as a driver with Uber.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this case pursuant to 15 U.S.C. §§ 4 and 15, and 28 U.S.C. §§ 1331 and 1337, in that this action arises under the federal antitrust laws. The Court has supplemental jurisdiction of the pendant state law claims pursuant to 28 U.S.C. § 1367. The Court also has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)

because the amount in controversy exceeds $5,000,000, and there are members of the class who are citizens of a different state than the Defendant.

11. This Court has personal jurisdiction over Kalanick.

12. Kalanick conducts business within the State of New York and has regularly and systematically transacted and/or solicited business in this State, either directly or through intermediaries.

13. Kalanick has derived substantial revenue, including as an owner and executive of Uber, from services rendered in New York State. He has likewise derived substantial revenue from interstate commerce.

14. Kalanick has purposely availed himself of the benefits of the State of New York and has committed wrongful acts in whole or in part within the State of New York, which have had direct effects in this State. Kalanick has expected, and should have expected, his actions to have consequences in the State of New York.

15. Among other things, Kalanick has purposefully directed his illegal activities to artificially raise Uber car service prices for persons within the State of New York. Activities in furtherance of these activities include, but are not limited to, providing his Uber car service and pricing algorithm in State of New York, engaging in lobbying efforts in this State related to the provision of Uber car services and use of the pricing algorithm, and appearing in this State for interviews and providing public statements regarding Uber's car services and pricing algorithm (including in November 2014 and at least as recently as September 2015 when he appeared as a guest on the Late Show with Stephen Colbert).

16. The claims in this case arise out of activities that relate to New York State.

17. This Court's exercise of personal jurisdiction over Kalanick would comport with fair play and substantial justice.

18. Venue is proper in this district pursuant to 28 U.S.C. § 1391 in that a substantial part of the events giving rise to the claim occurred in this district. New York City is reportedly Uber's biggest market in the United States and its most profitable.

19. Kalanick is engaged in, and his activities substantially affect, interstate trade and commerce.

CO-CONSPIRATORS

20. Various persons and entities including Uber driver-partners, known and unknown to Plaintiff and not named as defendants in this action, have participated as co-conspirators with Kalanick in the offenses alleged and have performed acts and made statements in furtherance of the conspiracy.

BACKGROUND

Uber and the Uber App

21. Kalanick founded Uber in 2009.

22. Uber is an on-demand car service that seeks to match riders with drivers.

23. It is Uber's position that it is not a transportation company. Uber does not provide transportation services itself.

24. Uber offers an application for smartphone devices (the "Uber App") through which users of the Uber App can request private drivers to pick them up and take them to their desired location. The Uber App utilizes dispatch software to send the nearest independent driver to the requesting party's location.

25. Uber offers different car service experiences, including uberX, uberTAXI, UberBLACK, UberSUV, and UberLUX (collectively, "Uber car service").

26. Following completion of a ride, Uber calculates a fare based on a base amount, ride distance, and time spent in transit, which may be multiplied during "surge" periods if rider demand is high and/or driver supply is low, and then processes a transaction on behalf of the driver.

27. Uber collects a percentage of the fare as a software licensing fee and remits the remainder to the driver-partner.

Uber Users: Riders

28. Uber users provide their name, mobile number, email, language, and credit card numbers or PayPal account information to Uber in exchange for an Uber account and access to the Uber App.

29. To become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy.

30. Uber account holders can obtain a "Fare Quote" directly from the Uber App by entering their pickup location and destination. The Uber App calculates the approximate amount based on the expected time and distance.

31. A rider pays a driver a fare, in a transaction facilitated by Uber but to which Uber is not a party.

32. Uber facilitates payment of that fare by charging the user's credit card or PayPal billing information on file and purportedly serves as the drivers' "limited payment collection agent" in this regard. Uber then sends a receipt to the user's email address.

Uber's Other Users: Driver-Partners

33. Uber actively recruits drivers to serve as "partners."

34. Uber and its drivers "expressly agree that no joint venture, partnership, employment, or agency relationship exists between [the driver and] Uber."

35. When Kalanick and his subordinates decide to offer Uber App services in a new geographic location, Uber uses social media to advertise for new "partner" drivers and holds meetings with these potential drivers.

36. Uber also organizes events for its driver-partners to get together. For example, in September 2015, Uber hosted a picnic at a park in Oregon where more than 150 driver-partners and their families reportedly joined Uber. Similar "partner appreciation" events have been organized for driver-partners in Burlington, Vermont, Portland, Maine, and New York City, among other places.

37. Uber tells potential drivers that "Uber gives you the freedom to get behind the wheel when it makes sense for you. Choose when you drive, where you go, and who you pick up."

38. Drivers have discretion as to whether to transport riders and may decline or cancel a request if, for example, a rider is unruly or intoxicated.

39. As of October 2015, Uber had an estimated 20,000 uberX driver-partners operating in New York City. Uber reported at that time that "average uberX gross fares per hour increased by 6.3% year over year."

40. At times, Uber has sought to mobilize its driver-partners to lobby on Uber's behalf.

Kalanick and Uber Control Pricing

41. Uber has steadfastly maintained that the driver-partners are not employees of Uber, not part of any Uber joint venture, and are wholly independent. In exchange for being listed on the Uber App, the drivers agree to pay a percentage of the fare to Uber.

42. The fares are calculated based on an Uber-generated algorithm. As demand for car services increases among users, applying the Uber algorithm results in increased fares ("surge pricing").

43. Kalanick's surge pricing model allows for up to eight times (8x) the standard fare to be charged during periods of high demand, and Kalanick and his co-conspirators have employed surge pricing on a regular basis.

44. Uber has not publicly revealed the specifics of its pricing algorithm, but Kalanick has commented about the "surge pricing" feature embedded in the algorithm.

45. Upon information and belief, Kalanick conceived of and implemented the "surge pricing" model into the Uber algorithm. Kalanick is a fierce defender of the surge pricing model.

46. In a December 17, 2013 report by Marcus Wohlsen posted on Wired.com and entitled "*Uber boss says surging prices rescue people from the snow*," Mr. Kalanick is quoted as saying: "We are not setting the price. The market is setting the price. We have algorithms to determine what the market is." www.wired.com/2013/12/uber-surge-pricing (last visited on Oct. 20, 2015). Mr. Kalanick further explained the "surge pricing" component of the Uber pricing conspiracy: "There's a harsh reality to situations where demand outstrips supply. As much as I'd love to give everybody a really cheap option, it's just simply not possible in certain sorts of extreme events. … I guarantee that our strategy on surge pricing is the optimal way to get as many people home as possible." *Id.*

47. In a September 17, 2015 post on the Uber website, Uber explains Kalanick's surge pricing to riders this way:

> Our goal at Uber is to ensure you can push a button and get a ride within minutes — even on the busiest nights of the year. And due to surge pricing, that's almost always possible. Here's how it works. When demand for rides outstrips the supply of cars, surge pricing kicks in, increasing the price. You'll automatically see a 'surge' icon

next to the products (uberX, UberBLACK, etc.) that are surging. If you still want a ride, Uber shows the surge multiplier and then asks for your consent to that higher price.

The website post continues:

> Surge pricing has two effects: people who can wait for a ride often decide to wait until the price falls; and drivers who are nearby go to that neighborhood to get the higher fares. As a result, the number of people wanting a ride and the number of available drivers come closer together, bringing wait times back down.
>
> Together with Chris Nosko, a professor at The University of Chicago, we have been studying the effects of surge pricing. On New Year's Eve last year, Uber experienced a technical glitch causing surge pricing in New York City to fail for 26 minutes. This created what we call in economics a "natural experiment" — when something varies, which you can then study after the fact.
>
> Today we are releasing a case study of rider and driver behavior during the surge glitch, and on the night of a sold-out-concert at Madison Square Garden when surge worked as intended. This study is not exhaustive, but will form the basis of more comprehensive research in the future.
>
> We found that, without surge pricing, Uber is not really Uber — you can't push a button and get a ride in minutes:
>
> - On the night of the concert, even though the number of people opening the Uber app experienced a 4x increase, the number of actual ride requests only rose slightly. In other words people decided not to request a ride. Meanwhile, 100% of ride requests were completed and ETAs were virtually unaffected.
>
> - By comparison on New Year's Eve, without surge, ride requests skyrocketed and only 25% of these requests were completed. ETAs also increased sharply. Without surge pricing, rider and driver behavior did not adapt to the increased interest in getting a ride.
>
> These two real-world scenarios illustrate a bit of Economics 101: supply and demand adjust in response to price changes. On Uber, this means a ride is more likely than not just a few minutes away, at the simple touch of a button.

48. In reality, Kalanick's pricing algorithm artificially manipulates supply and demand by imposing his surge pricing on drivers who would otherwise compete against one another on price.

49. Kalanick and Uber control the fares charged to riders. Through the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders.

50. Uber provides a driver guide for its driver-partners, which contains a FAQs section. One of the questions is "What will the total fare be?" The answer is: "Total fare is based on time and distance, so you won't know until the trip ends. It's not a good idea to estimate fares for riders because the actual charges may be higher."

51. Although they are independent partners, the drivers are not controlling the fare.

52. Uber uses "surge pricing" to incentivize its driver-partners to use the Uber App during periods of peak demand. Uber provides alerts to its driver-partners relating to "surge pricing" based on demand or limited availability of drivers.

53. Uber also communicates with its driver-partners to inform them of what their increased earnings might have been had they logged into the Uber App during recent busy periods. Uber also provides its driver-partners with information regarding upcoming events that are likely to create high-demand for transportation services (e.g., concerts, sporting events, busy holidays).

54. Uber manipulates its pricing algorithm by, among other things, encouraging drivers who are not available or willing to receive trip requests to log out of the Uber App in order to show less supply (which equates to higher fares).

55. As Kalanick is quoted as saying: "You want supply to always be full, and you use price to basically either bring more supply on or get more supply off, or get more demand in the system or get some demand out. It's classic Econ 101."

56. Kalanick has further explained his surge pricing model. "When demand outstrips supply, the price comes up in a particular neighborhood or across a city." (Sept. 10, 2015 appearance on Late Show with Stephen Colbert)

57. Kalanick can turn off surge pricing, if he so chooses. As he has admitted: "Sometimes, something happens in a city; we don't know what it is. And if it's an emergency, we basically turn it off. Because I just think community expectations are [such that in] an emergency, major weather events, things like that, we turn it off." *Id.*

58. In fact, very rarely if ever, does Kalanick or his subordinates "turn off" the surge pricing feature of the pricing algorithm.

59. Instead, Kalanick and his co-conspirators reap artificially high profits during other peak demand periods like New Year's Eve, Valentine's Day, and stormy weather.

The Driver-Partners Agree To Kalanick's Price-Fixing Scheme

60. All of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm.

61. Uber purports to allow its driver-partners to depart downward from the fare set by the Uber algorithm. In reality, however, drivers cannot do so. The drivers collect fares through the Uber App, rather than through a direct transaction with the rider. Accordingly, Uber controls the fare.

62. Uber's pricing is not always in the individual driver-partner's best interest. Upon information and belief, some drivers have lamented that Uber's "surge pricing" component can result in greater rider dissatisfaction and fewer rides for drivers. Upon information and belief, some drivers believe that having a more stable fare would increase rider satisfaction, as well as the number of riders willing to use Uber driver-partners at certain times.

63. For his part, Kalanick has staunchly defended the Uber price-fixing algorithm. "Airlines and hotels are more expensive during busy times. Uber is as well. We don't just charge to make a buck though, we take a small fee of the transaction, but the vast majority goes to the driver so that we can maximize the number of drivers on the road. ***The point is in order to provide you with a reliable ride, prices need to go up***."

64. Implicit in Kalanick's statement is his manipulation of free market principles by insisting that *all* of the Uber driver-partners must adhere to the Uber algorithm in order to deliver the experience that Kalanick desires: high-priced reliable rides. In an efficient market, however, the balance between reliability and price would sort itself out, with some riders willing to pay more for greater reliability and others willing to sacrifice some reliability for a lower fare. Kalanick, however, has abandoned the free market principles that he purports to support by tilting the scales in favor of higher fares.

65. Kalanick is the chief architect of the price-fixing conspiracy. The driver-partners agree to adhere to it because the artificial rates set by the pricing algorithm are higher on average than the fares that Plaintiff and Class Members would otherwise be charged in a competitive marketplace.

Kalanick is a Driver and a Direct Competitor with Driver-Partners

66. Kalanick is not only the CEO and co-founder of Uber; he also has been a driver who has used the Uber App.

67. Kalanick has publicized his work as a driver. Among other things, he has live tweeted his driving experience. For instance, on February 21, 2014, Kalanick tweeted, "Driving a range rover black on black . . . on uberX . . So legit." That same night, he further tweeted "3 trips down," among other things. His tweets continued through February 22, 2014.

68. As a driver, Kalanick has competed directly with other drivers using the Uber App.

69. Kalanick, as Uber's CEO, has ultimate control over the fares charged by himself, as a driver, and other drivers using the Uber App.

70. Kalanick and his direct competitors, by using the Uber App, agreed to charge identical fares to riders. Kalanick and his direct competitors using the Uber App understood that, by using the Uber App, they would charge identical fares to riders.

71. Kalanick's direct competitors delegated to Uber and to Kalanick, as Uber's CEO, the ability to fix prices through the Uber App algorithm. They agreed to charge those fares by becoming driver-partners and using the Uber App.

Driver-Partners Have Colluded With Kalanick to Raise Fares

72. Kalanick, in his position as Uber CEO, has orchestrated collusion among driver-partners to raise fares.

73. For instance, in September 2014, drivers using the Uber App in New York City colluded with each other to negotiate the reinstitution of higher fares for riders using UberBLACK and UberSUV services. Upon information and belief, Kalanick, as Uber's CEO, directed or ratified negotiations between Uber and these co-conspirators, in which Uber ultimately agreed to raise fares.

74. By organizing this price-fixing conspiracy, Kalanick ensured that fares would rise to a level that Uber, and the New York City drivers (*i.e.*, direct competitors), had jointly agreed upon.

75. As a result, riders using the Uber App have suffered by paying for increased fares resulting from this price-fixing conspiracy.

Plus Factors

76. The driver-partners had a common motive to conspire to adhere to the Uber pricing algorithm and the resulting artificially high fares because they could yield supra-competitive prices through their collective action.

77. Were it not for the unlawful agreement, individual driver-partners would have sought to differentiate themselves from other drivers on the basis of price, among other factors.

78. The driver-partners had many opportunities to meet and enforce their commitment to the unlawful arrangement.

79. Were the driver-partners acting independently, some significant portion would not agree to adhere to the Uber pricing algorithm in charging fares to riders.

Plaintiff and the Putative Class Suffered Antitrust Injury

80. But for Kalanick's conspiracy to fix fares charged by drivers using the Uber App, Uber ride-share service fares would have been substantially lower, including during the implementation of surge pricing. Absent Kalanick's anticompetitive actions, riders would have been able to obtain rates resulting from fare competition among drivers.

81. Studies have shown that the result of Kalanick's imposition of surge pricing is not to perfectly match supply with demand as he purports, but instead to remove some demand so that prices stay artificially high and Kalanick reaps artificially high profits.

82. Upon information and belief, Kalanick's Uber ride-share service comprises approximately 80 percent of the mobile app-generated ride-share service market.

83. As a result of Kalanick's anticompetitive actions, competition in the market for mobile app-generated ride-share service, and the sub-market of Uber car service, has been restrained.

Nationwide Class

84. Plaintiffs sue on behalf of a class of persons pursuant to Federal Rule of Civil Procedure 23. The Class consists of all persons in the United States who, on one or more occasions, have used the Uber App to obtain a ride from an Uber driver-partner and paid a fare for that ride set by the Uber pricing algorithm. Excluded from the Class is Kalanick, his co-conspirators, Uber's employees, officers, and directors, and Kalanick's legal representatives and heirs.

85. The persons in the Class are so numerous that individual joinder of all members is impracticable under the circumstances of this case. Although the precise number of such persons is unknown, the exact size of the Class is easily ascertainable, as each Class member can be identified by using Defendant's records and/or the records of Uber. Plaintiff is informed and believes that there are many thousands of Class members.

86. There are common questions of law and fact specific to the Class that predominate over any questions affecting individual members, including:

a. Whether Kalanick and the Uber driver-partner co-conspirators unlawfully contracted, combined and conspired to unreasonably restrain trade in violation of Section 1 of the Sherman Act by agreeing to charge all Uber riders the fare calculated by the Uber algorithm;

b. Whether Kalanick's actions in orchestrating the Uber pricing conspiracy violated Section 340 of New York's General Business Law;

c. Whether consumers and Class members have been damaged by Kalanick's conduct;

d. Whether punitive damages are appropriate;

e. Whether Kalanick should disgorge unlawful profits;

f. The amount of any damages; and

g. The nature and scope of injunctive relief necessary to restore a competitive market.

87. Plaintiff's claims are typical of the Class' claims, as they arise out of the same course of conduct and the same legal theories as the rest of the Class, and Plaintiff challenges the practices and course of conduct engaged in by Defendant with respect to the Class as a whole.

88. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has retained as Class Counsel able class action litigators.

89. Resolution of this action on a class-wide basis is superior to other available methods and is a fair and efficient adjudication of the controversy because in the context of this litigation, no individual Class member can justify the commitment of the large financial resources to vigorously prosecute a lawsuit against Defendant. Separate actions by individual Class members would also create a risk of inconsistent or varying judgments, which could establish incompatible standards of conduct for Defendant and substantially impede or impair the ability of Class members to pursue their claims. A class action also makes sense because Defendant has acted and refused to take steps that are, upon information and belief, generally applicable to thousands of individuals, thereby making injunctive relief appropriate with respect to the Class as a whole.

FIRST CAUSE OF ACTION
(Violation of the Sherman Act, 15 U.S.C. § 1)

90. Plaintiff repeats and realleges all previous allegations as if set forth in full herein.

91. Plaintiff does not believe it is necessary to prove a relevant market. To the extent one is required the relevant product market is mobile app-generated ride-share service, with a relevant sub-market of Uber car service.

92. To the extent required, the relevant geographical market is the entire United States.

93. Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination and conspiracy in restraint of trade. Specifically, Kalanick coordinated an unlawful agreement among the Uber driver-partners to adhere to the Uber pricing algorithm (including its Surge Pricing component) for fares charged to Uber riders.

94. This unlawful arrangement consists of a series of vertical agreements between Kalanick and each of the Uber driver-partners, as well as a horizontal agreement among the Uber driver-partners to adhere to the Uber pricing algorithm.

95. Were it not for their understanding that the other driver-partners were agreeing to the same thing, some driver-partners would not have entered the vertical agreements with Kalanick and Uber.

96. Through Kalanick's and Uber's actions, the Uber driver-partners have been enabled to participate in a horizontal agreement amongst themselves to adhere to the artificial price setting embodied in the Uber pricing algorithm. Defendant and Uber have sought to obscure the unlawful nature of this arrangement by disingenuously claiming that Uber driver-partners can charge a lower fare than the one generated by the Uber algorithm. At the same time, Defendant and Uber tout the ability for Uber driver-partners to earn more money by adhering to the Uber algorithm, and they facilitate Uber driver-partners' opportunities to meet together.

97. In orchestrating the horizontal price-fixing conspiracy, Kalanick committed himself to achieving an unlawful objective: namely, collusion with and among the co-conspirator drivers to set prices.

98. Despite Kalanick's position as a vertical market participant, his organizing of the conspiracy subjects him to per se liability for the results of the horizontal price-fixing agreement just as much as if operated at the same level as the driver-partners.

99. In addition, Kalanick's role as an occasional Uber driver puts him in a horizontal relationship with his driver-partner peers, which further supports per se treatment of his arrangements in restraint of trade.

100. Plaintiff and the Class members have been injured and will continue to be injured in their businesses and property by paying more for Uber car service than they would have paid or would pay in the future in the absence of Defendant's unlawful acts.

101. Plaintiff and the Class members have sustained substantial damages in an amount to be determined at trial.

102. The unlawful contracts, agreements, arrangements or combinations will continue unless permanently enjoined and restrained. Plaintiff and the Class members are entitled to an injunction that terminates the ongoing violations alleged in this Complaint.

SECOND CAUSE OF ACTION
(Violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340)

103. Plaintiff repeats and realleges all previous allegations as if set forth in full herein.

104. Through unlawful contracts, agreements, arrangements or combinations, Defendant has restrained trade in violation of the New York General Business Law, § 340, *et seq.*,

105. For the same reasons that Kalanick is liable for a Sherman Act violation for orchestrating an unlawful price fixing agreement among the Uber driver-partners, so too is he liable under the Donnelly Act.

106. In addition, Kalanick's conduct in requiring Uber driver-partners to adhere to the Uber pricing algorithm, subjects him to liability under the Donnelly Act on the alternative grounds that his actions constitute an unlawful vertical agreement in restraint of trade. Such vertical price-fixing is unlawful *per se*.

107. Plaintiff and the Class members have been injured and will continue to be injured in their businesses and property by paying more for Uber car service than they would have paid or would pay in the future in the absence of Defendant's unlawful acts.

108. Plaintiff and the Class members have sustained substantial damages in an amount to be determined at trial.

109. The unlawful contracts, agreements, arrangements or combinations will continue unless permanently enjoined and restrained. Plaintiff and the Class members are entitled to an injunction that terminates the ongoing violations alleged in this Complaint.

JURY DEMAND

110. Plaintiff requests a jury trial of all issues triable of right to a jury.

WHEREFORE, Plaintiff demands judgment against Kalanick as follows:

A. Certification of the action as a Class Action pursuant to Federal Rule of Civil Procedure 23, and appointment of Plaintiff as Class Representative and his counsel of record as Class Counsel.

B. A declaration that Defendant's conduct constituted a conspiracy and that Defendant is liable for the conduct or damage inflicted by any other co-conspirator;

C. A declaration that the use of the pricing algorithm for setting fares as described above is unlawful;

D. An award of monetary damages in an amount to be proved at trial, plus interest, to Plaintiff and Class members;

E. Actual damages, statutory damages, punitive or treble damages, and such other relief as provided by the statutes cited herein;

F. Pre-judgment and post-judgment interest on such monetary relief;

G. Equitable relief in the form of restitution and/or disgorgement of all unlawful or illegal profits received by Defendant as a result of the anticompetitive conduct alleged herein;

H. The costs of bringing this suit, including reasonable attorneys' fees, as further provided under the statutes cited herein; and

I. All other relief to which Plaintiff and members of the Class may be entitled at law or in equity.

Dated: December 16, 2015

ANDREW SCHMIDT LAW PLLC

By: /s/ Andrew Schmidt

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK,

Defendant.

FIRST AMENDED COMPLAINT

1:15 Civ. 9796 (JSR)

ECF Case

Jury Trial Demanded

Plaintiff Spencer Meyer, on behalf of himself and those similarly situated, by his counsel, Andrew Schmidt Law PLLC and Harter Secrest & Emery LLP, brings this action against Defendant Travis Kalanick ("Kalanick"), the chief executive officer and co-founder of Uber Technologies, Inc. ("Uber"), alleging as follows:

NATURE OF THE SUIT

1. This is a civil antitrust action against Kalanick, the co-founder and CEO of Uber. Uber has a simple but illegal business plan: to fix prices among competitors and take a cut of the profits. Kalanick is the proud architect of that business plan and, as CEO, its primary facilitator. This lawsuit seeks injunctive and monetary relief on behalf of the Uber riders injured by Kalanick's actions.

2. Kalanick designed Uber to be a price fixer. Kalanick has long insisted that Uber is not a transportation company and that it does not employ drivers. Instead, Uber is a technology

company, whose chief product is a smartphone app. The app matches riders with drivers. The app also provides a standard fare formula, the Uber pricing algorithm. Drivers using the Uber app do not compete on price. Rather, drivers charge the fares set by the Uber algorithm. Those fares surge at times to extraordinary levels, which are uniformly charged by drivers using the Uber app. Uber takes a cut of those price-fixed fares. Kalanick's business plan thus generates profit through price fixing.

3. Kalanick is not only the co-founder and CEO of Uber, but also a driver who has used the Uber app. Kalanick has live tweeted his own experiences as a driver using the app. In charging fares to his riders, Kalanick charged prices he ultimately controlled. Every other driver using the Uber app — Kalanick's direct competitors — agreed to use the identical pricing algorithm. Through the Uber app, Kalanick's direct competitors thus empowered him to set his and their fares.

4. The price-fixing Kalanick has arranged among Uber drivers is an open secret. In September 2014, Uber conspired with hundreds of drivers to negotiate an effective hike in fares that would benefit them, collectively, at the expense of their riders. Uber had initially required drivers of SUVs and black cars to accept a lower fare for rides. Drivers who should have been in direct competition with one another over price instead banded together to ask Uber to reverse its decision and reinstitute higher fares. Uber colluded with those drivers and put the higher fares back in place. This collective agreement to fix prices among competitors illustrates Uber's essential role, as designed by Kalanick: to fix prices among competing drivers.

5. Ironically, Kalanick has touted Uber's business model as procompetitive. If Uber were to become a transportation company and employ drivers, it would be free to compete with other companies using its pricing algorithm. But Uber has refused to become a transportation

company. Consequently, drivers using the app are independent firms that are in competition with one another for riders. They should be competing on price as drivers have on other ride-share platforms, like Sidecar. Instead, drivers have collectively adopted Kalanick's scheme to fix prices among direct competitors using Uber's pricing algorithm. Uber's price fixing is classic anticompetitive behavior.

6. Kalanick's conduct violates Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340. In this action, Plaintiffs seek injunctive relief preventing Kalanick from continuing his conspiracy and money damages to all Uber riders injured by his actions. In accordance with N.Y. Gen. Bus. Law § 340(5), notice of commencement of this action has been served upon the New York State Attorney General.

PARTIES

7. Plaintiff Spencer Meyer is a resident of Connecticut. Plaintiff has used Uber car services on multiple occasions, including the UberX car service experience. In both New York City and elsewhere, Plaintiff paid surge pricing to drivers using UberX.

8. Plaintiff has paid higher prices for car service as a direct and foreseeable result of the unlawful conduct set forth below.

9. Upon information and belief, Defendant Travis Kalanick is a resident of California. Kalanick is the mastermind of the Uber pricing conspiracy. He is Uber's CEO and an Uber Board member. Kalanick is the public face of Uber, its co-founder, and the manager of its operations. Kalanick also acts on occasion as a driver with Uber.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this case pursuant to 15 U.S.C. §§ 4 and 15, and 28 U.S.C. §§ 1331 and 1337, in that this action arises under the federal antitrust laws.

The Court has supplemental jurisdiction of the pendant state law claims pursuant to 28 U.S.C. § 1367. The Court also has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because the amount in controversy exceeds $5,000,000, and there are members of the class who are citizens of a different state than the Defendant.

11. This Court has personal jurisdiction over Kalanick.

12. Kalanick conducts business within the State of New York and has regularly and systematically transacted and/or solicited business in this State, either directly or through intermediaries.

13. Kalanick has derived substantial revenue, including as an owner and executive of Uber, from services rendered in New York State. He has likewise derived substantial revenue from interstate commerce.

14. Kalanick has purposely availed himself of the benefits of the State of New York and has committed wrongful acts in whole or in part within the State of New York that have had direct effects in this State. Kalanick has expected, and should have expected, his actions to have consequences in the State of New York.

15. Among other things, Kalanick has purposefully directed his illegal activities to artificially raise Uber car service prices for persons within the State of New York. Activities in furtherance of these activities include, but are not limited to, providing his Uber car service and pricing algorithm in the State of New York, engaging in lobbying efforts in this State related to the provision of Uber car services and use of the pricing algorithm, and appearing in this State for interviews and providing public statements regarding Uber's car services and pricing algorithm (including in November 2014 and at least as recently as September 2015 when he appeared in New York as a guest on the Late Show with Stephen Colbert).

16. The claims in this case arise out of activities that relate to New York State.

17. This Court's exercise of personal jurisdiction over Kalanick would comport with fair play and substantial justice.

18. Venue is proper in this district pursuant to 28 U.S.C. § 1391 in that a substantial part of the events giving rise to the claim occurred in this district. New York City is reportedly Uber's biggest market in the United States and its most profitable.

19. Kalanick is engaged in, and his activities substantially affect, interstate trade and commerce.

CO-CONSPIRATORS

20. Various persons and entities including Uber driver-partners, known and unknown to Plaintiff and not named as defendants in this action, have participated as co-conspirators with Kalanick in the offenses alleged and have performed acts and made statements in furtherance of the conspiracy.

BACKGROUND

Uber and the Uber App

21. Kalanick founded Uber in 2009.

22. Uber is an on-demand car service that seeks to match riders with drivers.

23. It is Uber's position that it is not a transportation company. Uber does not provide transportation services itself.

24. Uber offers an application for smartphone devices (the "Uber App") through which users of the Uber App can request private drivers to pick them up and take them to their desired location. The Uber App utilizes dispatch software to send the nearest independent drivers to the requesting parties' locations.

25. Uber offers different car service experiences, including UberX, UberBLACK, UberSUV, and UberLUX (collectively, "Uber car service").

26. Following completion of a ride, Uber calculates a fare based on a base amount, ride distance, and time spent in transit, which may be multiplied during "surge" periods if rider demand is high and/or driver supply is low, and then processes a transaction on behalf of the driver.

27. Uber collects a percentage of the fare as a software licensing fee and remits the remainder to the driver-partner.

Uber Users: Riders

28. Uber users provide their names, mobile numbers, emails, languages, and credit card numbers or PayPal account information to Uber in exchange for Uber accounts and access to the Uber App.

29. To become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy.

30. Uber account holders can obtain "Fare Quotes" directly from the Uber App by entering their pickup location and destination. The Uber App calculates approximate amounts based on the expected time and distance.

31. A rider pays a driver a fare in a transaction facilitated by Uber but to which Uber is not a party.

32. Uber facilitates payment of that fare by charging the user's credit card or PayPal billing information on file and purportedly serves as the driver's "limited payment collection agent" in this regard. Uber then sends a receipt to the user's email address.

33. No cash is exchanged directly between riders and drivers.

34. Nor are riders able to negotiate fares with drivers for rides matched through the Uber App.

35. Instead, riders pay drivers through the Uber App.

36. Riders pay drivers the fare set by the Uber App.

Uber's Other Users: Driver-Partners

37. Uber actively recruits drivers to serve as "partners."

38. Uber and its driver-partners enter into a written agreement.

39. Uber and its drivers "expressly agree that no joint venture, partnership, employment, or agency relationship exists between [the driver and] Uber."

40. When Kalanick and his subordinates decide to offer Uber App services in a new geographic location, Uber uses social media to advertise for new "partner" drivers and holds meetings with these potential drivers.

41. Uber also organizes events for its driver-partners to get together. For example, in September 2015, Uber hosted a picnic at a park in Oregon where more than 150 driver-partners and their families reportedly joined Uber. Similar "partner appreciation" events have been organized for driver-partners in Burlington, Vermont, Portland, Maine, and New York City, among other places.

42. Uber tells potential drivers that "Uber gives you the freedom to get behind the wheel when it makes sense for you. Choose when you drive, where you go, and who you pick up."

43. A driver has discretion as to whether to transport riders and may decline or cancel a request if, for example, a rider is unruly or intoxicated.

44. As of October 2015, Uber had an estimated 20,000 uberX driver-partners operating in New York City. Uber reported at that time that "average uberX gross fares per hour increased by 6.3% year over year."

45. At times, Uber has sought to mobilize its driver-partners to lobby on Uber's behalf.

Driver-Partners Authorize Kalanick and Uber To Control Pricing

46. Uber has steadfastly maintained that its driver-partners are not employees of Uber, are not part of any Uber joint venture, and are wholly independent. In exchange for being listed on the Uber App, drivers agree to pay a percentage of the fare to Uber.

47. Fares are calculated based on an Uber-generated algorithm. As demand for car services increases among users, applying the Uber algorithm results in increased fares ("surge pricing").

48. Kalanick's surge pricing model allows for up to ten times (10x) the standard fare to be charged during periods of high demand, and Kalanick and his co-conspirators have employed surge pricing on a regular basis.

49. Uber has not publicly revealed the specifics of its pricing algorithm, but Kalanick has commented on the surge pricing feature embedded in the algorithm.

50. Upon information and belief, Kalanick conceived of and implemented the surge pricing model into the Uber algorithm. Kalanick is a fierce defender of the surge pricing model.

51. In a December 17, 2013 report by Marcus Wohlsen posted on Wired.com and entitled "*Uber boss says surging prices rescue people from the snow*," Mr. Kalanick is quoted as saying: "We are not setting the price. The market is setting the price. We have algorithms to determine what the market is." www.wired.com/2013/12/uber-surge-pricing (last visited on Jan. 29, 2016). Mr. Kalanick further explained the surge pricing component of the Uber pricing conspiracy: "There's a harsh reality to situations where demand outstrips supply. As much as I'd love to give everybody a really cheap option, it's just simply not possible in certain sorts of extreme events. … I

guarantee that our strategy on surge pricing is the optimal way to get as many people home as possible." *Id.*

52. In a September 17, 2015 post on the Uber website, Uber explains Kalanick's surge pricing to riders this way:

> Our goal at Uber is to ensure you can push a button and get a ride within minutes — even on the busiest nights of the year. And due to surge pricing, that's almost always possible. Here's how it works. When demand for rides outstrips the supply of cars, surge pricing kicks in, increasing the price. You'll automatically see a 'surge' icon next to the products (uberX, UberBLACK, etc.) that are surging. If you still want a ride, Uber shows the surge multiplier and then asks for your consent to that higher price.

The website post continues:

> Surge pricing has two effects: people who can wait for a ride often decide to wait until the price falls; and drivers who are nearby go to that neighborhood to get the higher fares. As a result, the number of people wanting a ride and the number of available drivers come closer together, bringing wait times back down.
>
> Together with Chris Nosko, a professor at The University of Chicago, we have been studying the effects of surge pricing. On New Year's Eve last year, Uber experienced a technical glitch causing surge pricing in New York City to fail for 26 minutes. This created what we call in economics a "natural experiment" — when something varies, which you can then study after the fact.
>
> Today we are releasing a case study of rider and driver behavior during the surge glitch, and on the night of a sold-out-concert at Madison Square Garden when surge worked as intended. This study is not exhaustive, but will form the basis of more comprehensive research in the future.
>
> We found that, without surge pricing, Uber is not really Uber — you can't push a button and get a ride in minutes:
>
> - On the night of the concert, even though the number of people opening the Uber app experienced a 4x increase, the number of actual ride requests only rose slightly. In other words people decided not to request a ride. Meanwhile, 100% of ride requests were completed and ETAs were virtually unaffected.
>
> - By comparison on New Year's Eve, without surge, ride requests skyrocketed and only 25% of these requests were completed. ETAs also increased sharply. Without surge pricing, rider and driver behavior did not adapt to the increased interest in getting a ride.

> These two real-world scenarios illustrate a bit of Economics 101: supply and demand adjust in response to price changes. On Uber, this means a ride is more likely than not just a few minutes away, at the simple touch of a button.

53. In reality, Kalanick's pricing algorithm artificially manipulates supply and demand, guaranteeing sharply higher fares for drivers who would otherwise compete against one another on price.

54. Kalanick and Uber are authorized by drivers to control the fares charged to riders. Through the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders.

55. Uber provides a driver guide for its driver-partners, which contains a FAQs section. One of the questions is "What will the total fare be?" The answer is: "Total fare is based on time and distance, so you won't know until the trip ends. It's not a good idea to estimate fares for riders because the actual charges may be higher."

56. Although they are independent partners, drivers do not individually and independently control their fares. Instead, they relinquish control over fares to Uber with the shared understanding that Uber will set fares without forcing them as drivers to compete with one another.

57. Uber uses surge pricing to incentivize its driver-partners to use the Uber App during periods of peak demand. Uber provides alerts to its driver-partners relating to surge pricing based on demand or limited availability of drivers.

58. Uber also communicates with its driver-partners to inform them of what their increased earnings might have been had they logged into the Uber App during recent busy periods. Uber also provides its driver-partners with information regarding upcoming events that are likely to create high-demand for transportation services (e.g., concerts, sporting events, busy holidays).

59. Uber manipulates its pricing algorithm by, among other things, encouraging drivers who are not available or willing to receive trip requests to log out of the Uber App in order to show less supply (which equates to higher fares).

60. Some of Uber's driver-partners likewise manipulate the pricing algorithm. Drivers report staying offline with UberX during non-surge times to trigger surges and thus obtain artificially increased fares. These behaviors are incentivized by Kalanick's surge pricing algorithm.

61. As Kalanick is quoted as saying: "You want supply to always be full, and you use price to basically either bring more supply on or get more supply off, or get more demand in the system or get some demand out. It's classic Econ 101."

62. Kalanick has further explained his surge pricing model: "When demand outstrips supply, the price comes up in a particular neighborhood or across a city." (Sept. 10, 2015 appearance on Late Show with Stephen Colbert)

63. Kalanick can turn off surge pricing, if he so chooses. As he has admitted: "Sometimes, something happens in a city; we don't know what it is. And if it's an emergency, we basically turn it off. Because I just think community expectations are [such that in] an emergency, major weather events, things like that, we turn it off." *Id.*

64. In fact, very rarely if ever does Kalanick or his subordinates "turn off" the surge pricing feature of the pricing algorithm.

65. Instead, Kalanick and his co-conspirators reap artificially high profits during other peak demand periods like New Year's Eve, Valentine's Day, and stormy weather.

66. On the night of December 31, 2015 and early morning of January 1, 2016, Kalanick's surge pricing reportedly reached as high as 9.9 times standard fares in some U.S. cities.

67. On January 20, 2016, surge pricing reportedly was at 4.5 times standard fares in Washington, D.C. during a snow storm.

The Driver-Partners Agree To Kalanick's Price-Fixing Scheme

68. All of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm.

69. Uber claims to allow its driver-partners to depart downward from the fare set by the Uber algorithm. In reality, however, there is no mechanism by which drivers can do so. Uber has effectively conceded this fact in other litigation. Drivers collect fares through the Uber App, rather than through direct transactions with rider. Accordingly, as drivers all understand and agree, Uber controls the fare.

70. Driver-partners agree, in writing, to collect fares through the Uber App. Driver-partners understand and agree that they will not compete with other driver-partners on price because Uber controls the fare. Driver-partners agree to participate in a combination, conspiracy, or contract to fix prices when they swipe "accept" to accept the terms of Uber's written agreement.

71. Driver-partners further participate in a combination, conspiracy, or contract to fix prices each time they accept a rider using the Uber App. Each time a driver accepts a rider, the driver understands and agrees not to compete with any other driver on pricing and to charge Uber's pricing.

72. Oftentimes, using Uber's pricing would not be in an individual driver-partner's best interests absent an individual driver's assurance that all other driver-partners will charge the price set by Uber. When using Uber, drivers are unable to compete with other Uber drivers on price. This may result in lost business opportunities for individual drivers. Foregoing such competition only makes sense because drivers are guaranteed that other Uber drivers will not undercut them on

price and that, consequently, drivers who do pick up riders can collect above-market fares from them.

73. Moreover, upon information and belief, some drivers have lamented that Uber's surge pricing component can result in greater rider dissatisfaction and fewer rides for drivers. Upon information and belief, some drivers believe that having more stable fares would increase rider satisfaction, as well as increasing the number of riders willing to use Uber driver-partners at certain times.

74. For his part, Kalanick has staunchly defended the Uber price-fixing algorithm. "Airlines and hotels are more expensive during busy times. Uber is as well. We don't just charge to make a buck though, we take a small fee of the transaction, but the vast majority goes to the driver so that we can maximize the number of drivers on the road. The point is in order to provide you with a reliable ride, prices need to go up."

75. Implicit in Kalanick's statement is his manipulation of free market principles by insisting that *all* Uber driver-partners must adhere to the Uber algorithm in order to deliver the experience that Kalanick desires: high-priced, reliable rides. In an efficient market, however, the balance between reliability and price would sort itself out, with some riders willing to pay more for greater reliability and others willing to sacrifice some reliability for a lower fare. Kalanick has abandoned the free market principles that he purports to support by tilting the scales in favor of higher fares.

76. Kalanick is the chief architect of the price-fixing conspiracy, combination, or contract. The driver-partners have joined the conspiracy, combination, or contract because the artificial rates set by the pricing algorithm are higher on average than the fares that Plaintiff and Class Members would otherwise be charged in a competitive marketplace.

77. Driver-partners operate the Uber App with the common goal and purpose of maintaining Uber-controlled pricing, including surge pricing, and with the knowledge and intent that riders will be charged fares at prices set by Uber.

78. To maintain Uber's price-fixed fares, driver-partners are mutually dependent upon each other's commitment to charge those fares and to not compete on fares. Kalanick's design ensures that driver-partners will maintain those commitments because his Uber App prevents driver-partners from competing on fares.

79. Uber reports that in 2015, its U.S. driver-partners were paid more than $3.5 billion.

Kalanick is a Driver and a Direct Competitor with Driver-Partners

80. Kalanick is not only the CEO and co-founder of Uber; he also has been a driver who has used the Uber App.

81. Kalanick has publicized his work as a driver. Among other things, he has live tweeted his driving experience. For instance, on February 21, 2014, Kalanick tweeted, "Driving a range rover black on black . . . on uberX . . So legit." That same night, he further tweeted "3 trips down," among other things. His tweets continued through February 22, 2014.

82. As a driver, Kalanick has competed directly with other drivers using the Uber App.

83. Kalanick, as Uber's CEO, has ultimate control over the fares charged by himself, as a driver, and other drivers using the Uber App.

84. Kalanick and his direct competitors, by using the Uber App, agreed to charge identical fares to riders. Kalanick and his direct competitors using the Uber App understood that, by using the Uber App, they would charge identical fares to riders.

85. Kalanick's direct competitors delegated to Uber and to Kalanick, as Uber's CEO, the ability to fix prices through the Uber App algorithm. They agreed to charge those fares by becoming driver-partners and using the Uber App.

Driver-Partners Have Colluded With Kalanick to Raise Fares

86. Kalanick, in his position as Uber CEO, has colluded and agreed with driver-partners to raise fares.

87. For instance, in September 2014, drivers using the Uber App in New York City colluded with each other to negotiate the reinstitution of higher fares for riders using UberBLACK and UberSUV services. Upon information and belief, Kalanick, as Uber's CEO, directed or ratified negotiations between Uber and these co-conspirators, in which Uber ultimately agreed to raise fares.

88. By organizing this price-fixing conspiracy, Kalanick ensured that fares would rise to a level that Uber, and the New York City drivers (*i.e.*, direct competitors), had jointly agreed upon.

89. Riders using the Uber App have suffered by paying artificially increased fares resulting from this price-fixing conspiracy.

Plus Factors

90. Driver-partners have a common motive to conspire to adhere to the Uber pricing algorithm and the resulting artificially high fares because they could yield supra-competitive prices through their collective action.

91. Were it not for the unlawful agreement, individual driver-partners would have sought to differentiate themselves from other drivers on the basis of price, among other factors.

92. The driver-partners have had many opportunities to meet and enforce their commitment to the unlawful arrangement. At numerous meetings and events organized by Uber,

and through smart phone apps facilitating communications between drivers, driver-partners have reinforced and reaffirmed their mutual commitments to this unlawful arrangement.

93. Were the driver-partners acting independently, rather than concertedly, some significant portion would not agree to adhere to the Uber pricing algorithm in charging fares to riders.

The Mobile App-Generated Ride-Share Service Market

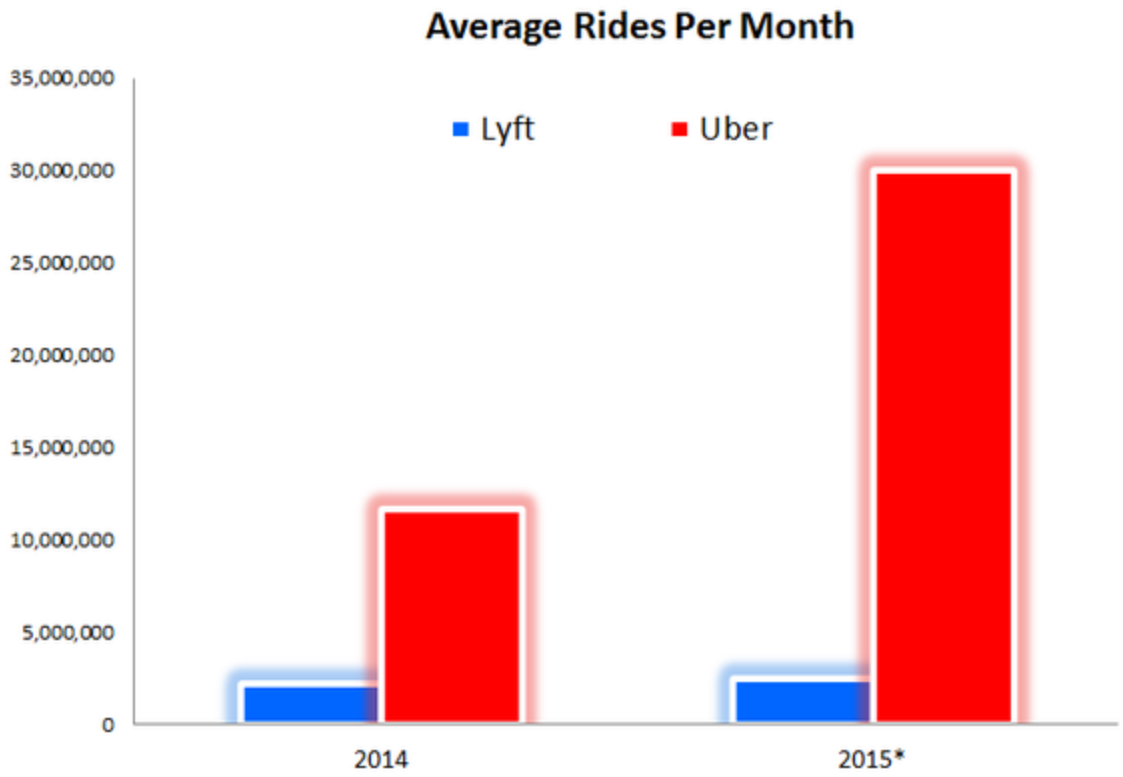
94. Uber competes in the relatively new mobile app-generated ride-share service market.

95. Upon information and belief, Uber has approximately 80% market share in the U.S. in the mobile app-generated ride-share service market.

96. Uber's chief competitor in the U.S. mobile app-generated ride-share service market is Lyft, which, upon information and belief, has nearly 20% market share.

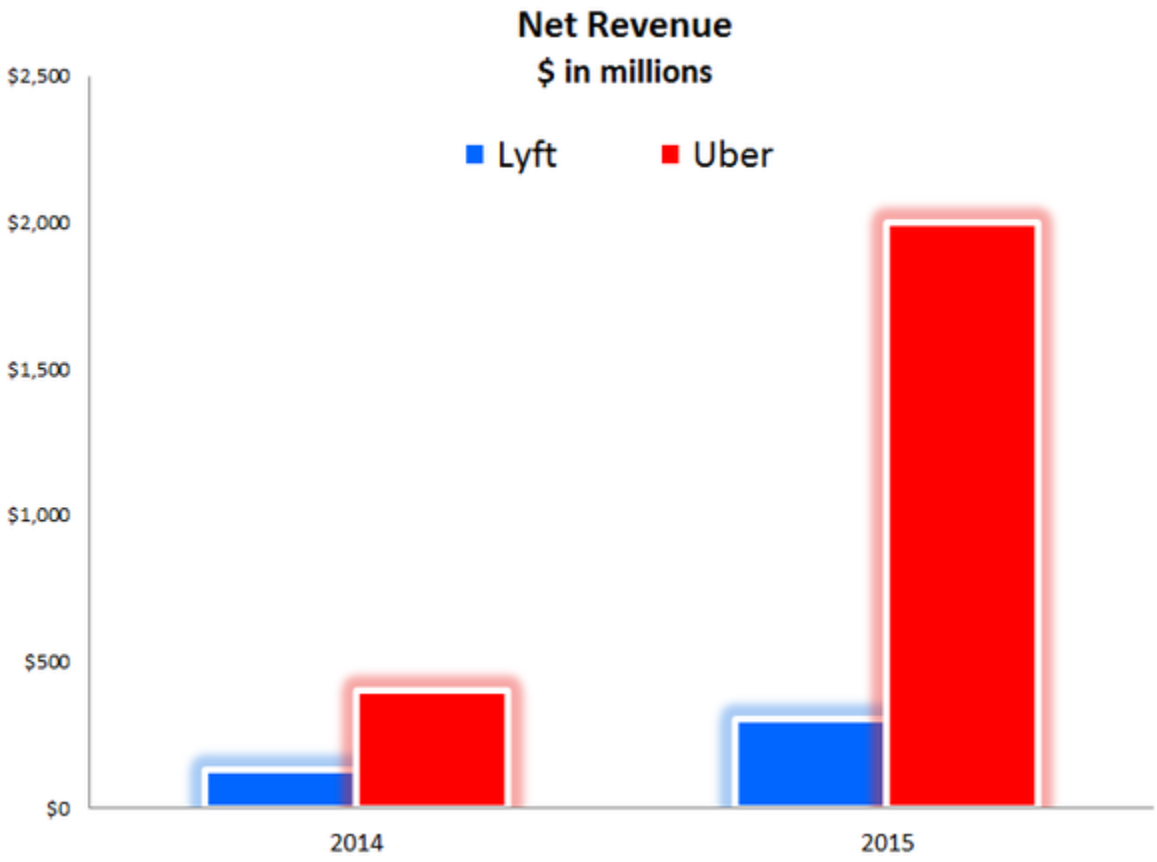
97. A third competitor in the market, Sidecar, left the market at the end of 2015.

98. As reported by Daniel Miller, in an article entitled "Lyft vs. Uber: Just How Dominant Is Uber in the Ridesharing Business?," May 24, 2015, available at www.fool.com/investing/general/2015/05/24/lyft-vs-uber-just-how-dominant-is-uber-ridesharing.aspx (last visited January 25, 2016), Uber Dominates The Market In Average Rides Per Month:



(Chart by Daniel Miller. Data source: Uber and Lyft. Note: 2015 figures above are based on the beginning of 2015, not what the companies expect to average through the full-year 2015 -- those figures will likely be higher -- whereas 2014 figures above show the average monthly numbers.)

99. According to the same report, Uber also dominates the market in net revenue:



(Chart by Daniel Miller. Data from Uber and Lyft leaked to TechCrunch and Bloomberg.)

100. In addition, Uber has much greater market penetration than its competitors. A study published in August 2015 reported that 6% of sampled smart phones had the Uber App installed, while only about 1% had the Lyft app installed.

101. Given Uber's dominant position in the market, Kalanick's price-fixing scheme has resulted in higher prices in the market as a whole.

102. Uber's market position has already helped force Sidecar out of the marketplace.

103. Uber's dominant position and considerable name recognition has also made it difficult for potential competitors to enter the marketplace.

104. Traditional taxi service is not a reasonable substitute for mobile app-generated ride-share service. Unlike trying to hail a taxi on a busy New York City street, the mobile app-generated ride-share companies allow prospective passengers to arrange for rides at the push of a button and then watch on their mobile phones for the nearest driver approach for pick up. Those using mobile app-generated ride-share service also need not have cash or credit card on hand, and they can simply get out of the car when they reach their destination without further delay. In addition, mobile app-generated ride-share service offerors allow a rider to rate their driver and view their driver's name, headshot, the make and model of his car, and overall rating before entering the vehicle. Moreover, traditional taxi services are heavily regulated, whereas those who offer mobile app-generated ride-share services like Uber are not.

105. Uber does not consider itself in the same market as taxis. Among other things, Uber has stated, "It's not Uber versus taxis, we don't see them as a ride-sharing competition." Uber has also stated that it is not "in competition with taxi."

106. Traditional cars for hire also are not reasonable substitutes for mobile app-generated ride-share service. Traditional cars for hire typically need to be scheduled in advance to pick up riders at a pre-arranged times and locations. The foresight and rigidity required of potential passengers for car for hire service is an important differentiator from those using on-demand, mobile app-generated ride-share service.

107. Although neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber has obtained a significant share of business in the combined markets of taxis, cars for hire, and mobile-app generated ride-share services. Uber's own experts have suggested that, within certain cities in the United States, Uber captures 50 to 70 percent of business customers among all types of rides.

108. Public transportation offerings, such as subway or bus, are also not reasonable substitutes for mobile app-generated ride-share service because, among other things, they do not pick up riders at the riders' locations, at the times that the rider wants rides, and they do not drop off riders at their preferred destinations.

Plaintiff and the Putative Class Suffered Antitrust Injury

109. Kalanick's actions have restrained competition by inflating prices. But for Kalanick's conspiracy to fix fares charged by drivers using the Uber App, Uber ride-share service fares would have been substantially lower, including during the implementation of surge pricing. Absent Kalanick's anticompetitive actions, riders would have been able to obtain rates resulting from fare competition among drivers.

110. Kalanick's actions have further restrained competition by decreasing output. As independent studies have shown, the result of Kalanick's collusive surge pricing is not, as he claims, to perfectly match supply with demand, but instead to remove some demand so that prices stay artificially high and Kalanick reaps artificially high profits.

111. Upon information and belief, Kalanick's Uber ride-share service comprises approximately 80 percent of the mobile app-generated ride-share service market.

112. As a result of Kalanick's anticompetitive actions, competition in the market for mobile app-generated ride-share service, and the sub-market of Uber car service, has been restrained.

Nationwide Class

113. Plaintiff sues on behalf of a class of persons pursuant to Federal Rule of Civil Procedure 23. The Class consists of all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set

by the Uber pricing algorithm. Excluded from the Class is Kalanick, his co-conspirators, Uber's employees, officers, and directors, and Kalanick's legal representatives and heirs.

114. Plaintiff also brings certain of the claims on behalf of himself and a portion of the Class described as the Surge Pricing Subclass. The Subclass consists of all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and have paid fares for their rides set by the Uber pricing algorithm that included surge pricing.

115. The persons in the Class and Subclass are so numerous that individual joinder of all members is impracticable under the circumstances of this case. Although the precise number of such persons is unknown, the exact size of the Class and Subclass are easily ascertainable, as each Class member and Subclass member can be identified by using Defendant's records and/or the records of Uber. Plaintiff is informed and believes that there are many thousands of Class and Subclass members.

116. There are common questions of law and fact specific to the Class and Subclass that predominate over any questions affecting individual members, including:

a. Whether Kalanick and the Uber driver-partner co-conspirators unlawfully contracted, combined, and conspired to unreasonably restrain trade in violation of Section 1 of the Sherman Act by agreeing to charge all Uber riders the fare calculated by the Uber algorithm;

b. Whether Kalanick's actions in orchestrating the Uber pricing conspiracy violated Section 340 of New York's General Business Law;

c. Whether consumers and Class members have been damaged by Kalanick's conduct;

d. Whether punitive damages are appropriate;

e. Whether Kalanick should disgorge unlawful profits;

f. The amount of any damages; and

g. The nature and scope of injunctive relief necessary to restore a competitive market.

117. Plaintiff's claims are typical of the claims of the Class and Subclass, as they arise out of the same course of conduct and the same legal theories as the rest of the Class and Subclass, and Plaintiff challenges the practices and course of conduct engaged in by Defendant with respect to the Class and Subclass as a whole.

118. Plaintiff will fairly and adequately protect the interests of the Class and the Subclass. Plaintiff has retained as Class and Subclass Counsel able class action litigators.

119. Resolution of this action on a class-wide basis is superior to other available methods and is a fair and efficient adjudication of the controversy because in the context of this litigation, no individual Class or Subclass member can justify the commitment of the large financial resources to vigorously prosecute a lawsuit against Defendant. Separate actions by individual Class or Subclass members would also create a risk of inconsistent or varying judgments, which could establish incompatible standards of conduct for Defendant and substantially impede or impair the ability of Class or Subclass members to pursue their claims. A class action also makes sense because Defendant has acted and refused to take steps that are, upon information and belief, generally applicable to thousands of individuals, thereby making injunctive relief appropriate with respect to the Class and Subclass as a whole.

FIRST CAUSE OF ACTION
(Violation of the Sherman Act, 15 U.S.C. § 1)

120. Plaintiff repeats and realleges all previous allegations as if set forth in full herein.

121. Under the facts and circumstances of this action, Plaintiff is not required to allege or prove a "relevant market." To the extent one is required, the relevant product market is mobile app-generated ride-share service, with a relevant sub-market of Uber car service.

122. To the extent required, the relevant geographical market is the entire United States.

123. Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination or conspiracy in restraint of trade. Specifically, Kalanick engaged in concerted action with Uber driver-partners to set the Uber pricing algorithm (including its surge pricing component) as the fixed price for Uber riders' fares.

124. This unlawful arrangement consists of a series of agreements between Kalanick and each of the Uber driver-partners, as well as a conscious commitment among the Uber driver-partners to the common scheme of adopting the Uber pricing algorithm as a fixed fare and of not competing with one another on price.

125. Were it not for the conspiracy, combination, or agreement between all driver-partners to charge the same price, some driver-partners would not have agreed to the price-fixing arrangement with Kalanick and Uber.

126. Through Kalanick's and Uber's actions, the Uber driver-partners have been enabled to participate in a conspiracy, combination, or contract among themselves to adhere to the artificial price setting embodied in the Uber pricing algorithm. Defendant and Uber have sought to obscure the unlawful nature of this arrangement by disingenuously and inaccurately claiming that Uber driver-partners can charge a lower fare than the one generated by the Uber algorithm. At the same time, Defendant and Uber tout the ability for Uber driver-partners to earn more money by adhering to the Uber algorithm, and they facilitate Uber driver-partners' opportunities to meet together.

127. In orchestrating this price-fixing conspiracy, combination, or contract, Kalanick committed himself to achieving an unlawful objective: namely, collusion with and among the co-conspirator drivers to fix prices.

128. Despite Kalanick's position as an operator of a platform that purportedly seeks to match riders with drivers, his organization of the conspiracy subjects him to per se liability for the results of the price-fixing.

129. In addition, Kalanick's role as an occasional Uber driver puts him in a horizontal relationship with his driver-partner peers, which further supports per se treatment of his arrangements in restraint of trade.

130. In the alternative, Kalanick is also liable under Section 1 of the Sherman Act under a "quick look" or a "rule of reason" analysis.

131. Plaintiff and the Class and Subclass members have been injured and will continue to be injured in their businesses and property by paying more for Uber car service than they would have paid or would pay in the future in the absence of Defendant's unlawful acts.

132. Plaintiff and the Class and Subclass members have sustained substantial damages in an amount to be determined at trial.

133. The unlawful contracts, agreements, arrangements, combinations, or conspiracies will continue unless permanently enjoined and restrained. Plaintiff and the Class and Subclass members are entitled to an injunction that terminates the ongoing violations alleged in this Complaint.

SECOND CAUSE OF ACTION
(Violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340)

134. Plaintiff repeats and realleges all previous allegations as if set forth in full herein.

135. Through unlawful contracts, agreements, arrangements, or combinations, Defendant has restrained trade in violation of the New York General Business Law, § 340, *et seq.*,

136. The conduct and actions that render Kalanick liable under the Sherman Act for orchestrating an unlawful price fixing agreement and arrangement among the Uber driver-partners also renders him liable under the Donnelly Act.

137. In the alternative, Kalanick is also liable under Section 340 of the Donnelly Act under a "quick look" or a "rule of reason" analysis.

138. Plaintiff and the Class and Subclass members have been injured and will continue to be injured in their businesses and property by paying more for Uber car service than they would have paid or would pay in the future in the absence of Defendant's unlawful acts.

139. Plaintiff and the Class and Subclass members have sustained substantial damages in an amount to be determined at trial.

140. The unlawful contracts, agreements, arrangements, or combinations will continue unless permanently enjoined and restrained. Plaintiff and the Class and Subclass members are entitled to an injunction that terminates the ongoing violations alleged in this Complaint.

JURY DEMAND

141. Plaintiff requests a jury trial of all issues triable of right to a jury.

WHEREFORE, Plaintiff demands judgment against Kalanick as follows:

A. Certification of the action as a Class Action pursuant to Federal Rule of Civil Procedure 23, and appointment of Plaintiff as Class and Subclass Representative and his counsel of record as Class and Subclass Counsel.

B. A declaration that Defendant's conduct constituted a conspiracy and that Defendant is liable for the conduct or damage inflicted by any other co-conspirator;

C. A declaration that the use of the pricing algorithm for setting fares as described above is unlawful;

D. An award of monetary damages in an amount to be proved at trial, plus interest, to Plaintiff and Class and Subclass members;

E. Actual damages, statutory damages, punitive or treble damages, and such other relief as provided by the statutes cited herein;

F. Pre-judgment and post-judgment interest on such monetary relief;

G. Equitable relief in the form of restitution and/or disgorgement of all unlawful or illegal profits received by Defendant as a result of the anticompetitive conduct alleged herein;

H. The costs of bringing this suit, including reasonable attorneys' fees, as further provided under the statutes cited herein; and

I. All other relief to which Plaintiff and members of the Class and Subclass may be entitled at law or in equity.

Dated: January 29, 2016

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, v. TRAVIS KALANICK, Defendant.	**Case No. 1:15-cv-9796 (JSR)**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TRAVIS KALANICK'S MOTION TO DISMISS

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INTRODUCTION

Uber Technologies, Inc. ("Uber") is an innovative technology company that connects independent driver-partners and riders through its smartphone application. As a new entrant in the transportation marketplace, Uber has vastly increased options, reduced prices and improved service for millions of Americans.[1] Antitrust law has long appreciated the procompetitive benefits that come along with technological innovation and new market entry. Plaintiff's First Amended Complaint ("Amended Complaint") nonetheless invokes that same antitrust law to attack Uber's innovative technology and its benefits to consumers and competition. The Amended Complaint attempts this feat by continuing to allege a wildly implausible—and physically impossible—conspiracy among hundreds of thousands of independent transportation providers all across the United States ("driver-partners"), based solely on the fact that they agreed to use Uber's pricing algorithm, and at some point in time accepted ride requests via the Uber App. This lawsuit, if allowed to proceed, would strangle innovation, decrease competition, and increase prices—defeating precisely the behavior antitrust law is designed to encourage. For this reason—and because the Amended Complaint continues to fail to state a claim under the antitrust laws— it must be dismissed.

According to Plaintiff, each and every driver-partner joined a single "horizontal" agreement—that is, an agreement between direct competitors—to fix prices when using the Uber App. But even as it asserts an unreal conspiracy of staggering breadth, the Amended Complaint,

[1] As recognized by the Federal Trade Commission, Uber's mobile application-based platform for matching riders and driver-partners represents an "innovative form of competition" that has expanded consumer welfare and prompted competition on a wide variety of fronts, including on price. Federal Trade Commission, Comment Letter ("FTC Comment Letter") at 2, June 7, 2013, available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf (last accessed Feb. 8, 2016).

like its predecessor, lacks any specific factual allegations to support any reasonable inference that driver-partners came to an agreement among themselves to violate the law, as opposed to their independent decisions to enter into vertical agreements with Uber. The Amended Complaint still contains no mention of any alleged co-conspirators by name, other than Defendant Travis Kalanick, Uber's CEO, who purportedly joined the horizontal conspiracy when, on a couple of isolated occasions, he acted as a driver-partner—and "tweeted" about his experience.

As Mr. Kalanick pointed out in his Motion to Dismiss the original Complaint, the Amended Complaint continues to fail to mention any specific communications between any co-conspirators, nor does it attempt to explain how unidentified communications among unidentified individuals at unidentified places and times could have led to an agreement among hundreds of thousands of independent driver-partners to fix prices. The Amended Complaint's only allegation that any driver-partners have even met one another is that Uber, on occasion, organizes "picnics" for small groups of driver-partners located in a particular city. Plaintiff would have this Court extrapolate from these isolated Uber-organized picnics the existence of a *nationwide* price-fixing conspiracy among hundreds of thousands of strangers. This is exactly the type of conclusory assertion of conspiracy, unaided by any specific factual allegations indicating an actual agreement to fix prices, that the Supreme Court held insufficient in *Bell Atlantic Corp. v. Twombly*, 555 U.S. 550 (2007). While the Amended Complaint attempts to remedy this fatal flaw, the amendments only further underscore the total implausibility and vagueness of Plaintiff's theory.

The Amended Complaint attempts to explain how hundreds of thousands of independent driver-partners conspired to fix prices by pointing to each individual driver-partner's agreement

with Uber to adhere to Uber's pricing algorithm for setting fares. But this allegation only serves to underscore the legality of the conduct at issue: Uber, an upstream technology company, has proposed contractual terms of dealing to downstream transportation providers that include use of Uber's pricing algorithm, and those downstream providers who wish to become driver-partners for Uber have agreed to those contractual terms and used the algorithm. Those driver-partners, moreover, remain free to contract with Uber's many competitors in the transportation marketplace that offer their own mobile applications for matching riders and drivers—including Lyft and traditional taxi companies.

For nearly a century, the Supreme Court has made clear that it is perfectly lawful for a vertical actor like Uber to announce terms of dealing to prospective downstream counterparties, and to deal only with those who agree to its preferred terms. This lawsuit seeks to sneak around this settled jurisprudence by making manifestly implausible and factually unsupported allegations of a horizontal conspiracy. This Court should reject that effort and dismiss the Amended Complaint, with prejudice.

STATEMENT OF FACTS ALLEGED IN THE AMENDED COMPLAINT

Defendant Travis Kalanick is the Chief Executive Officer and co-founder of Uber. Am. Compl. at 1. He is the sole defendant named in Plaintiff's Amended Complaint. *Id.*

"Uber is a technology company" that developed and licenses a mobile application (the "Uber App") for use on smartphone devices. *Id.* ¶ 2. The Uber App allows independent transportation providers—Uber "driver-partners"—to receive trip requests from members of the public, and provides electronic payment processing for trips booked through the Uber App. *Id.* ¶¶ 24, 26, 32; *see id.* ¶ 2 ("Uber is not a transportation company and does not employ drivers" to directly provide transportation services); *id.* ¶ 5 ("drivers using the App are independent firms

that are in competition with one another for riders"). "The Uber App utilizes dispatch software to send the nearest independent drivers to the requesting parties' location." *Id.* ¶ 24. Following a ride, Uber collects a software licensing fee, which is calculated as a percentage of the fare charged by the driver-partner to the rider, and remits the remainder of the fare to the driver-partner. *Id.* ¶ 27.

Uber enters into individual contracts with each driver-partner pursuant to which Uber agrees to provide the driver-partner with lead generation and payment processing services and the driver-partner agrees to pay Uber a licensing fee. *Id.* ¶ 38; *see* Declaration of Michael Colman, Ex. 2 ("Driver Terms"). As part of these separate contracts, Uber requires each driver-partner to agree to use Uber's pricing algorithm to arrive at a standard, suggested fare. *Id.* ¶ 47. The pricing algorithm is primarily based on a trip's "time and distance." *Id.* ¶ 55. The algorithm also uses "surge pricing," which may increase the price "based on demand or limited availability of drivers" "to incentivize its driver-partners to use the Uber App" at times of low supply. *Id.* ¶ 57. Uber's contracts with driver-partners expressly permit the driver-partners to reject the fare charged by the pricing algorithm and instead charge a lower fare. Driver Terms ¶ 4.1 ("You [the driver-partner] shall always have the right to: (i) charge a fare that is less than the pre-arranged Fare; or (ii) negotiate, at your request, a Fare that is lower than the pre-arranged Fare").[2] Even so, Plaintiff alleges that "[a]ll of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm" and not "to depart downward from the fare set by the Uber algorithm." Am. Compl. ¶¶ 68-69. Uber offers a variety of "different car service experiences," *id.* ¶ 25, with each "experience" providing a different level of service and price point.

[2] "In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint . . . and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010).

The Amended Complaint asserts that all Uber driver-partners who have accepted so much as a single ride request through the Uber App, by virtue of their agreement to Uber's Driver Terms, are "participa[nts] in a conspiracy, combination, or contract *among themselves* to adhere to the artificial price setting embodied in the Uber pricing algorithm." *Id.* ¶ 126 (emphasis added). Mr. Kalanick is the only person or entity identified by name as a party to the purported horizontal conspiracy. *Id.* ¶ 80. Plaintiff bases Mr. Kalanick's membership in the alleged horizontal conspiracy on the allegation that he acted as a driver-partner providing the UberX service on February 21 and 22, 2014. *Id.* ¶ 81 (alleging that Mr. Kalanick "tweeted" about his experience as a driver-partner).[3]

The Amended Complaint alleges that this conspiracy spans across the entire United States, *id.* ¶¶ 113, 122, and includes an estimated 20,000 driver-partners operating in New York City in October 2015, *id.* ¶ 44. Though the exact size of the alleged conspiracy is not specifically pleaded, the conspiracy must include at least several hundred thousand individual driver-partners in more than a hundred cities and 47 states across the United States. *See id.* ¶ 41; *O'Connor v. Uber Technologies, Inc.*, No. C-13-3826, 2015 WL 5138097, *7 (N.D. Cal. Sept. 1, 2015) (certifying a plaintiff class of 160,000 driver-partners operating in California alone). Plaintiff asserts that Mr. Kalanick, in his capacity as Uber's CEO, somehow "orchestrat[ed]" the unlawful horizontal agreement among all of these driver-partners. Am. Compl. ¶ 127.

Plaintiff Spencer Meyer, like all users of the Uber App, expressly agreed to Uber's terms and conditions. *Id.* ¶ 29. Among those conditions was the following: "**You [the user]**

[3] Uber's agreements with driver-partners relating to use of its pricing algorithm are considered "vertical" because they include price provisions "imposed by agreement between firms at different levels of distribution." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988). "Price-fixing agreements between two or more competitors," by contrast, are "known as horizontal price-fixing agreements." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

acknowledge and agree that you and [Uber] are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding." Declaration of Michael Colman, Ex. 1 ("User Terms") at 9 (bold in original).

ARGUMENT

I. Plaintiff Does Not Plead A Plausible Conspiracy Among Uber Driver-Partners.

To state a claim under § 1 of the Sherman Act, 15 U.S.C. § 1, a plaintiff must plead "enough factual matter (taken as true) to suggest an agreement was made." *Bell Atlantic Corp. v. Twombly*, 555 U.S. 550, 556 (2007); *id.* at 553 ("the crucial question is whether the challenged anticompetitive conduct stems from independent decision, or from an agreement") (quotation marks and brackets omitted); *id.* at 557 (an agreement requires an actual "meeting of the minds"). For there to be an "agreement" under § 1, the co-conspirators must have each made "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). In a § 1 case, therefore, a plaintiff can survive a motion to dismiss in one of two ways. First, a plaintiff may proffer "direct evidence that the defendants entered into an agreement in violation of the antitrust laws," for example by advancing particularized allegations of "a recorded phone call in which two competitors agreed to fix prices at a certain level." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). Second, "a complaint may, alternatively, present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.*

A. The Amended Complaint lacks any factual allegations indicating an agreement among driver-partners to fix prices.

Plaintiff's Amended Complaint is devoid of any direct evidence of an agreement between conspirators or even circumstantial facts to support a reasonable inference that a conspiracy existed among driver-partners for Uber. *Id.* Instead, the Amended Complaint principally relies

on the assertion that "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination or conspiracy in restraint of trade." Am. Compl. ¶ 123. Conclusory allegations such as these are insufficient under *Twombly*. 550 U.S. at 557 (a "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"); *RxUSA Wholesale Inc. v. Alcon Labs.*, 391 F. App'x 59, 61 (2d Cir. 2010) (affirming dismissal of antitrust claims because "assertion[s] of an agreement among the Manufacturers is entirely conclusory"); *Mayor of Baltimore*, 709 F.3d at 135-36 ("The ultimate existence of an 'agreement' under antitrust law . . . is a legal conclusion, not a factual allegation").

Even more glaring, there is no allegation of any driver-partner *ever* communicating with another driver-partner—or Mr. Kalanick—about prices, let alone the "high level of interfirm communications" that could plausibly suggest an agreement. *Mayor of Baltimore*, 709 F.3d at 139 (no inference of agreement where complaint makes particularized allegations of "only two actual communications between competitors"); *see also In re Elevator Antitrust Litig.*, No. 04-cv-1178(TPG), 2006 WL 1470994, at *3 (S.D.N.Y. May 30, 2006) ("if nothing in the way of specific transactions or patterns of transactions can be alleged indicating possible conspiratorial collusion or agreement to fix prices for the sale and maintenance of elevators, then the complaint is entirely lacking in any basis for claiming an illegal agreement or conspiracy"), *aff'd* 502 F.3d 47 (2d Cir. 2007).[4]

[4] The closest the original Complaint came to alleging with particularity that any two driver-partners ever communicated, about any topic, is that Uber organizes "picnics" in various cities for "driver-partners and their families." Compl. ¶ 36. The Amended Complaint makes a half-hearted attempt to expand on these meager allegations by asserting, with no supporting details, that there have been "numerous" unidentified "meetings and events organized by Uber" and that "smart phone apps facilitat[e] communications" between driver-partners. Am. Compl. ¶ 92. This is plainly insufficient to establish the "actual communications" necessary to facilitate an alleged nationwide conspiracy between hundreds of thousands of unrelated driver-partners.

The Amended Complaint in this case contains even fewer factual allegations to support an inference of conspiracy than the Complaint dismissed by this Court in *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612 (S.D.N.Y. 2013) (JSR). In that case, the plaintiffs alleged a conspiracy among a small group of six direct competitors, book publishers, and a vertical actor, Amazon. Plaintiffs alleged that there "may have been oral discussions or agreements directly between one or more of the [publishers] and AMAZON regarding the use of restrictive DRMs." *Id.* at 618. This Court found plaintiffs' allegation of a conspiracy "remarkable" in its "evasiveness," in part because "plaintiffs d[id] not specify who participated in these hypothetical discussions or agreements, only that they may have involved 'one or more' of the Publishers and Amazon." *Id.*

Here, there are even fewer indicia of an agreement: Plaintiff does not hypothesize a single "oral discussion" between driver-partners—arguing instead that mere use of the App somehow evidences conspiratorial communications across cities, counties, and states—nor does he attempt to identify particular individuals who had such discussions.[5] Put simply, the poverty

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Mayor of Baltimore, 709 F.3d at 139. An App is merely a medium of communication, like a phone or an email account. The existence of a *means* of communication is, of course, not evidence that a communication took place. Plaintiff fails to identify any particular meeting, event, or app-based communication in which driver-partners discussed prices, nor could he. *See* Declaration of Ryan Park, Ex. 1 (redline comparison of the Complaint and the Amended Complaint).

[5] Plaintiff's suggestion that a horizontal agreement can be inferred based on the happenstance that Mr. Kalanick has acted as a driver-partner cannot be taken seriously. The Amended Complaint does not allege that Mr. Kalanick has ever met or communicated with any driver-partner in his capacity *as a driver-partner*. *See* Am. Compl. ¶¶ 37-45, 80-85. That Mr. Kalanick, on a few isolated occasions, acted as a driver-partner cannot somehow transform Uber's vertical agreements with driver-partners into horizontal agreements involving Mr. Kalanick personally. Moreover, even if Uber's vertical agreements with driver-partners somehow included Mr. Kalanick, the Second Circuit has squarely held that the mere fact that a vertical actor also competes horizontally with its downstream competitors does not turn a vertical agreement into a horizontal one. *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prod., Inc.*,

of plausible allegations of a conspiracy in Plaintiff's Amended Complaint is reason enough to dismiss it, just as it was in the original Complaint.

B. Plaintiff has failed to plead a plausible conspiracy.

i. Plaintiff pleads only independent, not parallel, action.

Plaintiff's Amended Complaint also fails because the alleged conspiracy is impossible. Beyond proffering an unsupported legal conclusion without citation to any communications whatsoever between driver-partners, Plaintiff relies on the independent decisions of hundreds of thousands of driver-partners to agree to Uber's Driver Terms and subsequently use the Uber App as evidence of parallel conduct to support a conspiracy. Am. Compl. ¶¶ 70-71. This reliance is improper. Courts have universally found conduct to be "parallel" only when a small number of competitors have taken the same action at or around the same point in time. *E.g.*, *Mayor of Baltimore*, 709 F.3d at 138 (action by eleven banks to "withdraw[] from the [auction rate securities] market in a virtually simultaneous manner on February 13, 2008" deemed parallel).

This allegation of parallel conduct also fails for the same essential reason mentioned above: to support a price-fixing complaint, parallel action must be presented in the context of "a preceding agreement" among co-conspirators. *Twombly*, 550 U.S. at 557. In the absence of a preceding agreement, parallel conduct "could just as well be independent action." *Id.* (parallel conduct is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market"). Here, that independent action is the individual decision of each driver-partner to sign up with Uber and accept the contractual terms offered, which include use of the pricing algorithm.

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129 F.3d 240, 243-44 (2d Cir. 1997) (price restraint between distributor and downstream manufacturer treated as a vertical agreement, "even if the distributor and manufacturer also compete at the distribution level, where, as here, the manufacturer distributes its products through a distributor and independently").

ii. Plaintiff has failed to plead a plausible conspiracy regarding surge pricing.

Plaintiff states that "the driver-partners had a common motive to conspire to adhere to the Uber pricing algorithm" in order to capture the higher fares that result from surge pricing. Am. Compl. ¶ 90. In a direct contradiction of that statement, Plaintiff also alleges that "[o]ftentimes, using Uber's pricing would not be in an individual driver-partner's best interest" because it can "result in greater rider dissatisfaction and fewer rides for drivers." *Id.* ¶ 72. Regardless of how Plaintiff tries to characterize it, the common motive suggested here is nothing more than the profit motive of any transportation provider, which is not the same as a motive to conspire. The Amended Complaint fails to even hint at how such a common motive could plausibly translate into an agreement among hundreds of thousands of transportation providers around the nation.

The Amended Complaint also asserts that driver-partners' agreement to use surge pricing "only makes sense because drivers are guaranteed that other Uber drivers will not undercut them on price." *Id.* ¶ 72. This argument wrongly assumes that Uber driver-partners do not compete with other transportation providers that do not use surge pricing. It is also contradicted by Uber's Driver Terms, which permit driver-partners to operate independently, for a taxi provider, or to simultaneously receive ride requests from the Uber App and any competing mobile application service—such as Lyft, Gett, or the many apps offered by taxi companies.[6]

Regardless, Plaintiff fails to explain how surge pricing demonstrates a motive to *conspire* as opposed to simply a motive to agree independently to Uber's terms of dealing, which include

[6] Driver Terms ¶ 2.4 ("[The driver partner] acknowledges and agrees that it has complete discretion to operate its independent business and direct its Drivers at its own discretion, including the ability to provide services at any time to any third party separate and apart from [use of the Uber App]. For the sake of clarity, Customer understands that Customer retains the complete right to provide transportation services to its existing customers and to use other software application services in addition to the Uber Services."); *id.* ¶ 3.1 (driver-partners may "us[e] the Uber App to provide Transportation Services in conjunction with operating a taxi").

surge pricing as a component of its pricing algorithm. Plaintiff alleges no facts suggesting that collective action on the part of driver-partners is required for surge pricing to take effect for any individual driver-partner. Quite the contrary, no "conspiracy" is needed: Plaintiff asserts that Uber sets the pricing algorithm as part of its proposed terms of dealing. *Id.* ¶¶ 46-49, 54-57.

iii. Plaintiff's alleged conspiracy between hundreds of thousands of independent drivers is facially implausible.

Under Plaintiff's theory, all driver-partners who ever agreed to Uber's Driver Terms and then accepted so much as a single ride request through the Uber App are all co-conspirators and therefore are all jointly and severally liable for the full measure of antitrust damages. *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 519 (S.D.N.Y. 1996) ("Liability for antitrust violations is joint and several."). Plaintiff's expansive theory of a conspiracy between hundreds of thousands of driver-partners is at significant variance from those cases in the Second Circuit that have allowed antitrust complaints to survive pleading challenges.

United States v. Apple, for example, involved allegations that a small group of competitor book publishers had engaged in numerous conversations specifically related to the fixing of prices, and that those conversations yielded an actual agreement to increase prices. 952 F. Supp. 2d 638, 651 (S.D.N.Y. 2013) ("On a fairly regular basis, roughly once a quarter, the CEOs of the Publishers held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced, including most prominently Amazon's pricing policies"); *id.* (describing the Publishers' communications and agreement "to force [Amazon] to accept a price level higher than 9.99"). Plaintiff alleged that Apple, a vertical actor, joined and facilitated that horizontal conspiracy—which was again supported by allegations of scores of conversations and meetings between Apple and the publishers. *Id.* at 657-58. In stark contrast to the complaint in *Apple*, Plaintiff here alleges an

impossible horizontal conspiracy involving many thousands of competitors who are not alleged to have ever met or communicated with one another and are not even identified. *See Mayor of Baltimore*, 709 F.3d at 132, 138-39 (allegation that a small group of banks with a common motive of "cut[ting] losses," had, on a single, specific date and "in a virtually simultaneous manner," suddenly stopped placing support auction bids, despite consistently doing so for the previous several years, was insufficient to survive motion to dismiss even where there were allegations of specific communications between some of the banks because banks' decision to leave a failing market made independent "business sense").

C. The driver-partners' decision to use the Uber pricing algorithm is reasonably understood only as a reaction to Uber's lawful, single-firm conduct.

Even where a plaintiff properly pleads parallel conduct among several competitors along with circumstances that support an inference of an illegal agreement among them—which Plaintiff in this case has not done—a complaint fails to state a claim if there is an "obvious alternative explanation" for the co-conspirators' parallel actions. *Twombly*, 550 U.S. at 567. In *Twombly*, the Supreme Court considered a complaint alleging "sparse competition among large firms dominating separate geographical segments of the market." 550 U.S. at 567. The Court agreed that the defendants' "parallel conduct" of declining to compete in one another's respective geographic spheres "could very well signify illegal agreement," if considered in a vacuum. *Id.* Nevertheless, the Court held that the plaintiff had failed to plausibly allege existence of an illegal agreement because the complaint evinced "a natural explanation for the noncompetition alleged," namely that the defendants were merely "sitting tight, expecting their neighbors to do the same thing." *Id.* at 568.

Here, there is similarly a far more "natural," and undoubtedly true, explanation for the parallel conduct than the alleged conspiracy. Namely, each driver-partner independently decided

it was in his or her best interest to enter a vertical agreement with Uber, a condition of which was that the driver-partner agree to use Uber's pricing algorithm. Driver Terms ¶ 4.1; Am. Compl. ¶ 68 ("All of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm"). There are many reasons, separate from the pricing algorithm, that Uber driver-partners might make this choice, including access to riders through Uber's lead generation service, and Uber's payment processing services. Driver Terms ¶ 1.17.

The only reasonable inference to be drawn from the Amended Complaint's allegations is that Uber has proposed terms of dealing to downstream independent contractors (the driver-partners), each of whom is free to make the independent decision to accept or reject those terms. For nearly a century, this type of vertical conduct—by which a vertical actor "announce[s] its resale prices in advance, and refuse[s] to deal with those who fail to comply"—has been recognized as perfectly lawful under § 1 of the Sherman Act. *Monsanto*, 465 U.S. at 761 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see Bookhouse*, 985 F. Supp. 2d at 619 ("It is certainly not illegal for one party to announce terms of dealing and the counterparty to acquiesce to those terms") (citation omitted).

Plaintiff's entire Amended Complaint, then, is based on a fundamental misunderstanding of antitrust law. Specifically, Plaintiff asserts that this Court may infer the existence of a horizontal agreement among competitors based merely on allegations that those competitors each submitted to terms of dealing proposed by a vertical actor. Am. Compl. ¶ 70-71 ("Driver-partners agree to participate in a combination, conspiracy, or contract to fix prices when they swipe 'accept' to accept [Uber's Driver Terms]" and further manifest this agreement "each time they accept a rider using the Uber App."). But if alleging a series of vertical agreements were sufficient to support an inference of a horizontal conspiracy, then all vertical resale price

maintenance arrangements would be per se illegal. That is not the law. *Infra* II.A; *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882-83 (2007) (clothing manufacturer's vertical agreements requiring retailers to charge certain prices for its products judged by the rule of reason); *State Oil Co. v. Khan*, 522 U.S. 3, 8-9, 22 (1997) (oil supplier's vertical agreements requiring gas stations to charge certain prices for gasoline judged by the rule of reason); *Bookhouse*, 985 F. Supp. 2d at 622 ("plaintiffs only allege that each individual Publisher entered into an unlawful vertical agreement with Amazon, making no allegation of any horizontal conspiracy among the Publishers").

Courts have soundly rejected Plaintiff's suggestion that a horizontal agreement may be inferred merely from parallel action motivated by the same external stimulus. In *Commercial Data Servers v. International Business Machines Corp.*, for example, Judge McMahon held that parallel action by IBM's downstream distributors, allegedly prompted by IBM's "threat" to cease doing business with them if they did not take the action, did not plausibly suggest that "the downstream distributors agreed amongst themselves" to comply with IBM's demand. No. 00 Civ. 5008(CM), 2002 WL 1205740, at *3 (S.D.N.Y. Mar. 15, 2002). Similarly, in *LaFlamme v. Societe Air France*, the court held that plaintiff had failed to plausibly allege a horizontal agreement by competing airlines "to impose surcharges" where "rapidly rising jet fuel prices" were "an obvious potential stimuli and discernible reason aside from collusion that plausibly could have instigated independent decisions by defendants" to take the same action. 702 F. Supp. 2d 136, 152 (E.D.N.Y. 2010) (quotation marks omitted).

II. Plaintiff Does Not Plead An Unreasonable Restraint Of Trade Under Any Antitrust Theory.

To state a § 1 Sherman Act claim, a plaintiff alleging an unlawful agreement must plausibly allege that the "agreement constituted an unreasonable restraint of trade." *Capital*

Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993) This may be established by facts showing that the alleged agreement is per se unlawful, or that it fails the so-called "rule of reason." *Id.*

Per se liability is exclusively available for conspiracies that have as a component an unlawful agreement between horizontal competitors. *Dagher*, 547 U.S. at 5-7. Vertical price restraints, by contrast, are judged by the rule of reason. *Leegin*, 551 U.S. at 898-99. To the extent that a vertical actor may be subject to per se liability post-*Leegin*, it must have actively participated in or facilitated an underlying horizontal conspiracy. *See United States v. Apple*, 791 F.3d 290, 323 (2d Cir. 2015) ("The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. . . . But the relevant 'agreement in restraint of trade' in this case is not Apple's vertical Contracts with the Publisher Defendants . . . ; it is the horizontal agreement that Apple organized"); *Commercial Data Servers*, 2002 WL 1205740 at *3 ("a restraint is not horizontal because it has horizontal effects but because it is the product of a horizontal agreement"); *Bookhouse*, 985 F. Supp. 2d at 622 (allegation that a group of horizontal competitors each entered into an unlawful vertical agreement, but did not conspire with one another, is not subject to per se liability).

The rule of reason is the default standard for determining whether a practice unreasonably restrains trade in violation of § 1, with per se treatment "appropriate only after courts have had considerable experience with the type of restraint at issue" and, based on that experience, determined that it "would always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 885; *see id.* at 895 (Per se rules "can be

counterproductive" by "prohibiting procompetitive conduct the antitrust laws should encourage" and "increas[ing] litigation costs by promoting frivolous suits against legitimate practices").

A. Plaintiff's theory of per se liability fails because it is predicated on vertical conduct.

The facts set forth in the Amended Complaint establish that a legal structure was in place—specifically, a single firm acting vertically. The Amended Complaint describes Uber as a "technology company" that offers the "Uber App" to match riders with independent driver-partners, and which requires them to agree to use Uber's pricing algorithm to set fares. *Id.* ¶¶ 2, 24, 47, 68. These allegations, if accepted as true, only establish a single firm acting vertically.

The Supreme Court and the Second Circuit have repeatedly confirmed that a single firm acting vertically does not offend antitrust laws. In *Leegin*, for example, the Supreme Court held that such vertical price restraints do not fall within the narrow category of activities that are anticompetitive per se, emphasizing that "economics literature is replete with procompetitive justifications for . . . use of resale price maintenance." 551 U.S. at 889. The Court noted that a vertical price restriction such as resale price maintenance "can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand." *Id.* at 890; *see also State Oil Co. v. Khan*, 522 U.S. at 15 ("the primary purpose of the antitrust laws is to protect interbrand competition").

One of the ways interbrand competition is enhanced by way of vertical price restraints is "by facilitating market entry for new firms and brands." *Leegin*, 551 U.S. at 891. Uber's entry into the market for transportation services illustrates how this functions in practice: Aided by its use of a pricing algorithm, Uber's mobile application-based platform for matching riders and driver-partners represents an "innovative form of competition," which by definition enhances

consumer welfare and competition on a wide variety of fronts, including price. FTC Comment Letter at 2-3. As the Supreme Court has explained:

> New manufacturers and manufacturers entering new markets can use [vertical price restraints] in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Id. In addition, by reducing intrabrand price competition, for example, resale price maintenance prompts "the manufacturer's retailers [to] compete among themselves over services." *Id.* Not only does this introduce "valuable services" into the market, but it "has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between." *Id.* at 890, 892.[7]

B. The Amended Complaint fails to allege facts sufficient to state a claim for antitrust liability under the rule of reason.

The legality of a vertical price arrangement like that described in the Amended Complaint is measured by the rule of reason, according to which a Plaintiff must allege facts indicating that "the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v Khan*, 522 U.S. at 10. The Amended Complaint fails to state a claim under the rule of reason for least three reasons.

[7] For these reasons, the Amended Complaint also does not state a claim for antitrust liability under so-called "quick look" analysis, which applies "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." *Texaco*, 547 U.S. at 5; *see California Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999) (If an arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," quick look scrutiny does not apply).

First, as described *supra*, the facts as alleged show a single firm acting vertically in a legal manner by proposing mandatory terms of dealings to downstream actors.

Second, Plaintiff's market definition woefully fails to satisfy a rule of reason analysis. The "failure to define the relevant market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismiss[ing]" a rule of reason claim. *Commercial Data Servers*, 2002 WL 1205740, at *4 (citing cases); *see Bookhouse*, 985 F. Supp. 2d at 621 ("where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.") (citations and quotation marks omitted). The Amended Complaint proposes a relevant market defined as "mobile app-generated ride-share service, with a relevant sub-market of Uber car service." Am. Compl. ¶ 121. This market definition fails because it offers no "theoretically rational explanation" for defining the relevant market so narrowly. *Commercial Data Servers*, 2002 WL 1205740, at *4. Plaintiff's market definition excludes clear potential alternatives to the consuming public, such as legacy taxi companies, public transit such as subway and bus travel, and private transit such as personal vehicle use and walking—*i.e.*, the numerous other non-mobile app generated ride-share services that compete in the transportation marketplace. Each of these alternatives is a clear substitute for the services provided by driver-partners, rendering Plaintiff's market definition irrational. *Id.*

Plaintiff contends without factual support of any kind that traditional car transportation services, such as taxis and "cars for hire," do not compete with Uber driver-partners because the Uber App provides a range of innovative and desirable services to consumers, such as automated

payment processing and the ability "to arrange for rides at the push of a button and then watch on their mobile phones for the nearest driver approach for pick up." Am. Compl. ¶ 104-05. Similarly, Plaintiff contends that public transportation options, such as subway or bus, are not reasonable substitutes for Uber driver-partners because they are less convenient. *Id.* ¶ 106. Plaintiff apparently believes that the relevant market should be defined based on the features and functionality of a product or service, with any new or innovative features leading to the creation of a distinct market. That is not the law. "[T]he methodology courts prescribe to define a market for antitrust purposes" is "the interchangeability of use or the cross-elasticity of demand," meaning that two products are in the same antitrust market if a change in price for one product affects demand for the other product. *Chapman v. New York Div. for Youth*, 546 F.3d 230, 237 (2d Cir. 2008); *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (dismissals on pleadings for failure to allege a relevant market "frequently involve either (1) failed attempts to limit a product market to a single brand . . . that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way").

Nothing in the Amended Complaint even attempts to rebut the commonsense proposition that the "mobile app generated ride share services" provided by Uber driver-partners are reasonably interchangeable with other transportation services such as traditional taxi services, public transit, and private transport such that a change in price for one service affects demand for the others. Nor does Plaintiff attempt to rebut the even more obvious proposition that "mobile app generated ride share services" provided by Uber's driver-partners are reasonably interchangeable with competitors that similarly connect independent driver-partners and riders

through a smartphone such as Lyft, Gett, and the many taxi companies that also have apps.[8] Plaintiff's market definition therefore suffers from the same defects identified by this Court in *Bookhouse*, where plaintiffs' proposed limitation of the relevant market to "the market for e-books" was rejected because the complaint did not allege any facts indicating that "e-books and print books are not acceptable substitutes." 985 F. Supp. 2d at 621.[9]

Finally, Plaintiff fails to state a rule of reason claim because the only factual allegations in the Amended Complaint suggesting any adverse effect arising from Uber's pricing algorithm is that, "during periods of peak demand," prices increase "to incentivize . . . driver-partners to use the Uber App." Am. Compl. ¶ 57. But as the Amended Complaint itself makes clear, the entire point of surge pricing is to *increase* the supply of transportation providers available in the market, and thereby satisfy consumer demand. *Id.* ¶ 52 ("When demand for rides outstrips the supply of cars, surge pricing kicks in, increasing the price"); *see* ¶¶ 57-62. An increase in supply cannot by definition be anticompetitive. *Bulk Oil (ZUG) A.G. v. Sun Co.*, 583 F. Supp. 1134, 1137 (S.D.N.Y. 1983) (dismissing § 1 Sherman Act claim because "the net result of defendants' [action] was to increase the supply of crude oil in the United States, and thus the actual effect in the United States was pro-competitive").

[8] Plaintiff's defined "relevant sub-market" is "Uber['s] car service," further stretching credulity. That market—by definition—excludes any possible competing product. Plaintiff has not—and cannot—provide any rational reason for defining the market so narrowly.

[9] The Amended Complaint's allegation that in "certain cities in the United States, Uber captures 50 to 70 percent of business customers" in the sub-market of "taxis, cars for hire and mobile-app generated ride-share services" is entirely deficient. Plaintiff does not identify which cities where Uber allegedly enjoys this market share, nor does he allege that "business customers" are a relevant market dimension. Plaintiff further alleges a nationwide geographic market, with no geographic sub-markets, Am. Compl. ¶ 122, and so Uber's market share in any individual city is irrelevant to Plaintiff's claims as alleged.

III. The Donnelly Act claim fails for the same reasons as the Sherman Act claim.

Plaintiff's claim under New York's Donnelly Act, N.Y. Gen. Bus. L. § 340 *et seq.*, must be dismissed for the same reasons that apply to his Sherman Act claim. *Williams v. Citigroup Inc.*, 659 F.3d 208, 211 (2d Cir. 2011) ("The Donnelly Act, New York's antitrust statute, was modeled on the Sherman Act and has generally been construed in accordance with federal precedents."); *X.L.O. Concrete Corp. v. Rivergate Corp.*, 634 N.E.2d 158 (N.Y. 1994) (same).

The Appellate Division has specifically held that vertical price arrangements are legal under New York law. *People v. Tempur-Pedic Int'l, Inc.*, 95 A.D.3d 539, 540 (1st Div. 2012) (affirming grant of motion to dismiss complaint alleging that manufacturer violated New York law "by entering Resale Price Maintenance agreements (RPM) with its retailers" because "there is nothing in the text [of the referenced section of the Donnelly Act] to declare those contract provisions illegal or unlawful"). The Appellate Division has also made clear that it is perfectly lawful for a vertical actor to establish price policies that prompt downstream actors to "independently determine [whether] to acquiesce to the pricing scheme in order to continue" the business relationship with the vertical actor. *Id.* at 541 (citing *Leegin*, 551 U.S. at 901-02 and *Monsanto*, 465 U.S. at 764). Courts in this District have uniformly held that *Leegin*'s rule—that vertical price restraints are not subject to per se treatment, but instead judged by the rule of reason—applies to parallel claims brought under New York's Donnelly Act. *WorldHomeCenter.com, Inc. v. PLC Lighting, Inc.*, 851 F. Supp. 2d 494, 501 (S.D.N.Y. 2011); *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 569, 581 (S.D.N.Y. 2007).

IV. Plaintiff Cannot Circumvent the Class Waiver in His User Agreement.

Finally, the Court should dismiss the class claims in Plaintiff's Amended Complaint because Plaintiff is equitably estopped from avoiding the class action waiver contained in his

user agreement with Uber. *See American Express Co., v. Italian Colors Restaurant*, — U.S. —, 133 S.Ct. 2304, 2308, 2312 (2013) (affirming enforcement of class action waiver to compel arbitration and dismiss class action complaint).

The User Agreement governs use of the Uber App. *Id.* ¶ 29; User Terms at 1. Users of the Uber App agree to arbitration[10] and to waive class actions with respect to disputes arising out of their use of the App. User Terms at 9. Plaintiff seeks to avoid that waiver by raising class action claims against the company's CEO as opposed to Uber itself.[11] But those claims do not arise out of the CEO's actions; they arise out of the pricing algorithm administered by Uber through the Uber App.

Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes. *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999). As the Supreme Court has explained in the arbitration context, a litigant who is not a party to an arbitration agreement may invoke arbitration if the relevant state contract law allows the litigant to enforce the agreement.

[10] Although Mr. Kalanick does not seek to compel arbitration here, arbitration would be mandated for the reasons explained below if Mr. Kalanick sought to enforce the arbitration provision of the User Agreement. Mr. Kalanick does not waive and expressly reserves his right to move to compel arbitration in other cases arising out of the User Agreement.

[11] There appears to be no case in the century-long history of federal antitrust regulation in which an individual company officer or director was ever held personally liable in the context of vertical resale price maintenance. Individual liability for vertical resale price maintenance arrangements—even those, unlike Uber's, that fail the rule of reason—would have broad and unpredictable consequences. At the very least, it would chill individual executives, and by extension, companies, from engaging in a wide swath of activity that promotes competition and expands the range of goods and services available to consumers. *See Leegin*, 551 U.S. at 889-91; *United States v. Wise*, 370 U.S. 405, 416 (1962) (individuals may be subject to criminal penalties for organizing a horizontal price-fixing conspiracy in violation of § 1 of the Sherman Act).

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009).[12] In this case, the relevant contract law is the law of California. User Terms at 8-9. California law provides that a non-signatory to a contract can enforce that contract's terms where, *inter alia*, "the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013); *see Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 404 (2d Cir. 2001) (same, applying New York law).

Here, there can be no credible dispute that Plaintiff claims concerted misconduct between Uber and Mr. Kalanick that was founded in and intimately interconnected with his User Agreement. The Amended Complaint clearly alleges collusion and interdependent misconduct by Uber and its CEO: "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination and conspiracy in restraint of trade." Am. Compl. ¶ 123. Were that not enough, the Amended Complaint is rife with allegations that Mr. Kalanick and Uber worked closely together.[13] Moreover, many of Plaintiff's allegations refer exclusively to Uber, not Mr. Kalanick. Am. Compl. ¶¶ 22-39, 41-42, 45-47, 55-60, 68-73. In short, Plaintiff does little, if anything, to distinguish between Mr. Kalanick and Uber. *Jacobson v. Snap-on Tools Co.*, 15

[12] The same principle that permits non-signatories to enforce arbitration clauses permits non-signatories to enforce other provisions of contractual agreements. *Int'l Chartering Servs., Inc., v. Eagle Bulk Shipping Inc.*, No. 12 Civ. 3463 (AJN), 2015 WL 5915958, at *5 (S.D.N.Y. Oct. 8, 2015) (choice-of-law clauses).

[13] E.g., Am. Compl. ¶ 9 ("Kalanick is the public face of Uber, its co-founder and manager of its operations."); *id.* ¶¶ 47-50 (referencing the "Uber-generated algorithm" Mr. Kalanick allegedly "conceived," "implemented" and "defend[ed]"); *id.* ¶ 54 ("Kalanick and Uber artificially set the fares for its driver-partners to charge to riders."); *id.* ¶ 87 ("Kalanick, as Uber's CEO, directed or ratified negotiations between Uber and these co-conspirators, in which Uber ultimately agreed to raise fares.").

Civ. 2141, 2015 WL 8293164, at *6 (N.D. Cal. Dec. 9, 2015) (conduct "interdependent" where plaintiff treated two entities "as a single actor" and "consistently refer[ed] to them collectively").

Plaintiff's allegations are founded in and interconnected with the User Agreement. Plaintiff alleges that he "used Uber car services on multiple occasions" and "paid higher prices for car services" as a result. Am. Compl. ¶¶ 7-8. Plaintiff further alleges that driver-partners are required to charge prices set by the pricing algorithm in the Uber App. *Id.* ¶¶ 30-36, 68-69.[14]

Artful pleading cannot conceal the fact that this dispute is interconnected with the User Agreement—it arises out of the very services Plaintiff received under the User Agreement. *See Boucher v. Alliance Title Company, Inc.*, 127 Cal.App.4th 262, 272 (2005) ("That the claims are cast in tort rather than contract does not avoid the arbitration clause."); *accord American Bankers*

[14] This case is thus similar to *Uptown Drug Co., Inc. v. CVS Caremark Corp.*, where the Northern District of California applied the doctrine of equitable estoppel to permit non-signatories to enforce the terms of a contract. 962 F. Supp. 2d 1172, 1184-86 (N.D. Cal. 2013). *Uptown* involved a retail pharmacy chain ("Uptown") and four corporate affiliates (collectively, the "CVS Companies"). Uptown provided confidential customer information to one of the CVS Companies, which allegedly illegally shared it with another CVS Company that directly competed with Uptown. Uptown's business relationship was governed by a provider agreement it had with yet another CVS Company. *Id.* at 1176-77. Uptown sued all of the CVS Companies for misappropriation of trade secrets and argued that the non-signatories to the provider agreement could not enforce the arbitration clause contained in that agreement. *Id.* at 1183. The court rejected that argument, finding that Uptown's claims were intertwined with the underlying contract because the provider agreement "explicitly govern[ed] the use of [the confidential information] and because it provide[d] the basis for Uptown's disclosure of such information." *Id.* at 1185; *see also id.* at 1185-86 ("the dependent relationship between Uptown's misappropriation claims and the Provider Agreement is evident from the simple fact that, absent the Provider Agreement, Uptown would have no claims against Defendants with respect to the customer information at issue, because in that scenario, Uptown would not have been required to disclose such information to Defendants"). Similarly, here, the User Agreement governed Plaintiff's use of the Uber App and provided the basis for Plaintiff to use and pay for Uber's services. *See also Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 WL 370557, at *4 (N.D. Cal. Jan. 31, 2012) (compelling arbitration with non-signatory because the plaintiff "must rely on [certain] terms in the [purchase agreement] to prosecute his [claim]"); *Turtle Ridge Media Grp. v. Pacific Bell Directory*, 140 Cal. App. 4th 828, 833 (2006) (allowing non-signatory to enforce arbitration clause arising out of "business dealings" with signatory because, "outside of" the relevant contracts, the signatory had "no business relationship" with the non-signatory).

Ins. Grp., Inc. v. Long, 453 F.3d 623, 630 (4th Cir. 2006) ("although each of the [plaintiffs'] individual claims is phrased in tort, [plaintiffs] may not use artful pleading to avoid arbitration"); *Hughes Masonry Co., Inc., v. Greater Clark Cnty School Building Corp.*, 659 F.2d 826, 839 (7th Cir. 1981) (Plaintiffs "cannot have it both ways. [They] cannot rely on [a] contract when it works to [their] advantage and repudiate it when it works to [their] disadvantage"). Permitting Mr. Kalanick to invoke the class action waiver contained in the User Agreement "comports with, and indeed derives from, the very purposes of the [equitable estoppel] doctrine: to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to [abide by] another clause of the same agreement." *Jones v. Jacobson*, 195 Cal. App. 4th 1, 20 (2011).

Moreover, the Amended Complaint alleges that Mr. Kalanick acted "in his position as Uber CEO" to orchestrate the asserted price-fixing conspiracy. Am. Compl. ¶ 86; *see also id.* ¶ 1 (describing Mr. Kalanick as Uber's "CEO" and "primary facilitator"). Under California law, "a nonsignatory sued as an *agent* of a signatory may enforce the terms of an arbitration agreement." *Rowe v. Exline*, 153 Cal. App. 4th 1276, 1284 (2007); *Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 668 (2d Cir. 1997) (same, applying New York law). Plaintiff's allegation that Kalanick is Uber's agent, therefore, likewise bars him from avoiding the class action waiver in the User Agreement.

CONCLUSION

For the reasons described in this Memorandum, Defendant Travis Kalanick respectfully requests this Court dismiss the Amended Complaint in its entirety, with prejudice.

Dated: February 8, 2016

Respectfully submitted,

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Counsel for Defendant Travis Kalanick

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

v.

TRAVIS KALANICK,

Defendant.

Case No. 1:15-cv-9796 (JSR)

DECLARATION OF MICHAEL COLMAN

I, Michael Colman, declare under penalty of perjury, as follows:

1. I am employed by non-party Uber Technologies, Inc. ("Uber"), and I work out of Uber's San Francisco office. I have been employed by Uber since October 19, 2011 and have worked as an Operations Specialist since February 2013. In this capacity, I am familiar with the agreements referenced in this Declaration and have personal knowledge of Uber's policies and procedures for maintaining in its business records for such agreements.

2. I make this declaration in support of Defendant Travis Kalanick's motion, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss Plaintiff's First Amended Complaint in the above-captioned action.

3. I submit this declaration to place before the Court certain documents expressly incorporated by reference in the First Amended Complaint, and therefore may be considered on a Rule 12(b)(6) motion to dismiss.

4. Attached hereto as **Exhibit 1** is a true and correct copy of the applicable U.S. rider Terms and Conditions.

5. Attached hereto as **Exhibit 2** is a true and correct copy of the operative Uber USA, LLC Technology Services Agreement to which transportation providers and drivers using the Uber app to provide transportation services in New York City must agree prior to using the app.

I declare pursuant to 28 U.S.C. § 1746 and under penalty of perjury that the foregoing is true and correct.

Executed on: February 8, 2016

Michael Colman

EXHIBIT 1

<% include ../header.html %>

Terms and Conditions

Last Updated: May 17, 2013

<% include ../country-picker-terms.html %>

The terms and conditions stated herein (collectively, the "Agreement") constitute a legal agreement between you and Uber Technologies, Inc., a Delaware corporation (the "Company"). In order to use the Service (defined below) and the associated Application (defined below) you must agree to the terms and conditions that are set out below. By using or receiving any services supplied to you by the Company (collectively, the "Service"), and downloading, installing or using any associated application supplied by the Company which purpose is to enable you to use the Service (collectively, the "Application"), you hereby expressly acknowledge and agree to be bound by the terms and conditions of the Agreement, and any future amendments and additions to this Agreement as published from time to time at https://www.uber.com/terms or through the Service.

The Company reserves the right to modify the terms and conditions of this Agreement or its policies relating to the Service or Application at any time, effective upon posting of an updated version of this Agreement on the Service or Application. You are responsible for regularly reviewing this Agreement. Continued use of the Service or Application after any such changes shall constitute your consent to such changes.

THE COMPANY DOES NOT PROVIDE TRANSPORTATION SERVICES, AND THE COMPANY IS NOT A TRANSPORTATION CARRIER. IT IS UP TO THE THIRD PARTY TRANSPORTATION PROVIDER, DRIVER OR VEHICLE OPERATOR TO OFFER TRANSPORTATION SERVICES WHICH MAY BE SCHEDULED THROUGH USE OF THE APPLICATION OR SERVICE. THE COMPANY OFFERS INFORMATION AND A METHOD TO OBTAIN SUCH THIRD PARTY TRANSPORTATION SERVICES, BUT DOES NOT AND DOES NOT INTEND TO PROVIDE TRANSPORTATION SERVICES OR ACT IN ANY WAY AS A TRANSPORTATION CARRIER, AND HAS NO RESPONSIBILITY OR LIABILITY FOR ANY TRANSPORTATION SERVICES PROVIDED TO YOU BY SUCH THIRD PARTIES.

Key Content-related Terms

“Content” means text, graphics, images, music, software (excluding the Application), audio, video, information or other materials.

“Company Content” means Content that Company makes available through the Service or Application, including any Content licensed from a third party, but excluding User Content.

“User” means a person who accesses or uses the Service or Application.

“User Content” means Content that a User posts, uploads, publishes, submits or transmits to be made available through the Service or Application.

“Collective Content” means, collectively, Company Content and User Content.

Representations and Warranties

By using the Application or Service, you expressly represent and warrant that you are legally entitled to enter this Agreement. If you reside in a jurisdiction that restricts the use of the Service because of age, or restricts the ability to enter into agreements such as this one due to age, you must abide by such age limits and you must not use the Application and Service. Without limiting the foregoing, the Service and Application is not available to children (persons under the age of 18). By using the Application or Service, you represent and warrant that you are at least 18

years old. By using the Application or the Service, you represent and warrant that you have the right, authority and capacity to enter into this Agreement and to abide by the terms and conditions of this Agreement. Your participation in using the Service and/or Application is for your sole, personal use. You may not authorize others to use your user status, and you may not assign or otherwise transfer your user account to any other person or entity. When using the Application or Service you agree to comply with all applicable laws from your home nation, the country, state and city in which you are present while using the Application or Service.

You may only access the Service using authorized means. It is your responsibility to check to ensure you download the correct Application for your device. The Company is not liable if you do not have a compatible handset or if you have downloaded the wrong version of the Application for your handset. The Company reserves the right to terminate this Agreement should you be using the Service or Application with an incompatible or unauthorized device.

By using the Application or the Service, you agree that:

- You will only use the Service or Application for lawful purposes; you will not use the Services for sending or storing any unlawful material or for fraudulent purposes.
- You will not use the Service or Application to cause nuisance, annoyance or inconvenience.
- You will not impair the proper operation of the network.
- You will not try to harm the Service or Application in any way whatsoever.
- You will not copy, or distribute the Application or other content without written permission from the Company.
- You will only use the Application and Service for your own use and will not resell it to a third party.
- You will keep secure and confidential your account password or any identification we provide you which allows access to the Service.
- You will provide us with whatever proof of identity we may reasonably request.
- You will only use an access point or 3G data account (AP) which you are authorized to use.
- You are aware that when requesting transportation services by SMS, standard messaging charges will apply.

License Grant, Restrictions and Copyright Policy

Licenses Granted by Company to Company Content and User Content

Subject to your compliance with the terms and conditions of this Agreement, Company grants you a limited, non-exclusive, non-transferable license: (i) to view, download and print any Company Content solely for your personal and non-commercial purposes; and (ii) to view any User Content to which you are permitted access solely for your personal and non-commercial purposes. You have no right to sublicense the license rights granted in this section.

You will not use, copy, adapt, modify, prepare derivative works based upon, distribute, license, sell, transfer, publicly display, publicly perform, transmit, stream, broadcast or otherwise exploit the Service, Application or Collective Content, except as expressly permitted in this Agreement. No licenses or rights are granted to you by implication or otherwise under any intellectual property rights owned or controlled by Company or its licensors, except for the licenses and rights expressly granted in this Agreement.

License Granted by User

We may, in our sole discretion, permit Users to post, upload, publish, submit or transmit User Content. By making available any User Content on or through the Service or Application, you hereby grant to Company a worldwide, irrevocable, perpetual, non-exclusive, transferable, royalty-free license, with the right to sublicense, to use, view, copy, adapt, modify, distribute, license, sell, transfer, publicly display, publicly perform, transmit, stream, broadcast and otherwise exploit such User Content only on, through or by means of the Service or Application. Company does not claim any ownership rights in any User Content and nothing in this Agreement will be deemed to restrict any rights that you may have to use and exploit any User Content.

You acknowledge and agree that you are solely responsible for all User Content that you make available through the

Service or Application. Accordingly, you represent and warrant that: (i) you either are the sole and exclusive owner of all User Content that you make available through the Service or Application or you have all rights, licenses, consents and releases that are necessary to grant to Company and to the rights in such User Content, as contemplated under this Agreement; and (ii) neither the User Content nor your posting, uploading, publication, submission or transmittal of the User Content or Company's use of the User Content (or any portion thereof) on, through or by means of the Service or Application will infringe, misappropriate or violate a third party's patent, copyright, trademark, trade secret, moral rights or other intellectual property rights, or rights of publicity or privacy, or result in the violation of any applicable law or regulation.

Application License

Subject to your compliance with this Agreement, Company grants you a limited non-exclusive, non-transferable license to download and install a copy of the Application on a single mobile device or computer that you own or control and to run such copy of the Application solely for your own personal use. Furthermore, with respect to any Application accessed through or downloaded from the Apple App Store ("App Store Sourced Application"), you will use the App Store Sourced Application only: (i) on an Apple-branded product that runs iOS (Apple's proprietary operating system software); and (ii) as permitted by the "Usage Rules" set forth in the Apple App Store Terms of Service. Company reserves all rights in and to the Application not expressly granted to you under this Agreement.

Accessing and Downloading the Application from iTunes

The following applies to any App Store Sourced Application:

- You acknowledge and agree that (i) this Agreement is concluded between you and Company only, and not Apple, and (ii) Company, not Apple, is solely responsible for the App Store Sourced Application and content thereof. Your use of the App Store Sourced Application must comply with the App Store Terms of Service.
- You acknowledge that Apple has no obligation whatsoever to furnish any maintenance and support services with respect to the App Store Sourced Application.
- In the event of any failure of the App Store Sourced Application to conform to any applicable warranty, you may notify Apple, and Apple will refund the purchase price for the App Store Sourced Application to you and to the maximum extent permitted by applicable law, Apple will have no other warranty obligation whatsoever with respect to the App Store Sourced Application. As between Company and Apple, any other claims, losses, liabilities, damages, costs or expenses attributable to any failure to conform to any warranty will be the sole responsibility of Company.
- You and Company acknowledge that, as between Company and Apple, Apple is not responsible for addressing any claims you have or any claims of any third party relating to the App Store Sourced Application or your possession and use of the App Store Sourced Application, including, but not limited to: (i) product liability claims; (ii) any claim that the App Store Sourced Application fails to conform to any applicable legal or regulatory requirement; and (iii) claims arising under consumer protection or similar legislation.
- You and Company acknowledge that, in the event of any third party claim that the App Store Sourced Application or your possession and use of that App Store Sourced Application infringes that third party's intellectual property rights, as between Company and Apple, Company, not Apple, will be solely responsible for the investigation, defense, settlement and discharge of any such intellectual property infringement claim to the extent required by this Agreement.
- You and Company acknowledge and agree that Apple, and Apple's subsidiaries, are third party beneficiaries of this Agreement as related to your license of the App Store Sourced Application, and that, upon your acceptance of the terms and conditions of this Agreement, Apple will have the right (and will be deemed to have accepted the right) to enforce this Agreement as related to your license of the App Store Sourced Application against you as a third party beneficiary thereof.
- Without limiting any other terms of this Agreement, you must comply with all applicable third party terms of agreement when using the App Store Sourced Application.

You shall not (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make

available to any third party the Service or the Application in any way; (ii) modify or make derivative works based upon the Service or the Application; (iii) create Internet "links" to the Service or "frame" or "mirror" any Application on any other server or wireless or Internet-based device; (iv) reverse engineer or access the Application in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the Service or Application, or (c) copy any ideas, features, functions or graphics of the Service or Application, or (v) launch an automated program or script, including, but not limited to, web spiders, web crawlers, web robots, web ants, web indexers, bots, viruses or worms, or any program which may make multiple server requests per second, or unduly burdens or hinders the operation and/or performance of the Service or Application.

You shall not: (i) send spam or otherwise duplicative or unsolicited messages in violation of applicable laws; (ii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to children or violative of third party privacy rights; (iii) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (iv) interfere with or disrupt the integrity or performance of the Application or Service or the data contained therein; or (v) attempt to gain unauthorized access to the Application or Service or its related systems or networks.

Company will have the right to investigate and prosecute violations of any of the above to the fullest extent of the law. Company may involve and cooperate with law enforcement authorities in prosecuting users who violate this Agreement. You acknowledge that Company has no obligation to monitor your access to or use of the Service, Application or Collective Content or to review or edit any Collective Content, but has the right to do so for the purpose of operating the Service and Application, to ensure your compliance with this Agreement, or to comply with applicable law or the order or requirement of a court, administrative agency or other governmental body. Company reserves the right, at any time and without prior notice, to remove or disable access to any Collective Content that Company, at its sole discretion, considers to be in violation of this Agreement or otherwise harmful to the Service or Application.

Copyright Policy

Company respects copyright law and expects its users to do the same. It is Company's policy to terminate in appropriate circumstances Users or other account holders who repeatedly infringe or are believed to be repeatedly infringing the rights of copyright holders. Please see Company's Copyright Policy at https://www.uber.com/legal/copyright, for further information.

Payment Terms

Any fees that the Company may charge you for the Application or Service, are due immediately and are non-refundable. This no refund policy shall apply at all times regardless of your decision to terminate your usage, our decision to terminate your usage, disruption caused to our Application or Service either planned, accidental or intentional, or any reason whatsoever. The Company reserves the right to determine final prevailing pricing - Please note the pricing information published on the website may not reflect the prevailing pricing.

The Company, at its sole discretion, make promotional offers with different features and different rates to any of our customers. These promotional offers, unless made to you, shall have no bearing whatsoever on your offer or contract. The Company may change the fees for our Service or Application, as we deem necessary for our business. We encourage you to check back at our website periodically if you are interested about how we charge for the Service of Application.

SMS Messaging

If you select this feature, and have SMS service from one of the supported Carriers (T-Mobile, Verizon Wireless, AT&T, Sprint, Nextel, Boost, U.S. Cellular, MetroPCS and Cricket), you can request pickups via SMS and get notified if you request pickups through our Applications. Message and data rates may apply.

You will only receive messages from Company if you make a pickup request. If you change your mobile phone service

provider the service may be deactivated and you will need to re-enroll in the notification service. Company reserves the right to cancel the notification service at any time; you may cancel (opt-out) the service by texting the word STOP to 827-222 from your mobile phone. For more information, please text the word HELP to 827-222, or call 866-576-1039.

Intellectual Property Ownership

The Company alone (and its licensors, where applicable) shall own all right, title and interest, including all related intellectual property rights, in and to the Application and the Service and any suggestions, ideas, enhancement requests, feedback, recommendations or other information provided by you or any other party relating to the Application or the Service. This Agreement is not a sale and does not convey to you any rights of ownership in or related to the Application or the Service, or any intellectual property rights owned by the Company. The Company name, the Company logo, and the product names associated with the Application and Service are trademarks of the Company or third parties, and no right or license is granted to use them.

Third Party Interactions

During use of the Application and Service, you may enter into correspondence with, purchase goods and/or services from, or participate in promotions of third party service providers, advertisers or sponsors showing their goods and/or services through the Application or Service. Any such activity, and any terms, conditions, warranties or representations associated with such activity, is solely between you and the applicable third-party. The Company and its licensors shall have no liability, obligation or responsibility for any such correspondence, purchase, transaction or promotion between you and any such third-party. The Company does not endorse any sites on the Internet that are linked through the Service or Application, and in no event shall the Company or its licensors be responsible for any content, products, services or other materials on or available from such sites or third party providers. The Company provides the Application and Service to you pursuant to the terms and conditions of this Agreement. You recognize, however, that certain third-party providers of goods and/or services may require your agreement to additional or different terms and conditions prior to your use of or access to such goods or services, and the Company disclaims any and all responsibility or liability arising from such agreements between you and the third party providers.

The Company may rely on third party advertising and marketing supplied through the Application or Service and other mechanisms to subsidize the Application or Service. By agreeing to these terms and conditions you agree to receive such advertising and marketing. If you do not want to receive such advertising you should notify us in writing. The Company reserves the right to charge you a higher fee for the Service or Application should you choose not to receive these advertising services. This higher fee, if applicable, will be posted on the Company's website located at http://www.uber.com. The Company may compile and release information regarding you and your use of the Application or Service on an anonymous basis as part of a customer profile or similar report or analysis. You agree that it is your responsibility to take reasonable precautions in all actions and interactions with any third party you interact with through the Service.

Indemnification

By entering into this Agreement and using the Application or Service, you agree that you shall defend, indemnify and hold the Company, its licensors and each such party's parent organizations, subsidiaries, affiliates, officers, directors, Users, employees, attorneys and agents harmless from and against any and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs) arising out of or in connection with: (a) your violation or breach of any term of this Agreement or any applicable law or regulation, whether or not referenced herein; (b) your violation of any rights of any third party, including providers of transportation services arranged via the Service or Application, or (c) your use or misuse of the Application or Service.

Disclaimer of Warranties

THE COMPANY MAKES NO REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY,

TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE SERVICE OR APPLICATION. THE COMPANY DOES NOT REPRESENT OR WARRANT THAT (A) THE USE OF THE SERVICE OR APPLICATION WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, APPLICATION, SYSTEM OR DATA, (B) THE SERVICE OR APPLICATION WILL MEET YOUR REQUIREMENTS OR EXPECTATIONS, (C) ANY STORED DATA WILL BE ACCURATE OR RELIABLE, (D) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SERVICE WILL MEET YOUR REQUIREMENTS OR EXPECTATIONS, (E) ERRORS OR DEFECTS IN THE SERVICE OR APPLICATION WILL BE CORRECTED, OR (F) THE SERVICE OR THE SERVER(S) THAT MAKE THE SERVICE AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE SERVICE AND APPLICATION IS PROVIDED TO YOU STRICTLY ON AN "AS IS" BASIS. ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS, ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY THE COMPANY. THE COMPANY MAKES NO REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY, SAFETY, TIMELINESS, QUALITY, SUITABILITY OR AVAILABILITY OF ANY SERVICES, PRODUCTS OR GOODS OBTAINED BY THIRD PARTIES THROUGH THE USE OF THE SERVICE OR APPLICATION. YOU ACKNOWLEDGE AND AGREE THAT THE ENTIRE RISK ARISING OUT OF YOUR USE OF THE APPLICATION AND SERVICE, AND ANY THIRD PARTY SERVICES OR PRODUCTS REMAINS SOLELY WITH YOU, TO THE MAXIMUM EXTENT PERMITTED BY LAW.

Internet Delays

THE COMPANY'S SERVICE AND APPLICATION MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. THE COMPANY IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

Limitation of Liability

IN NO EVENT SHALL THE COMPANY AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). THE COMPANY AND/OR ITS LICENSORS SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU, INCLUDING BY NOT LIMITED TO LOSS, DAMAGE OR INJURY ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THE SERVICE OR APPLICATION, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE SERVICE OR APPLICATION, ANY RELIANCE PLACED BY YOU ON THE COMPLETENESS, ACCURACY OR EXISTENCE OF ANY ADVERTISING, OR AS A RESULT OF ANY RELATIONSHIP OR TRANSACTION BETWEEN YOU AND ANY THIRD PARTY SERVICE PROVIDER, ADVERTISER OR SPONSOR WHOSE ADVERTISING APPEARS ON THE WEBSITE OR IS REFERRED BY THE SERVICE OR APPLICATION, EVEN IF THE COMPANY AND/OR ITS LICENSORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

THE COMPANY MAY INTRODUCE YOU TO THIRD PARTY TRANSPORTATION PROVIDERS FOR THE PURPOSES OF PROVIDING TRANSPORTATION. WE WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY THIRD PARTY TRANSPORTATION PROVIDERS AND YOU EXPRESSLY WAIVE AND RELEASE THE COMPANY FROM ANY AND ALL ANY LIABILITY, CLAIMS OR DAMAGES ARISING FROM OR IN ANY WAY RELATED TO THE THIRD PARTY TRANSPORTATION PROVIDER. YOU ACKNOWLEDGE THAT THIRD PARTY TRANSPORTATION PROVIDERS PROVIDING TRANSPORTATION SERVICES REQUESTED THROUGH UBERX MAY OFFER RIDESHARING OR PEER-TO-PEER TRANSPORTATION SERVICES AND MAY NOT BE PROFESSIONALLY LICENSED OR PERMITTED. THE

COMPANY WILL NOT BE A PARTY TO DISPUTES, NEGOTIATIONS OF DISPUTES BETWEEN YOU AND ANY THIRD PARTY PROVIDERS. WE CANNOT AND WILL NOT PLAY ANY ROLE IN MANAGING PAYMENTS BETWEEN YOU AND THE THIRD PARTY PROVIDERS. RESPONSIBILITY FOR THE DECISIONS YOU MAKE REGARDING SERVICES OFFERED VIA THE APPLICATION OR SERVICE (WITH ALL ITS IMPLICATIONS) RESTS SOLELY WITH YOU. WE WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY SUCH THIRD PARTIES AND YOU EXPRESSLY WAIVE AND RELEASE THE COMPANY FROM ANY AND ALL LIABILITY, CLAIMS, CAUSES OF ACTION, OR DAMAGES ARISING FROM YOUR USE OF THE APPLICATION OR SERVICE, OR IN ANY WAY RELATED TO THE THIRD PARTIES INTRODUCED TO YOU BY THE APPLICATION OR SERVICE. YOU EXPRESSLY WAIVE AND RELEASE ANY AND ALL RIGHTS AND BENEFITS UNDER SECTION 1542 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA (OR ANY ANALOGOUS LAW OF ANY OTHER STATE), WHICH READS AS FOLLOWS: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH, IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

THE QUALITY OF THE TRANSPORTATION SERVICES SCHEDULED THROUGH THE USE OF THE SERVICE OR APPLICATION IS ENTIRELY THE RESPONSIBILITY OF THE THIRD PARTY PROVIDER WHO ULTIMATELY PROVIDES SUCH TRANSPORTATION SERVICES TO YOU. YOU UNDERSTAND, THEREFORE, THAT BY USING THE APPLICATION AND THE SERVICE, YOU MAY BE EXPOSED TO TRANSPORTATION THAT IS POTENTIALLY DANGEROUS, OFFENSIVE, HARMFUL TO MINORS, UNSAFE OR OTHERWISE OBJECTIONABLE, AND THAT YOU USE THE APPLICATION AND THE SERVICE AT YOUR OWN RISK.

Notice

The Company may give notice by means of a general notice on the Service, electronic mail to your email address on record in the Company's account information, or by written communication sent by first class mail or pre-paid post to your address on record in the Company's account information. Such notice shall be deemed to have been given upon the expiration of 48 hours after mailing or posting (if sent by first class mail or pre-paid post) or 12 hours after sending (if sent by email). You may give notice to the Company (such notice shall be deemed given when received by the Company) at any time by any of the following: letter sent by confirmed facsimile to the Company at the following fax numbers (whichever is appropriate): (877) 223-8023; letter delivered by nationally recognized overnight delivery service or first class postage prepaid mail to the Company at the following addresses (whichever is appropriate): Uber Technologies, Inc., 182 Howard Street, #8, San Francisco, CA 94105 addressed to the attention of: Chief Executive Officer.

Assignment

This Agreement may not be assigned by you without the prior written approval of the Company but may be assigned without your consent by the Company to (i) a parent or subsidiary, (ii) an acquirer of assets, or (iii) a successor by merger. Any purported assignment in violation of this section shall be void.

Export Control

You agree to comply fully with all U.S. and foreign export laws and regulations to ensure that neither the Application nor any technical data related thereto nor any direct product thereof is exported or re-exported directly or indirectly in violation of, or used for any purposes prohibited by, such laws and regulations. By using the App Store Sourced Application, you represent and warrant that: (i) you are not located in a country that is subject to a U.S. Government embargo, or that has been designated by the U.S. Government as a “terrorist supporting” country; and (ii) you are not listed on any U.S. Government list of prohibited or restricted parties.

Dispute Resolution

You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **"Disputes"**) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

Arbitration Process. A party who desires to initiate arbitration must provide the other party with a written Demand for Arbitration as specified in the AAA Rules. (The AAA provides a form Demand for Arbitration at www.adr.org/aaa/ShowPDF?doc=ADRSTG_004175 and a separate form for California residents at www.adr.org/aaa/ShowPDF?doc=ADRSTG_015822.) The arbitrator will be either a retired judge or an attorney licensed to practice law in the state of California and will be selected by the parties from the AAA's roster of consumer dispute arbitrators. If the parties are unable to agree upon an arbitrator within seven (7) days of delivery of the Demand for Arbitration, then the AAA will appoint the arbitrator in accordance with the AAA Rules.

Arbitration Location and Procedure. Unless you and Company otherwise agree, the arbitration will be conducted in the county where you reside. If your claim does not exceed $10,000, then the arbitration will be conducted solely on the basis of documents you and Company submit to the arbitrator, unless you request a hearing or the arbitrator determines that a hearing is necessary. If your claim exceeds $10,000, your right to a hearing will be determined by the AAA Rules. Subject to the AAA Rules, the arbitrator will have the discretion to direct a reasonable exchange of information by the parties, consistent with the expedited nature of the arbitration.

Arbitrator's Decision. The arbitrator will render an award within the time frame specified in the AAA Rules. The arbitrator's decision will include the essential findings and conclusions upon which the arbitrator based the award. Judgment on the arbitration award may be entered in any court having jurisdiction thereof. The arbitrator's award damages must be consistent with the terms of the "Limitation of Liability" section above as to the types and the amounts of damages for which a party may be held liable. The arbitrator may award declaratory or injunctive relief only in favor of the claimant and only to the extent necessary to provide relief warranted by the claimant's individual claim. If you prevail in arbitration you will be entitled to an award of attorneys' fees and expenses, to the extent provided under applicable law. Company will not seek, and hereby waives all rights it may have under applicable law to recover, attorneys' fees and expenses if it prevails in arbitration.

Fees. Your responsibility to pay any AAA filing, administrative and arbitrator fees will be solely as set forth in the AAA Rules. However, if your claim for damages does not exceed $75,000, Company will pay all such fees unless the arbitrator finds that either the substance of your claim or the relief sought in your Demand for Arbitration was frivolous or was brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)).

Changes. Notwithstanding the provisions of the modification-related provisions above, if Company changes this "Dispute Resolution" section after the date you first accepted this Agreement (or accepted any subsequent changes to this Agreement), you may reject any such change by sending us written notice (including by email to support@uber.com) within 30 days of the date such change became effective, as indicated in the "Last Updated Date"

above or in the date of Company's email to you notifying you of such change. By rejecting any change, you are agreeing that you will arbitrate any Dispute between you and Company in accordance with the provisions of this "Dispute Resolution" section as of the date you first accepted this Agreement (or accepted any subsequent changes to this Agreement).

General

No joint venture, partnership, employment, or agency relationship exists between you, the Company or any third party provider as a result of this Agreement or use of the Service or Application. If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provisions shall be enforced to the fullest extent under law. The failure of the Company to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by the Company in writing. This Agreement comprises the entire agreement between you and the Company and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained herein.

<% include ../footer.html %>

EXHIBIT 2

UBER USA, LLC

TECHNOLOGY SERVICES AGREEMENT

Last update: December 11, 2015

This Technology Services Agreement ("*Agreement*") constitutes a legal agreement between an independent company in the business of providing transportation services ("*Customer*" or "*You*") and Uber USA, LLC, a limited liability company ("*Uber*").

Uber provides the Uber Services (as defined below) for the purpose of providing lead generation to transportation services providers. The Uber Services enable an authorized transportation provider to seek, receive and fulfill requests for transportation services from an authorized user of Uber's mobile application.

Customer is authorized to provide transportation services in the state(s) and jurisdiction(s) in which it operates, and it desires to enter into this Agreement for the purpose of accessing and using the Uber Services to enhance its transportation business.

Customer acknowledges and agrees that Uber is a technology services provider that does not provide transportation services, function as a transportation carrier, nor operate as a broker for the transportation of passengers.

In order to use the Uber Services, Customer must agree to the terms and conditions that are set forth below. Upon Customer's execution (electronic or otherwise) of this Agreement, Customer and Uber shall be bound by the terms and conditions set forth herein.

IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES AND THE ASSOCIATED SOFTWARE, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW IN SECTION 15.3 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH UBER ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION. BY VIRTUE OF YOUR ELECTRONIC EXECUTION OF THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING SECTION 15.3) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN SECTION 15.3 BELOW.

1. **Definitions**

1.1. "*Affiliate*" means an entity that, directly or indirectly, controls, is under the control of, or is under common control with a party, where control means having more than fifty percent (50%) of the voting stock or other ownership interest or the majority of the voting rights of such entity.

1.2. "*City Addendum*" means an addendum to this Agreement or supplemental information setting forth additional Territory-specific terms, as made available and as updated by Uber from time to time.

1.3. "*Device*" means an Uber Device or Driver-Provided Device, as the case may be.

1.4. "*Driver*" means a principal, employee or contractor of Customer: (a) who meets the then-current Uber requirements to be an active driver using the Uber Services; (b) whom Uber authorizes to access the Uber Services to provide Transportation Services on behalf of Customer; and (c) who has entered into the Driver Addendum.

1.5. "*Driver Addendum*" means the terms and conditions that Customer is required to enter into with a Driver prior to such Driver providing Transportation Services on behalf of Customer (as may be updated by Uber from time to time).

1.6. "*Driver App*" means Uber's mobile application that enables transportation providers to access the Uber Services for the purpose of seeking, receiving and fulfilling on-demand requests for transportation services by Users, as may be updated or modified by Uber at its discretion from time to time.

1.7. "*Driver ID*" means the identification and password key assigned by Uber to a Driver that enables a Driver to use and access the Driver App.

1.8. "*Driver-Provided Device*" means a mobile device owned or controlled by Customer or a Driver: (a) that meets the then-current Uber specifications for mobile devices as set forth at www.uber.com/byod-devices; and (b) on which the Driver App has been installed as authorized by Uber solely for the purpose of providing Transportation Services.

1.9. "*Fare*" has the meaning set forth in Section 4.1.

1.10. "*Service Fee*" has the meaning set forth in Section 4.4.

1.11. "*Taxi Services*" has the meaning set forth in Section 3.1.

1.12. "*Territory*" means the city or metro areas in the United States in which Customer and its Drivers are enabled by the Driver App to receive requests for Transportation Services.

1.13. "*Tolls*" means any applicable road, bridge, ferry, tunnel and airport charges and fees, including inner-city congestion, environmental or similar charges as reasonably determined by the Uber Services based on available information.

1.14. "*Transportation Services*" means the provision of passenger transportation services to Users via the Uber Services in the Territory by Customer and its Drivers using the Vehicles.

1.15. "*Uber Data*" means all data related to the access and use of the Uber Services hereunder, including all data related to Users (including User Information), all data related to the provision of Transportation Services via the Uber Services and the Driver App, and the Driver ID.

1.16. "*Uber Device*" means a mobile device owned or controlled by Uber that is provided to Customer or a Driver for the sole purpose of such Driver using the Driver App to provide Transportation Services.

1.17. "*Uber Services*" mean Uber's on-demand lead generation and related services that enable transportation providers to seek, receive and fulfill on-demand requests for transportation services by Users seeking transportation services; such Uber Services include access to the Driver App and Uber's software, websites, payment services as described in Section 4 below, and related support services systems, as may be updated or modified by Uber at its discretion from time to time.

1.18. "*User*" means an end user authorized by Uber to use Uber's mobile application for the purpose of obtaining Transportation Services offered by Uber's transportation provider customers.

1.19. "*User Information*" means information about a User made available to Customer or a Driver in connection with such User's request for and use of Transportation Services, which may include the User's name, pick-up location, contact information and photo.

1.20. "*Vehicle*" means any vehicle of Customer that: (a) meets the then-current Uber requirements for a vehicle on the Uber Services; and (b) Uber authorizes for use by a Driver for the purpose of providing Transportation Services on behalf of Customer.

2. **Use of the Uber Services**

2.1. **Driver IDs**. Uber will issue Customer a Driver ID for each Driver providing Transportation Services to enable Customer and each Driver to access and use the Driver App on a Device in accordance with the Driver Addendum and this Agreement. Uber reserves the right to deactivate the Driver ID of those Drivers who have not fulfilled a request for Transportation Services using the Driver App at least once a month. **Customer agrees that it will, and that it will ensure that its Drivers will, maintain Driver IDs in confidence and not share Driver IDs with any third party other than the Driver associated with such Driver ID for the purpose of providing Transportation Services. Customer will immediately notify Uber of any actual or suspected breach or improper use or disclosure of a Driver ID or the Driver App.**

2.2. **Provision of Transportation Services**. When the Driver App is active, User requests for Transportation Services may appear to a Driver via the Driver App if the Driver is available and in the vicinity of the User. If a Driver accepts a User's request for Transportation Services, the Uber Services will provide certain User Information to such Driver via the Driver App, including the User's first name and pickup location. In order to enhance User satisfaction with the Uber mobile application and a Driver's Transportation Services, it is recommended that Driver waits at least ten (10) minutes for a User to show up at the requested pick-up location. The Driver will obtain the destination from the User, either in person upon pickup or from the Driver App if the User elects to enter such destination via Uber's mobile application. Customer acknowledges and agrees that once a Driver has accepted a User's request for Transportation Services, Uber's mobile application may provide certain information about the Driver to the User, including the Driver's first name, contact information, Customer entity name, photo and location, and the Driver's Vehicle's make and license plate number. Customer shall not, and shall ensure that all Drivers do not, contact any Users or use any User's personal data for any reason other than for the purposes of fulfilling Transportation Services. As between Uber and Customer, Customer acknowledges and agrees that: (a) Customer and its Drivers are solely responsible for determining the most effective, efficient and safe manner to perform each instance of Transportation Services; and (b) except for the Uber Services or any Uber Devices (if applicable), Customer shall provide all necessary equipment, tools and other materials, at Customer's own expense, necessary to perform Transportation Services. Customer understands and agrees that Customer and each Driver have a legal obligation under the Americans with Disabilities Act and

similar state laws to transport Users with Service Animals (as defined by applicable state and federal law), including guide dogs for the blind and visually impaired Users, and there is no exception to this obligation for allergies or religious objections. Customer's or any Driver's knowing failure to transport a User with a Service Animal shall constitute a material breach of this Agreement. Customer agrees that a "knowing failure" to comply with this legal obligation shall constitute either: (1) a denial of a ride where the Customer/Driver states the denial was due to a Service Animal; or (2) there is more than one (1) instance in which a User or the companion of a User alleges that the Customer/Driver cancelled or refused a ride on the basis of a Service Animal.

2.3. **Customer's Relationship with Users**. Customer acknowledges and agrees that Customer's provision of Transportation Services to Users creates a direct business relationship between Customer and the User. Uber is not responsible or liable for the actions or inactions of a User in relation to Customer or any Driver, the activities of Customer, a Driver or any Vehicle. Customer shall have the sole responsibility for any obligations or liabilities to Users or third parties that arise from its provision of Transportation Services. Customer acknowledges and agrees that it and each Driver are solely responsible for taking such precautions as may be reasonable and proper (including maintaining adequate insurance that meets the requirements of all applicable laws including motor vehicle financial responsibility) regarding any acts or omissions of a User or third party. Customer acknowledges and agrees that Uber may release the contact and/or insurance information of Customer and/or a Driver to a User upon such User's reasonable request. Customer acknowledges and agrees that, unless specifically consented to by a User, neither Customer nor Driver may transport or allow inside any Vehicle individuals other than a User and any individuals authorized by such User during the performance of Transportation Services for such User. Customer acknowledges and agrees, and shall ensure that its Drivers agree, that all Users should be transported directly to their specified destination, as directed by the applicable User, without unauthorized interruption or unauthorized stops.

2.4. **Customer's Relationship with Uber**. Customer acknowledges and agrees that Uber's provision to Customer of the Driver App and the Uber Services creates a direct business relationship between Uber and Customer. Uber does not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement specifically, including in connection with the operation of Customer's business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles. Customer and its Drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Services. Customer and its Drivers retain the option, via the Driver App, to attempt to accept or to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request for Transportation Services via the Driver App, subject to Uber's then-current cancellation policies. With the exception of any signage required by local law or permit/license requirements, Uber shall have no right to require Customer or any Driver to: (a) display Uber's or any of its Affiliates' names, logos or colors on any Vehicle(s); or (b) wear a uniform or any other clothing displaying Uber's or any of its Affiliates' names, logos or colors. Customer acknowledges and agrees that it has complete discretion to operate its independent business and direct its Drivers at its own discretion, including the ability to provide services at any time to any third party separate and apart from Transportation Services. For the sake of clarity, Customer understands that Customer retains the complete right to provide transportation services to its existing customers and to use other software application services in addition to the Uber Services. Uber retains the right to deactivate or otherwise restrict Customer or any Driver from accessing or

using the Driver App or the Uber Services in the event of a violation or alleged violation of this Agreement, a violation or alleged violation of a Driver Addendum, Customer's or any Driver's disparagement of Uber or any of its Affiliates, Customer's or any Driver's act or omission that causes harm to Uber's or its Affiliates' brand, reputation or business as determined by Uber in its sole discretion.

2.5. **Customer's Relationship with Drivers**. Customer shall have the sole responsibility for any obligations or liabilities to Drivers that arise from its relationship with its Drivers (including provision of Transportation Services). Customer acknowledges and agrees that it exercises sole control over the Drivers and will comply with all applicable laws (including tax, social security and employment laws) governing or otherwise applicable to its relationship with its Drivers. Notwithstanding Customer's right, if applicable, to take recourse against a Driver, Customer acknowledges and agrees that it is at all times responsible and liable for the acts and omissions of its Drivers vis-à-vis Users and Uber, even where such vicarious liability may not be mandated under applicable law. Customer shall require each Driver to enter into a Driver Addendum (as may be updated from time to time) and shall provide a copy of each executed Driver Addendum to Uber. Customer acknowledges and agrees that Uber is a third party beneficiary of each Driver Addendum, and that, upon a Driver's acceptance of the terms and conditions of the Driver Addendum, Uber will have the right (and will be deemed to have accepted the right) to enforce the Driver Addendum against the Driver as a third party beneficiary thereof.

2.6. **Ratings**.

2.6.1. Customer acknowledges and agrees that: (a) after receiving Transportation Services, a User will be prompted by Uber's mobile application to provide a rating of such Transportation Services and Driver and, optionally, to provide comments or feedback about such Transportation Services and Driver; and (b) after providing Transportation Services, the Driver will be prompted by the Driver App to provide a rating of the User and, optionally, to provide comments or feedback about the User. Customer shall instruct all Drivers to provide ratings and feedback in good faith.

2.6.2. Customer acknowledges that Uber desires that Users have access to high-quality services via Uber's mobile application. In order to continue to receive access to the Driver App and the Uber Services, each Driver must maintain an average rating by Users that exceeds the minimum average acceptable rating established by Uber for the Territory, as may be updated from time to time by Uber in its sole discretion ("*Minimum Average Rating*"). A Driver's average rating is intended to reflect Users' satisfaction with the Driver's Transportation Services rather than any such Driver's compliance with any of Uber's policies or recommendations. In the event a Driver's average rating falls below the Minimum Average Rating, Uber will notify Customer and may provide the Driver in Uber's discretion, a limited period of time to raise his or her average rating above the Minimum Average Rating. If such Driver does not increase his or her average rating above the Minimum Average Rating within the time period allowed (if any), Uber reserves the right to deactivate such Driver's access to the Driver App and the Uber Services. Additionally, Customer acknowledges and agrees that repeated failure by a Driver to accept User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to accept User requests for Transportation Services for a period of time, such Driver will log off of the Driver App.

2.6.3. Uber and its Affiliates reserve the right to use, share and display Driver and User ratings and comments in any manner in connection with the business of Uber and its Affiliates without attribution to or approval of Customer or the applicable Driver. Customer acknowledges that Uber and its Affiliates are distributors (without any obligation to verify) and not publishers of Driver and User ratings and comments, provided that Uber and its Affiliates reserve the right to edit or remove comments in the event that such comments include obscenities or other objectionable content, include an individual's name or other personal information, or violate any privacy laws, other applicable laws or Uber's or its Affiliates' content policies.

2.7. **Devices**.

2.7.1. Uber encourages Customer to use Driver-Provided Devices in providing Transportation Services. Otherwise, if Customer elects to use any Uber Devices, Uber will supply Uber Devices upon request to each authorized Driver and provide the necessary wireless data plan for such Devices, provided that Uber will require reimbursement from Customer for the costs associated with the wireless data plan of each Uber Device and/or request a deposit for each Uber Device. Customer acknowledges and agrees that: (a) Uber Devices may only be used for the purpose of enabling Driver access to the Uber Services; and (b) Uber Devices may not be transferred, loaned, sold or otherwise provided in any manner to any party other than the Driver assigned to use such Uber Device. Uber Devices shall at all times remain the property of Uber, and upon termination of this Agreement or the termination or deactivation of a Driver, Customer agrees to return to Uber the applicable Uber Devices within ten (10) days. Customer acknowledges and agrees that failure to timely return any Uber Devices, or damage to Uber Devices outside of "normal wear and tear," will result in the forfeiture of related deposits.

2.7.2. If Customer elects to use any Driver-Provided Devices: (i) Customer and/or its Drivers are responsible for the acquisition, cost and maintenance of such Driver-Provided Devices as well as any necessary wireless data plan; and (ii) Uber shall make available the Driver App for installation on such Driver-Provided Devices. Uber hereby grants the authorized user of any Driver-Provided Device a personal, non-exclusive, non-transferable license to install and use the Driver App on a Driver-Provided Device solely for the purpose of providing Transportation Services. Customer agrees to not, and shall cause each applicable Driver to not, provide, distribute or share, or enable the provision, distribution or sharing of, the Driver App (or any data associated therewith) with any third party. The foregoing license grant shall immediately terminate and Driver will delete and fully remove the Driver App from the Driver-Provided Device in the event that Customer and/or the applicable Driver ceases to provide Transportation Services using the Driver-Provided Device. Customer agrees, and shall inform each applicable Driver that: (i) use of the Driver App on a Driver-Provided Device requires an active data plan with a wireless carrier associated with the Driver-Provided Device, which data plan will be provided by either Customer or the applicable Driver at their own expense; and (ii) use of the Driver App on a Driver-Provided Device as an interface with the Uber Services may consume very large amounts of data through the data plan. **UBER ADVISES THAT DRIVER-PROVIDED DEVICES ONLY BE USED UNDER A DATA PLAN WITH UNLIMITED OR VERY HIGH DATA USAGE LIMITS, AND UBER SHALL NOT BE RESPONSIBLE**

OR LIABLE FOR ANY FEES, COSTS, OR OVERAGE CHARGES ASSOCIATED WITH ANY DATA PLAN.

2.8. **Location Based Services**. Customer acknowledges and agrees that each Driver's geo-location information must be provided to the Uber Services via a Device in order to provide Transportation Services. Customer acknowledges and agrees, and shall inform and obtain the consent of each Driver, that: (a) the Driver's geo-location information may be obtained by the Uber Services while the Driver App is running; and (b) the approximate location of the Driver's Vehicle will be displayed to the User before and during the provision of Transportation Services to such User. In addition, Company and its Affiliates may monitor, track and share with third parties Driver's geo-location information obtained by the Driver App and Device for safety and security purposes.

3. **Drivers and Vehicles**

3.1. **Driver Requirements**. Customer acknowledges and agrees that each Driver shall at all times: (a) hold and maintain (i) a valid driver's license with the appropriate level of certification to operate the Vehicle assigned to such Driver, and (ii) all licenses, permits, approvals and authority applicable to Customer and/or Driver that are necessary to provide passenger transportation services to third parties in the Territory; (b) possess the appropriate and current level of training, expertise and experience to provide Transportation Services in a professional manner with due skill, care and diligence; and (c) maintain high standards of professionalism, service and courtesy. Customer acknowledges and agrees that each Driver may be subject to certain background and driving record checks from time to time in order for such Driver to qualify to provide, and remain eligible to provide, Transportation Services. In addition if Customer and/or Driver are using the Uber App to provide Transportation Services in conjunction with operating a taxi ("*Taxi Services*"), such Customer and/or Driver shall comply with all applicable laws with respect thereto. Customer acknowledges and agrees that Uber reserves the right, at any time in Uber's sole discretion, to deactivate or otherwise restrict a Driver from accessing or using the Driver App or the Uber Services if Customer or such Driver fails to meet the requirements set forth in this Agreement or the Driver Addendum.

3.2. **Vehicle Requirements**. Customer acknowledges and agrees that each Vehicle shall at all times be: (a) properly registered and licensed to operate as a passenger transportation vehicle in the Territory; (b) owned or leased by Customer, or otherwise in Customer's lawful possession; (c) suitable for performing the passenger transportation services contemplated by this Agreement; and (d) maintained in good operating condition, consistent with industry safety and maintenance standards for a Vehicle of its kind and any additional standards or requirements in the applicable Territory, and in a clean and sanitary condition.

3.3. **Documentation**. To ensure Customer's and each of its Drivers' compliance with all requirements in Sections 3.1 and 3.2 above, Customer must provide Uber with written copies of all such licenses, permits, approvals, authority, registrations and certifications prior to Customer's and the applicable Drivers' provision of any Transportation Services. Thereafter, Customer must submit to Uber written evidence of all such licenses, permits, approvals, authority, registrations and certifications as they are renewed. Uber shall, upon request, be entitled to review such licenses, permits, approvals, authority, registrations and certifications from time to time, and Customer's failure to provide or maintain any of the foregoing shall constitute a material breach of this Agreement. Uber reserves the right to independently verify Customer's and any Driver's documentation from time to time in any way Uber deems appropriate in its reasonable discretion.

4. **Financial Terms**

4.1. **Fare Calculation and Customer Payment**. Customer is entitled to charge a fare for each instance of completed Transportation Services provided to a User that are obtained via the Uber Services (*"Fare"*), where such Fare is calculated based upon a base fare amount plus distance (as determined by Uber using location-based services enabled through the Device) and/or time amounts, as detailed at www.uber.com/cities for the applicable Territory ("*Fare Calculation*"). Customer acknowledges and agrees that the Fare provided under the Fare Calculation is the only payment Customer will receive in connection with the provision of Transportation Services, and that neither the Fare nor the Fare Calculation includes any gratuity. Customer is also entitled to charge User for any Tolls, taxes or fees incurred during the provision of Transportation Services, and, if applicable. Customer: (i) appoints Uber as Customer's limited payment collection agent solely for the purpose of accepting the Fare, applicable Tolls and, depending on the region and/or if requested by Customer, applicable taxes and fees from the User on behalf of the Customer via the payment processing functionality facilitated by the Uber Services; and (ii) agrees that payment made by User to Uber (or to an Affiliate of Uber acting as an agent of Uber) shall be considered the same as payment made directly by User to Customer. In addition, the parties acknowledge and agree that as between Customer and Uber, the Fare is a recommended amount, and the primary purpose of the pre-arranged Fare is to act as the default amount in the event Customer does not negotiate a different amount. Customer shall always have the right to: (i) charge a fare that is less than the pre-arranged Fare; or (ii) negotiate, at Customer's request, a Fare that is lower than the pre-arranged Fare (each of (i) and (ii) herein, a "*Negotiated Fare*"). Uber shall consider all such requests from Customer in good faith. Uber agrees to remit, or cause to be remitted, to Customer on at least a weekly basis: (a) the Fare less the applicable Service Fee; (b) the Tolls; and (c) depending on the region, certain taxes and ancillary fees. If Customer has separately agreed that other amounts may be deducted from the Fare prior to remittance to Customer (*e.g.*, vehicle financing payments, lease payments, mobile device usage charges, etc.), the order of any such deductions from the Fare shall be determined exclusively by Uber (as between Customer and Uber). Notwithstanding anything to the contrary in this Section 4.1, if Customer is providing Taxi Services, the following shall apply: (x) the Fare is calculated pursuant to local taxi regulations in the Territory; (y) Customer or Driver agrees to enter the exact Fare amount (as indicated by the official taxi meter in the Vehicle) into the Driver App upon completion of an instance of Transportation Services; and (z) in some jurisdictions, Users will pay such Customer or Driver directly rather than through Uber's mobile application (Uber will notify Customer if (z) is applicable in its Territory).

4.2. **Changes to Fare Calculation**. Uber reserves the right to change the Fare Calculation at any time in Uber's discretion based upon local market factors, and Uber will provide notice to Customer in the event of changes to the base fare, per mile, and/or per minute amounts that would result in a change in the recommended Fare for each instance of completed Transportation Services. Continued use of the Uber Services after any such change in the Fare Calculation shall constitute Customer's consent to such change.

4.3. **Fare Adjustment**. Uber reserves the right to: (i) adjust the Fare for a particular instance of Transportation Services (*e.g.*, Driver took an inefficient route, Driver failed to properly end a particular instance of Transportation Services in the Driver App, technical error in the Uber Services, etc.); or (ii) cancel the Fare for a particular instance of Transportation Services (*e.g.*, a User is charged for Transportation Services that were not provided, in the event of a User

complaint, fraud, etc.). Uber's decision to reduce or cancel the Fare in any such manner shall be exercised in a reasonable manner.

4.4. **Service Fee**. In consideration of Uber's provision of the Driver App and the Uber Services for the use and benefit of Customer and its Drivers hereunder, Customer agrees to pay Uber a service fee on a per Transportation Services transaction basis calculated as a percentage of the Fare determined by the Fare Calculation (regardless of any Negotiated Fare), as provided to Customer and/or a Driver via email or otherwise made available electronically by Uber from time to time for the applicable Territory ("*Service Fee*"). In the event regulations applicable to Customer's Territory require taxes to be calculated on the Fare, Uber shall calculate the Service Fee based on the Fare net of such taxes. Uber reserves the right to change the Service Fee at any time in Uber's discretion based upon local market factors, and Uber will provide notice to Customer in the event of such change. Continued use of the Uber Services after any such change in the Service Fee calculation shall constitute Customer's consent to such change. In addition, with respect to Taxi Services in the applicable Territory, Customer agrees to pay Uber a booking fee in consideration of Uber's provision of the Driver App and the Uber Services.

4.5. **Cancellation Charges**. Customer acknowledges and agrees that Users may elect to cancel requests for Transportation Services that have been accepted by a Driver via the Driver App at any time prior to the Driver's arrival. In the event that a User cancels an accepted request for Transportation Services, Uber may charge the User a cancellation fee on behalf of the Customer. If charged, this cancellation fee shall be deemed the Fare for the cancelled Transportation Services for the purpose of remittance to Customer hereunder ("*Cancellation Fee*"). The parties acknowledge and agree that as between Customer and Uber, this Cancellation Fee is a recommended amount, and the primary purpose of such Cancellation Fee is to act as a default amount in the event Customer does not negotiate a different amount. Customer shall always have the right to: (i) charge a cancellation fee that is less than the Cancellation Fee; or (ii) negotiate, at your request, a cancellation fee that is lower than the Cancellation Fee (each of (i) and (ii) herein, a "*Negotiated Cancellation Fee*"). If charged, the Cancellation Fee (regardless of any Negotiated Cancellation Fee) shall be deemed the Fare for the cancelled Transportation Services for the purpose of remittance to Customer hereunder.

4.6. **Receipts**. As part of the Uber Services, Uber provides Customer a system for the delivery of receipts to Users for Transportation Services rendered. Upon the completion of Transportation Services for a User by a Driver, Uber prepares an applicable receipt and issues such receipt to the User via email on behalf of the Customer and applicable Driver. Such receipts are also provided via email or the online portal available to Customer through the Uber Services. Receipts include the breakdown of amounts charged to the User for Transportation Services and may include specific information about the Customer and applicable Driver, including the Customer's entity name and contact information and the Driver's name and photo, as well as a map of the route taken by the Driver. Customer shall inform Drivers that any corrections to a User's receipt for Transportation Services must be submitted to Uber in writing within three (3) business days after the completion of such Transportation Services. Absent such a notice, Uber shall not be liable for any mistakes in or corrections to the receipt or for recalculation or disbursement of the Fare.

4.7. **No Additional Amounts**. Customer acknowledges and agrees that, for the mutual benefit of the parties, through advertising and marketing, Uber and its Affiliates may seek to attract new Users to Uber and to increase existing Users' use of Uber's mobile application. Customer

acknowledges and agrees such advertising or marketing does not entitle Customer to any additional monetary amounts beyond the amounts expressly set forth in this Agreement.

4.8. **Taxes**. Customer acknowledges and agrees that it is required to: (a) complete all tax registration obligations and calculate and remit all tax liabilities related to its and its Drivers' provision of Transportation Services as required by applicable law; and (b) provide Uber with all relevant tax information. Customer further acknowledges and agrees that it is responsible for taxes on its own income (and that of its Drivers) arising from the performance of Transportation Services. Notwithstanding anything to the contrary in this Agreement, Uber may in its reasonable discretion based on applicable tax and regulatory considerations, collect and remit taxes resulting from its or its Drivers' provision of Transportation Services and/or provide any of the relevant tax information provided by Customer or any Driver pursuant to the foregoing requirements in this Section 4.8 directly to the applicable governmental tax authorities on your behalf or otherwise.

5. **Proprietary Rights; License**

5.1. **License Grant**. Subject to the terms and conditions of this Agreement, Uber hereby grants Customer a non-exclusive, non-transferable, non-sublicensable, non-assignable license, during the term of this Agreement, to use (and allows its Drivers to use) the Uber Services (including the Driver App on a Device) solely for the purpose of providing Transportation Services to Users and tracking resulting Fares and Fees. All rights not expressly granted to Customer are reserved by Uber, its Affiliates and their respective licensors.

5.2. **Restrictions**. Customer shall not, and shall not allow any other party to: (a) license, sublicense, sell, resell, transfer, assign, distribute or otherwise provide or make available to any other party the Uber Services, Driver App or any Uber Device in any way; (b) modify or make derivative works based upon the Uber Services or Driver App; (c) improperly use the Uber Services or Driver App, including creating Internet "links" to any part of the Uber Services or Driver App, "framing" or "mirroring" any part of the Uber Services or Driver App on any other websites or systems, or "scraping" or otherwise improperly obtaining data from the Uber Services or Driver App; (d) reverse engineer, decompile, modify, or disassemble the Uber Services or Driver App, except as allowed under applicable law; or (e) send spam or otherwise duplicative or unsolicited messages. In addition, Customer shall not, and shall not allow any other party to, access or use the Uber Services or Driver App to: (i) design or develop a competitive or substantially similar product or service; (ii) copy or extract any features, functionality, or content thereof; (iii) launch or cause to be launched on or in connection with the Uber Services an automated program or script, including web spiders, crawlers, robots, indexers, bots, viruses or worms, or any program which may make multiple server requests per second, or unduly burden or hinder the operation and/or performance of the Uber Services; or (iv) attempt to gain unauthorized access to the Uber Services or its related systems or networks.

5.3. **Ownership**. The Uber Services, Driver App and Uber Data, including all intellectual property rights therein, and the Uber Devices are and shall remain the property of Uber, its Affiliates or their respective licensors. Neither this Agreement nor Customer's use of the Uber Services, Driver App or Uber Data conveys or grants to Customer any rights in or related to the Uber Services, Driver App or Uber Data, except for the limited license granted above. Customer is not permitted to use or reference in any manner Uber's, its Affiliates', or their respective licensors' company names, logos, product and service names, trademarks, service marks or other indicia of ownership, alone or in combination with other letters, punctuation, words, symbols and/or designs (the "*UBER Marks and Names*"). Customer will not try to register or otherwise claim

ownership in any of the UBER Marks and Names, alone or in combination with other letters, punctuation, words, symbols and/or designs or in any confusingly similar mark or name.

6. **Confidentiality**

6.1. Each party acknowledges and agrees that in the performance of this Agreement it may have access to or may be exposed to, directly or indirectly, confidential information of the other party ("*Confidential Information*"). Confidential Information includes Uber Data, Driver IDs, User Information, and the transaction volume, marketing and business plans, business, financial, technical, operational and such other non-public information of each party (whether disclosed in writing or verbally) that such party designates as being proprietary or confidential or of which the other party should reasonably know that it should be treated as confidential.

6.2. Each party acknowledges and agrees that: (a) all Confidential Information shall remain the exclusive property of the disclosing party; (b) it shall not use Confidential Information of the other party for any purpose except in furtherance of this Agreement; (c) it shall not disclose Confidential Information of the other party to any third party, except to its employees, officers, contractors, agents and service providers ("*Permitted Persons*") as necessary to perform under this Agreement, provided Permitted Persons are bound in writing to obligations of confidentiality and non-use of Confidential Information no less protective than the terms hereof; and (d) it shall return or destroy all Confidential Information of the disclosing party, upon the termination of this Agreement or at the request of the other party (subject to applicable law and, with respect to Uber, its internal record-keeping requirements).

6.3. Notwithstanding the foregoing, Confidential Information shall not include any information to the extent it: (a) is or becomes part of the public domain through no act or omission on the part of the receiving party; (b) was possessed by the receiving party prior to the date of this Agreement without an obligation of confidentiality; (c) is disclosed to the receiving party by a third party having no obligation of confidentiality with respect thereto; or (d) is required to be disclosed pursuant to law, court order, subpoena or governmental authority, provided the receiving party notifies the disclosing party thereof and provides the disclosing party a reasonable opportunity to contest or limit such required disclosure.

7. **Privacy**

7.1. **Disclosure of Customer or Driver Information**. Subject to applicable law and regulation, Uber may, but shall not be required to, provide to Customer, a Driver, a User, an insurance company and/or relevant authorities and/or regulatory agencies any information (including personal information (*e.g.*, information obtained about a Driver through any background check) and any Uber Data) about Customer, a Driver, or any Transportation Services provided hereunder if: (a) there is a complaint, dispute or conflict, including an accident, between Customer or a Driver on the one hand and a User on the other hand; (b) it is necessary to enforce the terms of this Agreement; (c) it is required, in Uber's or any Affiliate's sole discretion, by applicable law or regulatory requirements (*e.g.*, Uber or its Affiliate receives a subpoena, warrant, or other legal process for information); (d) it is necessary, in Uber's or any Affiliate's sole discretion, to (1) protect the safety, rights, property or security of Uber or its Affiliates, the Uber Services or any third party; (2) protect the safety of the public for any reason including the facilitation of insurance claims related to the Uber Services; (3) detect, prevent or otherwise address fraud, security or technical issues; and/or (4) prevent or stop activity Uber or its Affiliates, in their sole discretion, may consider to be, or to pose a risk of being, an illegal, unethical, or legally actionable activity); or (e) it is required or necessary, in Uber's or any of its Affiliate's sole

discretion, for insurance or other purposes related to Customer's or any Driver's ability to qualify, or remain qualified, to use the Uber Services. Customer understands that Uber may retain and its Drivers' personal data for legal, regulatory, safety and other necessary purposes after this Agreement is terminated.

7.2. Uber and its Affiliates may collect personal data from Customer or a Driver during the course of Customer's or such Driver's application for, and use of, the Uber Services, or obtain information about Customer or any Drivers from third parties. Such information may be stored, processed, transferred, and accessed by Uber and its Affiliates, third parties and service providers, for business purposes, including for marketing, lead generation, service development and improvement, analytics, industry and market research, and such other purposes consistent with Uber's and its Affiliates' legitimate business needs. Customer (or Driver, through the Driver Addendum) expressly consents to such use of personal data.

8. **Insurance**

8.1. Customer agrees to maintain during the term of this Agreement on all Vehicles operated by Customer or its Drivers commercial automobile liability insurance that provides protection against bodily injury and property damage to third parties at levels of coverage that satisfy all applicable laws in the Territory. This coverage must also include any no-fault coverage required by law in the Territory that may not be waived by an insured. Customer agrees to provide Uber and its Affiliates a copy of the insurance policy, policy declarations, proof of insurance identification card and proof of premium payment for the insurance policy required in this Section 8.1 upon request. Furthermore, Customer must provide Uber with written notice of cancellation of any insurance policy required by Uber. Uber shall have no right to control Customer's selection or maintenance of Customer's policy.

8.2. Customer agrees to maintain during the term of this Agreement commercial general liability insurance that provides protection against personal injury, advertising injury and property damage to third parties at levels of coverage required by all applicable laws in the Territory.

8.3. **Customer agrees to maintain during the term of this Agreement workers' compensation insurance for itself and any of its subcontractors as required by all applicable laws in the Territory. If permitted by applicable law, Customer may choose to insure itself against industrial injuries by maintaining occupational accident insurance in place of workers' compensation insurance. Customer's subcontractors may also, to the extent permitted by applicable law, maintain occupational accident insurance in place of workers' compensation insurance. Furthermore, if permitted by applicable law, Customer may choose not to insure itself against industrial injuries at all, but does so at its own risk.**

8.4. Customer shall add Uber (or any Affiliate which may be designated by Uber from time to time) to Customer's insurance policies required in Sections 8.1 and 8.2 above as an additional insured, and shall, upon Uber's request, provide Uber with a copy of such insurance certificate(s) within seven (7) days of such request.

9. **Representations and Warranties; Disclaimers**

9.1. **By Customer**. Customer hereby represents and warrants that: (a) it has full power and authority to enter into this Agreement and perform its obligations hereunder; (b) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its origin; (c) it has not entered into, and during the term will not enter into, any agreement that would prevent it from complying with this Agreement; (d) it will comply with all applicable laws in its performance of

this Agreement, including holding and complying with all permits, licenses, registrations and other governmental authorizations necessary to provide (i) Transportation Services using the Drivers and Vehicles pursuant to this Agreement, and (ii) passenger transportation services to third parties in the Territory generally; and (e) it shall require all Drivers to comply with the Driver Addendum, the applicable terms and conditions set forth in this Agreement and all applicable laws.

9.2. **Disclaimer of Warranties**. UBER PROVIDES, AND CUSTOMER ACCEPTS, THE UBER SERVICES, DRIVER APP AND THE UBER DEVICES ON AN "AS IS" AND "AS AVAILABLE" BASIS. UBER DOES NOT REPRESENT, WARRANT OR GUARANTEE THAT CUSTOMER'S OR ANY DRIVER'S ACCESS TO OR USE OF THE UBER SERVICES, DRIVER APP OR THE UBER DEVICES: (A) WILL BE UNINTERRUPTED OR ERROR FREE; OR (B) WILL RESULT IN ANY REQUESTS FOR TRANSPORTATION SERVICES. UBER FUNCTIONS AS AN ON-DEMAND LEAD GENERATION AND RELATED SERVICE ONLY AND MAKES NO REPRESENTATIONS, WARRANTIES OR GUARANTEES AS TO THE ACTIONS OR INACTIONS OF THE USERS WHO MAY REQUEST OR RECEIVE TRANSPORTATION SERVICES FROM CUSTOMER OR ANY DRIVER HEREUNDER, AND UBER DOES NOT SCREEN OR OTHERWISE EVALUATE USERS. BY USING THE UBER SERVICES AND DRIVER APP, CUSTOMER ACKNOWLEDGES AND AGREES THAT CUSTOMER OR A DRIVER MAY BE INTRODUCED TO A THIRD PARTY THAT MAY POSE HARM OR RISK TO CUSTOMER, A DRIVER OR OTHER THIRD PARTIES. CUSTOMER AND DRIVERS ARE ADVISED TO TAKE REASONABLE PRECAUTIONS WITH RESPECT TO INTERACTIONS WITH THIRD PARTIES ENCOUNTERED IN CONNECTION WITH THE USE OF THE UBER SERVICES OR DRIVER APP. NOTWITHSTANDING UBER'S APPOINTMENT AS THE LIMITED PAYMENT COLLECTION AGENT OF CUSTOMER FOR THE PURPOSE OF ACCEPTING PAYMENT FROM USERS ON BEHALF OF CUSTOMER AS SET FORTH IN SECTION 4 ABOVE, UBER EXPRESSLY DISCLAIMS ALL LIABILITY FOR ANY ACT OR OMISSION OF CUSTOMER, ANY USER OR OTHER THIRD PARTY.

9.3. **No Service Guarantee**. UBER DOES NOT GUARANTEE THE AVAILABILITY OR UPTIME OF THE UBER SERVICES OR DRIVER APP. CUSTOMER ACKNOWLEDGES AND AGREES THAT THE UBER SERVICES OR DRIVER APP MAY BE UNAVAILABLE AT ANY TIME AND FOR ANY REASON (*e.g.*, DUE TO SCHEDULED MAINTENANCE OR NETWORK FAILURE). FURTHER, THE UBER SERVICES OR DRIVER APP MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS, AND UBER IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGES, LIABILITIES OR LOSSES RESULTING FROM SUCH PROBLEMS.

10. **Indemnification**

10.1. Customer shall indemnify, defend (at Uber's option) and hold harmless Uber and its Affiliates and their respective officers, directors, employees, agents, successors and assigns from and against any and all liabilities, expenses (including legal fees), damages, penalties, fines, social security contributions and taxes arising out of or related to: (a) Customer's breach of its representations, warranties or obligations under this Agreement; or (b) a claim by a third party (including Users, regulators and governmental authorities) directly or indirectly related to Customer's provision of Transportation Services or use of the Uber Services. This indemnification provision shall not apply to Customer's or any Drivers' breach of any representations regarding their status as independent contractors.

10.2. As between Customer and Uber, Customer is and shall be solely responsible for its Drivers' provision of Transportation Services. As such, Customer shall indemnify, defend (at Uber's option) and hold harmless Uber and its Affiliates and their respective officers, directors, employees, agents, successors and assigns from and against any and all liabilities, expenses

(including legal fees), damages, penalties, fines, social contributions and taxes directly or indirectly arising out of or related to its Drivers' provision of Transportation Services or use of the Uber Services.

11. **Limits of Liability**. UBER AND ITS AFFILIATES SHALL NOT BE LIABLE UNDER OR RELATED TO THIS AGREEMENT FOR ANY OF THE FOLLOWING, WHETHER BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES: (i) ANY INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY, CONSEQUENTIAL, OR OTHER INDIRECT DAMAGES OF ANY TYPE OR KIND; OR (ii) CUSTOMER'S OR ANY THIRD PARTY'S PROPERTY DAMAGE, OR LOSS OR INACCURACY OF DATA, OR LOSS OF BUSINESS, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE. EXCEPT FOR UBER'S OBLIGATIONS TO PAY AMOUNTS DUE TO CUSTOMER PURSUANT TO SECTION 4 ABOVE, BUT SUBJECT TO ANY LIMITATIONS OR OTHER PROVISIONS CONTAINED IN THIS AGREEMENT WHICH ARE APPLICABLE THERETO, IN NO EVENT SHALL THE LIABILITY OF UBER OR ITS AFFILIATES UNDER THIS AGREEMENT EXCEED THE AMOUNT OF SERVICE FEES ACTUALLY PAID TO OR DUE TO UBER HEREUNDER IN THE SIX (6) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM.

12. **Term and Termination**

12.1. **Term**. This Agreement shall commence on the date accepted by Customer and shall continue until terminated as set forth herein.

12.2. **Termination**. Either party may terminate this Agreement: (a) without cause at any time upon seven (7) days prior written notice to the other party; (b) immediately, without notice, for the other party's material breach of this Agreement; or (c) immediately, without notice, in the event of the insolvency or bankruptcy of the other party, or upon the other party's filing or submission of request for suspension of payment (or similar action or event) against the terminating party. In addition, Uber may terminate this Agreement or deactivate Customer or a particular Driver immediately, without notice, with respect to Customer and/or any Driver in the event Customer and/or any Driver, as applicable, no longer qualifies, under applicable law or the standards and policies of Uber, to provide Transportation Services or to operate the Vehicle, or as otherwise set forth in this Agreement.

12.3. **Effect of Termination**. Upon termination of the Agreement, Customer and all Drivers, as applicable, shall: (a) promptly return to Uber all Uber Devices; and (b) immediately delete and fully remove the Driver App from any applicable Driver-Provided Devices. Outstanding payment obligations and Sections 1, 2.3, 2.5, 2.6.3, 4.7, 4.8, 5.3, 6, 7, 9, 10, 11, 12.3, 13, 14 and 15 shall survive the termination of this Agreement.

13. **Relationship of the Parties**

13.1. **Except as otherwise expressly provided herein with respect to Uber acting as the limited payment collection agent solely for the purpose of collecting payment from Users on behalf of Customer, the relationship between the parties under this Agreement is solely that of independent contracting parties. The parties expressly agree that: (a) this Agreement is not an employment agreement, nor does it create an employment relationship, between Uber and Customer or Uber and any Driver; and (b) no joint venture, partnership, or agency relationship exists between Uber and Customer or Uber and any Driver**.

13.2. Customer has no authority to bind Uber and undertakes not to hold itself out, and to ensure that each Driver does not hold himself or herself out, as an employee, agent or authorized

representative of Uber or its Affiliates. Where, by implication of mandatory law or otherwise, Customer or any Driver may be deemed an agent or representative of Uber, Customer undertakes and agrees to indemnify, defend (at Uber's option) and hold Uber and its Affiliates harmless from and against any claims by any person or entity based on such implied agency or representative relationship.

14. **Miscellaneous Terms**

14.1. **Modification**. In the event Uber modifies the terms and conditions of this Agreement or Driver Addendum at any time, such modifications shall be binding on Customer only upon Customer's acceptance of the modified Agreement and/or Driver Addendum. Uber reserves the right to modify any information referenced at hyperlinks from this Agreement from time to time. Customer hereby acknowledges and agrees that, by using the Uber Services, or downloading, installing or using the Driver App, Customer is bound by any future amendments and additions to information referenced at hyperlinks herein, or documents incorporated herein, including with respect to Fare Calculations. Continued use of the Uber Services or Driver App after any such changes shall constitute Customer's consent to such changes. Unless changes are made to the arbitration provisions herein, Customer agrees that modification of this Agreement does not create a renewed opportunity to opt out of arbitration.

14.2. **Supplemental Terms**. Supplemental terms may apply to Customer's and Driver's use of the Uber Services, such as use policies or terms related to certain features and functionality, which may be modified from time to time ("*Supplemental Terms*"). Customer may be presented with certain Supplemental Terms from time to time. Supplemental Terms are in addition to, and shall be deemed a part of, this Agreement. Supplemental Terms shall prevail over this Agreement in the event of a conflict.

14.3. **Severability**. If any provision of this Agreement is or becomes invalid or non-binding, the parties shall remain bound by all other provisions hereof. In that event, the parties shall replace the invalid or non-binding provision with provisions that are valid and binding and that have, to the greatest extent possible, a similar effect as the invalid or non-binding provision, given the contents and purpose of this Agreement.

14.4. **Assignment**. Neither party shall assign or transfer this Agreement or any of its rights or obligations hereunder, in whole or in part, without the prior written consent of the other party; provided that Uber may assign or transfer this Agreement or any or all of its rights or obligations under this Agreement from time to time without consent: (a) to an Affiliate; or (b) to an acquirer of all or substantially all of Uber's business, equity or assets.

14.5. **Entire Agreement**. This Agreement, including all Supplemental Terms, constitutes the entire agreement and understanding of the parties with respect to its subject matter and replaces and supersedes all prior or contemporaneous agreements or undertakings regarding such subject matter. In this Agreement, the words "including" and "include" mean "including, but not limited to." The recitals form a part of this Agreement.

14.6. **No Third Party Beneficiaries**. There are no third party beneficiaries to this Agreement, except as expressly set forth in the Arbitration Provision in Section 15.3. Nothing contained in this Agreement is intended to or shall be interpreted to create any third party beneficiary claims.

14.7. **Notices**. Any notice delivered by Uber to Customer under this Agreement will be delivered by email to the email address associated with Customer's account or by posting on the Customer portal available on the Uber Services. Any notice delivered by Customer to Uber under this

Agreement will be delivered by contacting Uber at http://partners.uber.com in the "Contact Us" section. Additional Territory-specific notices may be required from time to time.

15. **Governing Law; Arbitration**

15.1 The choice of law provisions contained in this Section 15.1 do not apply to the arbitration clause contained in Section 15.3, such arbitration clause being governed by the Federal Arbitration Act. Accordingly, and except as otherwise stated in Section 15.3, the interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction. Any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Services that are not subject to the arbitration clause contained in this Section 15.3 shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California. However, neither the choice of law provision regarding the interpretation of this Agreement nor the forum selection provision is intended to create any other substantive right to non-Californians to assert claims under California law whether that be by statute, common law, or otherwise. These provisions, and except as otherwise provided in Section 15.3, are only intended to specify the use of California law to interpret this Agreement and the forum for disputes asserting a breach of this Agreement, and these provisions shall not be interpreted as generally extending California law to Customer if Customer does not otherwise operate its business in California. The foregoing choice of law and forum selection provisions do not apply to the arbitration clause in Section 15.3 or to any arbitrable disputes as defined therein. Instead, as described in Section 15.3, the Federal Arbitration Act shall apply to any such dispute. The failure of Uber to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by Uber in writing.

15.2 Other than disputes regarding the intellectual property rights of the parties and other claims identified in Section 15.3.ii, any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Services shall be subject to arbitration pursuant to Section 15.3.

15.3 Arbitration.

Important Note Regarding this Section 15.3:

- Except as provided below, arbitration does not limit or affect the legal claims you may bring against Uber. Agreeing to arbitration only affects where any such claims may be brought and how they will be resolved.

- Arbitration is a process of private dispute resolution that does not involve the civil courts, a civil judge, or a jury. Instead, the parties' dispute is decided by a private arbitrator selected by the parties using the process set forth herein. Other arbitration rules and procedures are also set forth herein.

- Unless the law requires otherwise, as determined by the Arbitrator based upon the circumstances presented, you will be required to split the cost of any arbitration with Uber.

- IMPORTANT: This Arbitration Provision will require you to resolve any claim that you may have against Uber on an individual basis, except as provided below, pursuant to the terms of the Agreement unless you choose to opt out of the Arbitration Provision. Except as provided below, this provision will preclude you from bringing any class, collective, or representative action (other than actions under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code § 2698 *et seq.* ("PAGA")) against Uber, and also precludes you from participating in or recovering relief under any current or future class, collective, or representative (non-PAGA) action brought against Uber by someone else.

    - ***Cases have been filed against Uber and may be filed in the future involving claims by users of Uber Services and Software, including by drivers. You should assume that there are now, and may be in the future, lawsuits against Uber alleging class, collective, and/or representative (non-PAGA) claims on your behalf, including but not limited to claims for tips, reimbursement of expenses, and employment status. Such claims, if successful, could result in some monetary recovery to you.*** ***(THESE CASES NOW INCLUDE, FOR EXAMPLE, YUCESOY ET AL. V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. 3:15-CV-00262 (NORTHERN DISTRICT OF CALIFORNIA); IN RE UBER FCRA LITIGATION, CASE NO. 14-CV-05200-EMC (NORTHERN DISTRICT OF CALIFORNIA); AND O'CONNOR V. UBER TECHNOLOGIES, INC., ET AL., CASE NO. CV 13-03826-EMC (NORTHERN DISTRICT OF CALIFORNIA). The contact information for counsel in the O'Connor matter is as follows: Shannon Liss-Riordan, Lichten & Liss-Riordan, P.C., 100 Cambridge Street, 20th Floor, Boston, MA 02114, Telephone: (617) 994-5800, Fax: (617) 994-5801, email: sliss@llrlaw.com.)***

    - **The mere existence of such class, collective, and/or representative lawsuits, however, does not mean that such lawsuits will ultimately succeed. But if you do agree to arbitration with Uber, you are agreeing in advance, except as otherwise provided, that you will not participate in and,**

therefore, will not seek to recover monetary or other relief under any such class, collective, and/or representative (non-PAGA) lawsuit.

- **However, as discussed above and except as provided below, if you agree to arbitration, you will not be precluded from bringing your claims against Uber in an individual arbitration proceeding. If successful on such claims, you could be awarded money or other relief by an arbitrator (subject to splitting the cost of arbitration as mentioned above).**

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ARBITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS — INCLUDING BUT NOT LIMITED TO AN ATTORNEY — REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

i. How This Arbitration Provision Applies.

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving interstate commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. Nothing contained in this Arbitration Provision shall be construed to prevent or excuse You from utilizing any informal procedure for resolution of complaints established in this Agreement (if any), and this Arbitration Provision is not intended to be a substitute for the utilization of such procedures.

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative (non-PAGA) action.

Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration

Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge. However, as set forth below, the preceding sentences shall not apply to disputes relating to the interpretation or application of the Class Action Waiver or PAGA Waiver below, including their enforceability, revocability or validity.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to all disputes between You and Uber, as well as all disputes between You and Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to Your relationship with Uber, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for individual claims for employee benefits under any benefit plan sponsored by Uber and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

This Agreement is intended to require arbitration of every claim or dispute that lawfully can be arbitrated, except for those claims and disputes which by the terms of this Agreement are expressly excluded from the Arbitration Provision.

Uber Technologies, Inc. is an intended, third party beneficiary of this Agreement.

ii. <u>Limitations On How This Agreement Applies</u>.

The disputes and claims set forth below shall not be subject to arbitration and the requirement to arbitrate set forth in Section 15.3 of this Agreement shall not apply:

A representative action brought on behalf of others under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code § 2698 *et seq.*, to the extent waiver of such a claim is deemed unenforceable by a court of competent jurisdiction;

Claims for workers compensation, state disability insurance and unemployment insurance benefits;

Regardless of any other terms of this Agreement, nothing prevents you from making a report to or filing a claim or charge with the Equal Employment Opportunity Commission, U.S. Department of Labor, Securities Exchange Commission, National Labor Relations Board, or Office of Federal Contract Compliance Programs, and nothing in this Agreement or Arbitration Provision prevents the investigation by a government agency of any report, claim or charge otherwise covered by this Arbitration Provision. Nothing in this Arbitration Provision shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration;

Disputes that may not be subject to a predispute arbitration agreement pursuant to applicable Federal law or Executive Order are excluded from the coverage of this Arbitration Provision;

Disputes regarding the Intellectual Property Rights of the parties;

This Arbitration Provision shall not be construed to require the arbitration of any claims against a contractor that may not be the subject of a mandatory arbitration agreement as provided by section 8116 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118), section 8102 of the Department of Defense ("DoD") Appropriations Act for Fiscal Year 2011 (Pub. L. 112-10, Division A), and their implementing regulations, or any successor DoD appropriations act addressing the arbitrability of claims.

iii. Selecting The Arbitrator and Location of the Arbitration.

The Arbitrator shall be selected by mutual agreement of Uber and You. Unless You and Uber mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the jurisdiction where the arbitration will be conducted. If the Parties cannot agree on an Arbitrator, then an arbitrator will be selected using the alternate strike method from a list of five (5) neutral arbitrators provided by JAMS (Judicial Arbitration & Mediation Services). You will have the option of making the first strike. If a JAMS arbitrator is used, then the JAMS Streamlined Arbitration Rules & Procedures rules will apply; however, if there is a conflict between the JAMS Rules and this Agreement, this Agreement shall govern. Those rules are available here:

http://www.jamsadr.com/rules-streamlined-arbitration/

The location of the arbitration proceeding shall be no more than 45 miles from the place where You last provided transportation services under this Agreement, unless each party to the arbitration agrees in writing otherwise.

iv. Starting The Arbitration.

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the Parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to Uber shall be provided to General Counsel, Uber Technologies, Inc., 1455 Market St., Ste. 400, San Francisco CA 94103. The Arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

v. How Arbitration Proceedings Are Conducted.

In arbitration, the Parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator.

You and Uber agree to resolve any dispute that is in arbitration on an individual basis only, and not on a class or collective action basis ("Class Action Waiver"). The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis. The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis. Notwithstanding any other provision of this Agreement, the Arbitration Provision or the JAMS Streamlined Arbitration Rules & Procedures, disputes regarding the enforceability, revocability or validity of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. In any case in which (1) the dispute is filed as a class, collective, or representative action and (2) there is a final judicial determination that all or part of the Class Action Waiver is unenforceable, the class, collective, and/or representative action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

While Uber will not take any retaliatory action in response to any exercise of rights You may have under Section 7 of the National Labor Relations Act, if any, Uber shall not be precluded from moving to enforce its rights under the FAA to compel arbitration on the terms and conditions set forth in this Agreement.

Private Attorneys General Act.

Notwithstanding any other provision of this Agreement or the Arbitration Provision, to the extent permitted by law, (1) **You and Uber agree not to bring a representative action on behalf of others under the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code § 2698 et seq., in any court or in arbitration**, and (2) for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and Uber agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law) ("PAGA Waiver"). Notwithstanding any other provision of this Agreement or the Arbitration Provision, the validity of the PAGA Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. If any provision of the PAGA Waiver is found to be unenforceable or unlawful for any reason, (1) the unenforceable provision shall be severed from this Agreement; (2) severance of the unenforceable provision shall have no impact whatsoever on the Arbitration Provision or the Parties' attempt to arbitrate any remaining claims on an individual basis pursuant to the Arbitration Provision; and (3) any representative action brought under PAGA on behalf of others must be litigated in a civil court of competent jurisdiction and not in arbitration. To the extent that there are any claims to be litigated in a civil court of competent jurisdiction because a civil court of competent jurisdiction determines that the PAGA Waiver is unenforceable with respect

to those claims, the Parties agree that litigation of those claims shall be stayed pending the outcome of any individual claims in arbitration.

vi. Paying For The Arbitration.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law (i.e., a party prevails on a claim that provides for the award of reasonable attorney fees to the prevailing party). In all cases where required by law, Uber will pay the Arbitrator's and arbitration fees. If under applicable law Uber is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. However, You will not be required to bear any type of fee or expense that You would not be required to bear if You had filed the action in a court of law. Any disputes in that regard will be resolved by the Arbitrator as soon as practicable after the Arbitrator is selected, and Uber shall bear all of the Arbitrator's and arbitration fees until such time as the Arbitrator resolves any such dispute.

vii. The Arbitration Hearing And Award.

The Parties will arbitrate their dispute before the Arbitrator, who shall confer with the Parties regarding the conduct of the hearing and resolve any disputes the Parties may have in that regard. Within 30 days of the close of the arbitration hearing, or within a longer period of time as agreed to by the Parties or as ordered by the Arbitrator, any party will have the right to prepare, serve on the other party and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Arbitration Provision. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration. The Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.

viii. Your Right To Opt Out Of Arbitration.

Arbitration is not a mandatory condition of your contractual relationship with Uber. If You do not want to be subject to this Arbitration Provision, You may opt out of this Arbitration Provision by notifying Uber in writing of Your desire to opt out of this Arbitration Provision, which writing must be dated, signed and delivered by electronic mail to optout@uber.com, by U.S. Mail, or by any nationally recognized delivery service (*e.g*, UPS, Federal Express, etc.), or by hand delivery to:

General Counsel
Uber Technologies, Inc.
1455 Market St., Ste. 400
San Francisco CA 94103

In order to be effective, the writing must clearly indicate Your intent to opt out of this Arbitration Provision and the envelope containing the signed writing must be received (if delivered by hand) or post-marked within 30 days of the date this Agreement is executed by You. Your writing opting out of this Arbitration Provision will be filed with a copy of this Agreement and maintained by Uber. Should You not opt out of this Arbitration Provision within the 30-day period, You and Uber shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of Your choice concerning this Arbitration Provision. You understand that You will not be subject to retaliation if You exercise Your right to assert claims or opt-out of coverage under this Arbitration Provision.

ix. Full And Complete Agreement Related To Formal Resolution Of Disputes; Enforcement Of This Agreement.

This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement. Except as stated in subsection v, above, in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.

By clicking "I accept", Customer expressly acknowledge that Customer has read, understood, and taken steps to thoughtfully consider the consequences of this Agreement, that Customer agrees to be bound by the terms and conditions of the Agreement, and that Customer is legally competent to enter into this Agreement with Uber.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

-against-

TRAVIS KALANICK,

Defendant.

1:15 Civ. 9796 (JSR)

ECF Case

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT TRAVIS KALANICK'S MOTION TO DISMISS

ANDREW SCHMIDT LAW PLLC
Andrew Arthur Schmidt

-and-

HARTER SECREST & EMERY LLP
Brian Marc Feldman
Jeffrey A. Wadsworth
Edwin M. Larkin
A. Paul Britton

Attorneys for Plaintiff
Spencer Meyer

February 18, 2016

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PRELIMINARY STATEMENT

Uber drivers are competitors who do not compete. Unlike taxicabs, Uber drivers' fares are not fixed by a government regulator. Yet drivers charge identical prices for identical services at identical times, including surge pricing of up to ten times baseline fares. This price-fixing holds because participating drivers commit to charge fares set by the Uber app (the "App"). Together, drivers create a marketplace in which price competition is impossible. The App perfects price-fixing.

Plaintiff, a user of Uber drivers' services, brings federal and state antitrust claims against Defendant Travis Kalanick, Uber's founder and CEO, for orchestrating this price-fixing scheme. In his motion, Defendant does not contest that Uber's driver-partners are distinct entities that should be competing with each other. Instead, he asserts that a price-fixing conspiracy of such "staggering breadth" is "physically impossible." Yet that is precisely what Uber provides—instant price-fixing among "hundreds of thousands of strangers" without the risk of cheating.

Defendant's motion should be denied. The First Amended Complaint ("FAC") states a *per se* violation of the Sherman Act. There is no merit to the claim that price-fixing is implausible; this case is based on express (and conceded) contracts, not imagined backroom conversations. *See infra* at I.A. Defendant is liable for orchestrating this price-fixing, which amounts to horizontal concerted action between drivers both (i) because drivers agree to fixed prices only with the assurance that all others are bound to the same prices, and (ii) because drivers collectively sustain Uber's viability as a marketplace. *See infra* at I.B. Likewise, the *per se* rule applies to Defendant's negotiation of higher fares with a concerted group of drivers in September 2014, as Defendant nowhere contests. *See infra* at I.C. The *per se* rule thus applies.

In the alternative, the complaint meets the "quick look" and rule-of-reason tests. Because Uber sells nothing for resale, and because drivers in the Uber marketplace face no free-rider

problem, none of the procompetitive benefits of resale price maintenance can justify Defendant's price-fixing. *See infra* at II.A. And contrary to Defendant's proposed market definition, which would include walking, Plaintiff reasonably limits the market to mobile app-generated ride-share services. *See infra* at II.B. Moreover, inflated fares and suppressed output are indisputably clear adverse effects for purposes of assessing antitrust harm. *See infra* at II.C.

In addition, Plaintiff's state law claim survives even if the federal claim does not. New York State's Donnelly Act extends beyond conspiracies to "arrangements" and bars price-fixing without exception. *See infra* at III.

Finally, the Uber User Agreement does not prevent Plaintiff from joining class members to this suit. California law, which Defendant concedes controls this issue, bars enforcement of the User Agreement's class action waiver. In any event, the User Agreement is with Uber. Defendant may not rely on equitable estoppel to step into Uber's shoes because the antitrust claims here do not rest on any obligation in the User Agreement. Nor may Defendant cherry-pick the class waiver within an arbitration agreement he is not enforcing. *See infra* at IV.

For these reasons and those below, the motion should be denied in its entirety.

BACKGROUND

A. UBER'S BUSINESS MODEL

Uber's flagship product is an App that helps people find and pay for rides from independent drivers. FAC ¶ 24. Uber may have the look and feel of a single-firm car service with a fleet of drivers, like Dial 7, or of a municipal taxi commission, like the New York City TLC, but it is neither of these things. By its own account, Uber is strictly a technology company, not a transportation company. *Id.* ¶¶ 2, 23; Declaration of Michael Colman dated Feb. 8, 2016 ("Colman Decl."), Ex. 1 ("User Agreement") at 2 ("[Uber] offers information and a method to obtain . . . third party transportation services, but does not and does not intend to provide

transportation services or act in any way as a transportation carrier"). So despite identifying drivers who use its App as "driver-partners," Uber has made painstakingly clear—both in its contract with drivers and in its labor disputes with them[1]—that drivers are not Uber employees, partners, or agents. *See* Colman Decl., Ex. 2 ("Driver Terms") at ¶ 13.1 (Uber and drivers "expressly agree" that no "employment relationship" nor "joint venture, partnership, or agency relationship exists" between the driver and Uber). Drivers are thus wholly independent economic entities who pay Uber a fee to use its App to connect with customers ("riders").

In many ways, Uber resembles online travel companies like Expedia. Expedia's website allows air travelers to compare fares and check availability simultaneously across multiple airlines and routes and to conveniently book and pay for flights through Expedia, which in turn reserves seats with and remits payment to individual airlines. Yet there is a glaring difference between Expedia and Uber. Expedia does not dictate uniform pricing across competing airlines, while Uber fixes prices among competing driver-partners. *See* FAC ¶¶ 56, 68-69.

B. THE UBER APP

Riders access the App by creating an account and storing their payment information, such as a credit card number or PayPal account. FAC ¶ 28. The App boasts three principal features. *First*, consumers can request rides through their smartphones. *Id.* ¶ 24. A rider can obtain an approximate fare quote by entering a pickup location and destination, *id.* ¶ 30; when a consumer requests a ride, the App utilizes dispatch software to send the nearest driver to the rider's location, *id.* ¶ 24. *Second*, riders pay drivers through the App, eliminating the need to carry cash or credit cards. *Id.* ¶¶ 32, 35. Uber facilitates payment by charging the fare to the rider's stored

[1] *See, e.g.*, *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1209 (N.D. Cal. 2015) ("Uber adamantly contends that the drivers are *not* its employees.") (emphasis in original); Reply Mem. of Uber & Travis Kalanick, et al., at 1, *O'Connor v. Uber Techs.*, 3:13-cv-03826 (N.D. Cal. 2013), ECF No. 45 ("Uber . . . does not itself provide any transportation services").

payment method and then forwarding that fare to the driver less a percentage that Uber collects as a software licensing fee. *Id.* ¶¶ 27, 32. As a result, Uber's revenues are inextricably intertwined with drivers' revenues. *Id.*

Fares are calculated through the App's *third* key feature, a proprietary pricing algorithm. *Id.* ¶¶ 26, 47, 49. After a ride is completed, the algorithm calculates a fare from a base amount and the ride's distance and duration. *Id.* ¶ 26. During periods of high demand in an area, the algorithm automatically integrates "surge pricing," increasing fares by up to ten times. *Id.* ¶ 48.

In agreeing to use the App, drivers relinquish all pricing responsibility to Uber; they retain no direct control over the App's algorithm or resulting prices. *Id.* ¶¶ 56, 68–69. Defendant claims that "Uber's contracts with driver-partners expressly permit the driver-partners to reject the fare charged by the pricing algorithm and instead charge a lower fare." Defendant's Memorandum of Law dated February 8, 2016 ("Def. Mem.") at 4 (quoting Driver Terms ¶ 4.1). But this is doubly misleading. First, the contractual provision Defendant quotes also requires each driver to acknowledge and agree "that the Fare provided under the Fare Calculation is the only payment [the driver] will receive in connection with the provision of Transportation Services." Driver Terms ¶ 4.1. The contract is thus internally inconsistent, at best. More importantly, drivers are bound by the Uber-set fare because there is no mechanism by which drivers can charge anything but the App-dictated fare. FAC ¶ 69. The App makes negotiated or manually discounted fares impossible. *Id.*

The App's automated and binding fares result in a uniform pricing scheme for all similarly situated drivers in a given area.[2] Those fares rise and fall together as the Uber pricing algorithm detects increased or decreased user demand. *Id.* ¶¶ 47, 52. Absent the App's pricing

[2] Drivers are categorized into different "car service experiences," such as UberX, UberBLACK, UberSUV, and UberLUX, depending on the type of car they drive. FAC ¶ 25.

algorithm, drivers would compete on price as all other horizontal competitors do. *Id.* ¶¶ 70–72, 92. The App relieves drivers of the need to compete. Indeed, it renders competition impossible.

C. DEFENDANT KALANICK AS CHIEF ARCHITECT

Defendant Kalanick is Uber's co-founder and CEO and the chief architect of this business strategy. *Id.* ¶ 1. He fiercely defends his business and its surge-pricing model, which he devised and implemented into the Uber pricing algorithm. *Id.* ¶ 50. He tries to justify his pricing algorithm as simply capturing the dynamics of supply and demand. *Id.* ¶¶ 50–51, 61–62. But, in reality, his pricing algorithm artificially manipulates supply and demand, guaranteeing higher fares for drivers who would otherwise have to compete with one another. *Id.* ¶ 53. Drivers have thus flocked to participate in Defendant's price-fixing scheme for good reason. *Id.* ¶ 95 ("Uber has approximately 80% market share in the U.S.").

Defendant's scheme of fixed, non-competitive fares serves the mutual interests of driver-partners and Defendant alike—at the expense of consumers—and the parties work together to ensure the conspiracy's continued success. For example, when Uber lowered fares for services in New York City in September 2014, drivers colluded with one another to negotiate the reinstatement of higher fares. Defendant is believed to have directed or ratified those negotiations; Uber ultimately agreed to raise fares. *Id.* ¶¶ 4, 86-89.

ARGUMENT

I. PLAINTIFF STATES A *PER SE* SHERMAN ACT SECTION ONE CLAIM.

The Sherman Act prohibits every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. A Section 1 violation requires "a combination or some form of concerted action between at least two legally distinct economic entities." *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993). Concerted action means "a conscious commitment to a common scheme designed to

achieve an unlawful objective," like an agreement to follow "rules of the game" that require price-fixing. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 766 & n.11 (1984).

A plaintiff must also "demonstrate that the agreement constituted an unreasonable restraint of trade either *per se* or under the rule of reason." *Capital Imaging Assocs.*, 996 F.2d at 542. *Per se* restraints "include horizontal agreements among competitors to fix prices." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *see Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("Traditional 'hard-core' price-fixing remains *per se* unlawful."). Agreements between competitors to fix prices are the "supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 39, 408 (2004); *accord Goldfarb v. Virginia State Bar*, 421 U.S. 773, 782 (1975) ("a naked agreement was clearly shown, and the effect on prices is plain"). Thus, "horizontal price-fixing conspiracies traditionally have been, and remain, the archetypal example of a *per se* restraint on trade." *United States v. Apple*, 791 F.3d 290, 321 (2d Cir. 2015) (quotation marks omitted).

This is a *per se* case. Defendant created express "rules of the game" for driver-partners to use his pricing algorithm to build and sustain a competition-free marketplace. *See* FAC ¶¶ 56, 68-71. As explained below, Defendant's challenges to the complaint are misplaced, as this case presents a horizontal price-fixing conspiracy orchestrated by Defendant.

A. NEITHER *TWOMBLY* NOR *COLGATE* PRECLUDES PLAINTIFF'S CLAIM.

Most of Defendant's arguments can be dispensed with quickly. He principally argues from two irrelevant cases: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *United States v. Colgate & Co.*, 250 U.S. 300 (1919). *See* Def. Mem. at 2-3, 6-12. Neither applies here.

Defendant spends many pages arguing that concerted action among driver-partners is implausible, citing *Twombly* and its progeny. *See id*. Yet Plaintiff's claim presents none of the speculation that *Twombly* addressed. In particular, there is no mystery as to why Uber driver-

partners charge the same fares. Defendant himself admits that each driver-partner expressly "agree[s] to use Uber's pricing algorithm" as "a condition" of the agreement with Uber. Def. Mem. 12-13; *see also id.* at 9 (each driver-partner "sign[s] up with Uber and accept[s] the contractual terms offered, which include use of the pricing algorithm"); *id.* at 10-11 ("Uber's terms of dealing . . . include surge pricing as a component of its pricing algorithm"). A price-fixing agreement is thus not merely plausible; Defendant has admitted it. *See id.*

In *Twombly*, by contrast, the Supreme Court confronted behavior that was consistent with an agreement, but which was "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." 550 U.S. at 554. Here, by contrast, driver-partners avoid competing with each other and instead use Defendant's pricing algorithm because of their collective agreements with Uber. That conclusion does not flow from remote inferences or depend on circumstantial proof. It reflects a written contract. Moreover, it is Defendant's own explanation. *See* Def. Mem. at 12-13. Defendant's heavy reliance on *Twombly* is thus misplaced.[3]

The *Colgate* doctrine is also irrelevant here. *See* Def. Mem. at 3, 13. In *Colgate*, the Supreme Court distinguished concerted action from a refusal to deal. The Court explained that the Sherman Act "does not restrict the long recognized right of a trader . . . to exercise his own independent discretion as to parties with whom he will deal" and to "announce in advance the circumstances under which he will refuse to sell." 250 U.S. at 307; *accord Monsanto*, 465 U.S.

[3] Driver-partners charge identical fares by contract, and *not* based on their "common perceptions of the market," *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010), *nor* in response to external stimuli like "rapidly rising jet fuel prices," *LaFlamme v. Societe Air Fr.*, 702 F. Supp. 2d 136 (E.D.N.Y. 2010), or threats, *see Commercial Data Servers v. IBM Corp.*, No. 00 Civ. 5008, 2002 U.S Dist. LEXIS 5600, at *9 (S.D.N.Y. Mar. 15, 2002). Their conduct is more than just parallel or independent. Def. Mem. at 14. *See Apple*, 791 F.3d at 317-18 ("'independent reasons' can also be 'interdependent,' and in no way undermine[] . . . an agreement to raise . . . prices').

at 760. Cases applying *Colgate* have thus examined firms' refusals to deal. *See, e.g.*, *Monsanto*, 465 U.S. at 757-58 (examining refusal to deal with distributor); *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys.*, 879 F.2d 1005, 1013-14 (2d Cir. 1989) (same); *H.L. Moore Drug Exch. v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981) (same). The doctrine means "no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960). Here, Plaintiff does not allege any such refusal to deal. Thus, the *Colgate* doctrine, like *Twombly*, is inapplicable.

Defendant erroneously offers this Court's decision in *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612 (S.D.N.Y. 2013), as misplaced support for his *Twombly* and *Colgate* arguments. *See* Def. Mem. at 4, 13. The differences between *Bookhouse* and this case are stark. There, defendant Amazon had promised publishers that it would take measures to block customers from copying the digital ebooks it sold. *See* 985 F. Supp. 2d at 617. Then, to the detriment of publishers, Amazon decided to disable the ebooks from working on any non-Amazon devices. *See id.* at 617-19. Amazon unilaterally implemented these restrictions, without agreeing with the publishers that such conditions would be imposed. *Id.* Plaintiff brick-and-mortar booksellers claimed that Amazon's restrictions, along with its refusal to sell ebooks to them, violated the Sherman Act. *Id.* at 617. This Court found no concerted action because there was neither an agreement between Amazon and the publishers restricting ebooks to Amazon devices nor even a reason why the publishers would want such restrictions. *Id.* at 619.

The facts here are nearly the opposite of those in *Bookhouse*. Whereas *Bookhouse* lacked facts plausibly suggesting an agreement to engage in anti-competitive conduct, this case centers on a written price-fixing agreement whose existence no one disputes. Moreover, while the *Bookhouse* publishers had no hand in restricting ebooks to Amazon devices, Uber's driver-

partners impose fixed prices each and every time they charge an App-set fare. Finally, whereas there was no reason why the *Bookhouse* publishers would have benefitted from Amazon's restrictions, here Plaintiff has detailed the benefits that driver-partners enjoy from Defendant's price-fixing. *See, e.g.*, FAC ¶¶ 72, 87, 109. *Bookhouse* thus reinforces the conclusion that neither *Twombly* nor *Colgate* applies to this case.

B. DEFENDANT ORCHESTRATED AN ILLEGAL PRICE-FIXING CONSPIRACY.

Contrary to Defendant's suggestion, the *per se* rule applies to Defendant's conduct even if his relationship with driver-partners is deemed a vertical one. *See* Def. Mem. at 13, 16. In *United States v. Apple*, the Second Circuit held Apple liable *per se* for orchestrating an unlawful conspiracy among five major publishers to raise the retail prices of ebooks. 791 F.3d at 297-98. In so holding, the Circuit reaffirmed that "where the vertical organizer has not only committed to vertical agreements, but also agreed to participate in [a] horizontal conspiracy," *per se* treatment applies to "all participants." *Id.* at 325; *see also United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959).

Defendant cannot seriously contest that he organized uniform price-fixing among driver-partners. That was his design. FAC ¶ 2. As in *Apple*, such price-fixing is attractive to driver-partners for the very reason that all driver-partners are bound to it. *Id.* ¶ 72 (Forgoing "such competition only makes sense because drivers are guaranteed that other Uber drivers will not undercut them on price and that, consequently, drivers who do pick up riders can collect above-market fares from them."); *see Apple*, 791 F.3d at 316 (noting Apple "understood that its proposed Contracts were attractive . . . *only* if [the competitors] collectively" adopted them). Likewise, Defendant's "use of the promise of higher prices as a bargaining chip to induce [competitors] to participate in [the platform] constituted a conscious commitment to the goal of raising [such] prices." *Id.* at 317. Yet Defendant's price-fixing is more even egregious than

Apple's was. Apple was unwilling to directly set prices, *id.* at 303-05, 317; Defendant bluntly does so. Ultimately, like Apple, Defendant "imposed [his] view of proper pricing, supplanting the market's free play" and competitors—here, driver-partners—agreed. *Id.* at 329.

Defendant is liable for such conduct. And, for their part, the driver-partners must be deemed to have conspired horizontally for two independent reasons, as explained below.

1. Driver-Partners Conspired Under The *Interstate Circuit* Rule.

First, each driver-partner understood that Uber invited, required, and only worked with other driver-partners who agreed to follow Defendant's pricing. As Judge Cote held in her *Apple* decision, competitors conspire where "the only condition on which a [competitor] would agree to [the] terms was if it could be sure its competitors were doing the same thing." *In re Electronic Books Antitrust Litig.*, 859 F. Supp. 2d 671, 685 (S.D.N.Y. 2012) (quotation marks omitted); *see also Apple*, 791 F.3d at 316 (fixing prices "something no individual [competitor] had sufficient leverage to do on its own"). That is what Plaintiff here alleges. FAC ¶¶ 70-72.

It is well established that, "where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade." *Laumann v. NHL*, 907 F. Supp. 2d 465, 486 (S.D.N.Y. 2012). This principle comes from *Interstate Circuit, Inc. v. United States*, where competing movie distributors, without checking with each other, accepted a theater's terms as proposed in a letter jointly addressed to the various distributors. 306 U.S. 208, 215-19 (1939). The Supreme Court explained:

> It was enough that, knowing that concerted action was contemplated and invited, the [competitors] gave their adherence to the scheme and participated in it. Each [competitor] was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce . . . and, knowing it, all participated in the plan. . . . [E]ach [competitor] early became

> aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

Id. at 226-27. The *Interstate Circuit* doctrine applies where, as here, competitors agree to identical terms with a vertical actor in reliance on the fact that all competitors are doing so. *See id.; Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000).[4]

Defendant has ignored this doctrine. Instead, as in *In re Nexium (Esomeprazole) Antitrust Litig.*, Defendant "seems to assume that the Plaintiff[] imagine[s] the existence of a secret, back room deal" between driver-partners, by which they all agreed to Defendant's pricing algorithm. 42 F. Supp. 3d 231, 254 (D. Mass. 2014). Yet that "is not the inference the Plaintiff[] ask[s] the Court to draw." *Id.* The App is an exceptionally effective price-fixing mechanism that permits disparate drivers to join Uber with a built-in guarantee against competition from other participating driver-partners. The complaint simply alleges that drivers are drawn to Uber because of this assurance. FAC ¶ 72. That allegation fits squarely within the *Interstate Circuit* doctrine's scope—*i.e.*, that driver-partners "would not have undertaken their common action without reasonable assurances that all would act in concert." *In re Nexium (Esomeprazole) Antitrust Litig.*, 42 F. Supp. 3d at 225. This action does not posit a secret backroom deal; the operation of the App itself evidences an illegal horizontal conspiracy.

2. Driver-Partners Conspired By Sustaining the Uber Marketplace.

Second, consistent with conspiracy case law, the driver-partners conspired by sustaining the Uber marketplace based on their common interest in attracting buyers and charging fixed prices. Federal antitrust law has long drawn upon criminal conspiracy law to define hub-and-

[4] *Interstate Circuit* is distinguishable from *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002), a case in which there was no "evidence that [Coca-Cola dealers distributers] benefitted from [a] restriction" against distributing PepsiCo products. *Laumann v. NHL*, 56 F. Supp. 3d 280, 306 (S.D.N.Y. 2014). Here, as in *Interstate Circuit*, competitors enjoyed higher profits (including surge pricing) as a result of Defendant's uniform agreement. FAC ¶ 109.

spoke antitrust conspiracies. *See, e.g., Interstate Circuit*, 306 U.S. at 227 (relying on criminal conspiracy cases); *Dickson v. Microsoft Corp*., 309 F.3d 193, 203-04 (4th Cir. 2002) (relying on the criminal conspiracy decision in *Kotteakos v. United States*, 328 U.S. 750 (1948)), *cited by Apple*, 791 F.3d at 314 n.15.[5] A hub-and-spoke conspiracy with a rim (*i.e.*, a connection between spokes) is deemed "a single conspiracy" in the criminal context. *See Dickson*, 309 F.3d at 203-04; *United States v. Ulbricht*, 31 F. Supp. 3d 540, 554 (S.D.N.Y. 2014).

Criminal courts have regularly found that sellers within distinct marketplaces or operations were members of a single conspiracy with other sellers in the same distinct marketplace. *See, e.g.*, *United States v. Brown*, 587 F.3d 1082, 1090 (11th Cir. 2009); *United States v. Rodriguez*, 525 F.3d 85, 102-03 (1st Cir. 2008); *United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993). Unlike disaggregated sellers, sellers within a distinct marketplace often share the "conscious commitment to a common scheme" described by *Monsanto*, 465 U.S. at 764. "To function effectively, a complex . . . network must necessarily include reliable suppliers . . . as well as executives and managers." *United States v. Edwards*, 945 F.2d 1387, 1393 (7th Cir. 1991) (quotation marks omitted). Sellers are linked together "by their mutual interest in sustaining the overall enterprise of catering to the ultimate demands of [the] particular . . . market." *Banks*, 10 F.3d at 1054. Moreover, sellers in a distinct marketplace have "a common goal: to [sell] and to provide a marketplace for [their sales], and an overlap of participants." *Brown*, 587 F.3d at 1090. The "'marketplace' is at the heart of [the] conspiracy because [buyers are] drawn to a location and not to a particular [seller]." *Id*. Criminal conspiracy law is thus

[5] The criminal conspiracy standard—"agree[ment] to participate in what [one] kn[o]w[s] to be a collective venture directed toward a common goal," *United States v. Maldonado-Rivera*, 922 F.3d 934, 963 (2d Cir. 1990) —is almost identical to the antitrust standard of "a conscious commitment to a common scheme," *Monsanto Co.*, 465 U.S. at 764.

clear that sellers conspire together—*i.e.*, horizontally—when they comprise a distinct marketplace.

Uber is a distinct marketplace comprised of its driver-partners. Its driver-partners share a common interest in attracting riders, with the commitment that none will compete on price. The App, which buyers (riders) visit like a marketplace, matches those buyers (riders) with sellers (drivers). FAC ¶¶ 22, 24. The Uber marketplace, and the price-fixing of the marketplace, requires the participation and agreement of driver-partners as "reliable suppliers." *Edwards*, 945 F.2d at 1393. It likewise requires the participation of "executives and managers," such as Defendant. *Id.* Together, Defendant and the driver-partners are linked by a mutual interest in "sustaining the overall enterprise of catering to the ultimate demands" of riders. *Banks*, 10 F.3d at 1054. Riders are "drawn to a location"—the Uber App—rather than any particular driver-partner. *Brown*, 587 F.3d at 1090. Without driver-partners, the marketplace would fail to meet demand and would collapse. Thus, just as in a distinct black market, driver-partners here conspire horizontally to make the Uber marketplace work.[6]

Defendant's Uber marketplace conspiracy is analogous to the conspiracy organized by Ross William Ulbricht, the creator of the black market website Silk Road. The Government alleged and proved that Ulbricht "sat atop an overarching single conspiracy, which included all vendors who sold any type of narcotics on Silk Road at any time." *United States v. Ulbricht*, 79 F. Supp. 3d 466, 482, 490 (S.D.N.Y. 2015).[7] Judge Forrest rejected the argument that the marketplace's various sellers "at most gave rise to a multitude of discrete conspiracies, rather

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[6] As driver-partners have recently explained, "No drivers, no Uber." *See* "Some Uber Drivers Planning City-Wide Post-Super Bowl Shutdown," The Gothamist (Feb. 7, 2016), at http://gothamist.com/2016/02/07/uber_drivers_planning_city-wide_pos.php.

[7] *See* Superseding Indictment at 4-7, *Ulbricht*, No. 14-cr-68 (S.D.N.Y. Aug. 21, 2014), ECF No. 52 (charging single conspiracy in count three); Verdict at 3, *Ulbricht*, No. 14-cr-68 (S.D.N.Y. Feb. 5, 2015), ECF No. 183 (returning guilty verdict on single conspiracy count).

than the enormous, anonymous, and essentially unlimited conspiracy charged." *Id.* at 481-82 (quotation marks omitted). Instead, she recognized that Ulbricht could be the "hub of the conspiracy," with "the website itself [a]s the flypaper, the stickiness that's around it," and the sellers as "spokes." Trans. at 6-7, *Ulbricht*, No. 14-cr-68 (S.D.N.Y. Dec. 17, 2014), ECF No. 145 ("Dec. 17 Trans."). Among themselves, sellers had "mutual dependence" "in terms of audience attraction." *Id.* at 20. Thus, evidence "that Silk Road operated as a marketplace" could prove a single conspiracy—*i.e.*, a horizontal conspiracy—among "all vendors who sold narcotics on Silk Road." *Ulbricht*, 79 F. Supp. 3d at 490.

The same is true for Uber: Defendant is the hub, Uber is the marketplace, and the driver-partners are a rim, bound together by their mutual dependence in attracting riders.[8] Judge Forrest explained that "if there were an automated telephone line that offered others the opportunity to gather together in narcotics trafficking by pressing '1,' this would surely be powerful evidence of the button-pusher's agreement to enter the conspiracy." *Ulbricht*, 31 F. Supp. 3d at 559. That is what Defendant concedes here: that it is "undoubtedly true" that each driver-partner accepted Uber's offer to "enter into a[n] . . . agreement, a condition of which was that the driver-partner agree to use Uber's pricing algorithm" along with all other driver-partners. Def. Mem. at 12-13.

In so doing, the driver-partners formed a classic hub-and-spoke conspiracy with a rim.

C. DEFENDANT IGNORES THE SEPTEMBER 2014 CONSPIRACY.

Even if this Court were to reject Plaintiff's arguments above and adopt Defendant's erroneous interpretation of the Sherman Act, the complaint would still state a claim. Defendant insists that he cannot be liable absent allegations describing how "driver-partners came to an

[8] This case is more straightforward than the Silk Road case, which also involved a thorny question as to whether sellers of different wares (*e.g.*, drug dealers versus counterfeiters) formed a single rim. *See, e.g.*, Dec. 17 Trans. at 11; *Ulbricht*, 79 F. Supp. 3d at 483 n.9. Here, all driver-partners share a mutual interest in attracting riders for the same service: rides.

agreement among themselves" to fix prices. Def. Mem. at 2-3. Yet the complaint describes exactly such a scenario.

Specifically, "[i]n September 2014, Uber conspired with hundreds of drivers to negotiate an effective hike in fares that would benefit them, collectively, at the expense of their riders." FAC ¶¶ 4, 86-89. That strike arose after Uber "initially required drivers of SUVs and black cars to accept a lower fare." *Id.* ¶ 4. In an incontrovertible act of concerted action, "[d]rivers who should have been in direct competition with one another over price instead banded together to ask Uber to reverse its decision and reinstitute higher fares." *Id.* Plaintiff believes Defendant "directed or ratified negotiations between Uber and these co-conspirators, in which Uber ultimately agreed to raise fares." *Id.* ¶ 87. This appears to be one of multiple examples of such blatant price-fixing.[9]

Defendant does not and cannot contest that this horizontal concerted action between driver-partners was sufficiently pled under *Twombly*. *Cf. Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 192 (2d Cir. 2012). There is no basis to dismiss this claim.[10]

II. IN THE ALTERNATIVE, PLAINTIFF STATES A SHERMAN ACT CLAIM UNDER THE "QUICK LOOK" AND RULE OF REASON TESTS.

Even if the Court declines to apply a *per se* rule in this case, Plaintiff has still stated a plausible Sherman Act claim under either the "quick look" doctrine or the rule of reason.

A. DEFENDANT'S PRICE-FIXING LACKS PROCOMPETITIVE JUSTIFICATION.

Defendant urges that Uber's price-fixing is "resale price maintenance" under *Leegin* and *State Oil Co. v. Khan*, 522 U.S. 3 (1997). Def. Mem. at 14, 16. As a threshold matter, this case does not involve "resale" at all. Uber is not in the transportation services business; it is a

[9] *See, e.g.*, "Uber Drivers and Others in the Gig Economy Take a Stand," N.Y. Times (Feb. 2, 2016) (describing similar negotiations in other cities).

[10] Defendant is liable for this price-fixing, regardless of how many driver-partners negotiated with him, because all drivers "adhere[d] to the fee schedules." *Goldfarb*, 421 U.S. at 778 n.6.

technology company that provides "lead generation" and "payment processing services." Def. Mem. at 4; Colman Dec., Ex. 2; FAC ¶¶ 2, 5, 23. Thus, when Defendant causes driver-partners to charge uniform fares to riders, those drivers are not "reselling" anything.

In any event, even if "resale price maintenance" were a proper analogue, Plaintiff has plainly alleged enough for a factfinder in this case to conclude that the vertical price restraint is unlawful—under the "quick look" doctrine or the rule of reason—because it imposes an unreasonable restraint on competition. *See*, *e.g.*, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (restraint is unlawful when "its anticompetitive effects outweigh its procompetitive effects"). While *Leegin* opened the door to examining minimum resale price maintenance through the rule of reason, the circumstances in *Leegin* fell far short of the price-fixing scheme by Defendant here.

Indeed, Defendant's price-fixing scheme gives rise to all the evils underlying nearly one hundred years of antitrust jurisprudence condemning minimum resale price maintenance, *see Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911),[11] without any of the procompetitive effects that convinced the Supreme Court to apply the rule of reason, *see Leegin*, 551 U.S. at 889. As the Second Circuit has explained, under *Leegin*, "[v]ertical price restraints are unfit for the *per se* rule because they can be used to encourage retailers to invest in promoting a product by ensuring that other retailers will not undercut their prices for that good." *Apple*, 791 F.3d at 324. *Leegin* rested in good part on the rationale that "discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand [generated by] those services," such as "fine showrooms, . . . product demonstrations, or . . . knowledgeable employees." *Leegin*, 551 U.S. at 890-91. But no similar free-riding problem justifies

[11] Defendant reverses history when he erroneously suggests that the law has permitted vertical price-fixing "for nearly a century." Def. Mem. at 3. The opposite is true.

Defendant's price-fixing scheme. The App, not any driver-partner's car or individual marketing efforts, produces demand. Driver-partners are essentially commoditized on the Uber platform. If the price-fixing features of the App were turned off so driver-partners could compete on price, discounting driver-partners would not be able to take advantage of other driver-partners' efforts to capture demand. Instead, they simply would be able to compete on price.

Because no logical procompetitive justifications have been proffered for the price restraint at issue here, this Court need go no further in concluding under the "quick look" doctrine that Defendant's motion to dismiss fails on rule of reason grounds. *See*, *e.g.*, *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674-76 (7th Cir. 1992), *cited with approval in Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *see also Apple*, 791 F.3d at 330 (Livingston, J., writing for herself) (applying "quick look" review to relieve "plaintiff of its burden of providing a robust market analysis by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications") (citations omitted).

B. PLAINTIFF HAS PLED A PLAUSIBLE RELEVANT PRODUCT MARKET

Defendant also mistakenly contends that Plaintiff's proposed market definition "woefully fails to satisfy a rule of reason analysis." Def. Mem. at 18-20.

Yet to survive a Rule 12(b)(6) motion to dismiss, Plaintiff's alleged product market must only "bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, and it must be 'plausible.'" *Todd*, 275 F.3d at 200 (citations and quotation marks omitted). The basic test is that the "relevant market definition must encompass the realities of competition." *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994). This frequently requires "a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Techn. Servs., Inc.*, 504 U.S. 451, 482 (1992). "Because market definition is a deeply fact-intensive inquiry, courts

hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd*, 275 F.3d at 199-200; *see also New York Jets LLC v. Cablevision Sys. Corp.*, No. 05 Civ. 2875, 2005 U.S. Dist. LEXIS 23763, *17-18 (S.D.N.Y. Oct. 17, 2005).

Here, Plaintiff has alleged a plausible and rational product market of mobile app-generated ride-share services, and a relevant geographic market of the United States.[12] Uber is the dominant force in that market with approximately 80% market share, while Lyft has less than 20%. FAC ¶¶ 94-96. "Uber's market position has already helped force Sidecar out of the marketplace." FAC ¶ 102. And, "[g]iven Uber's dominant position in the market, Kalanick's price-fixing scheme has resulted in higher prices in the market as a whole." FAC ¶ 101.

Defendant ignores the complaint in arguing that Plaintiff "offers no 'theoretically rational explanation' for defining the relevant market so narrowly," *i.e.*, encompassing all mobile app-generated ride-share services. Def. Mem. at 18 (quoting *Commercial Data Servers*, 2002 U.S. Dist. LEXIS 5600, at *11-13).[13] Yet the complaint expressly distinguishes the mobile app-generated ride-share service market from "[t]raditional taxi service," "traditional cars for hire," and "[p]ublic transportation offerings, such as subway or bus." FAC ¶¶ 104, 106, and 108. Furthermore, the complaint explains why these other offerings are not reasonable substitutes for mobile app-generated ride-share service and thus not reasonably interchangeable. These differences include the ease with which mobile app-generated ride-share consumers can order rides, the on-demand nature of the service, and the automatic payment systems. *See id.* In addition, the "heavily regulated" nature of legacy taxi service is another important distinction in

[12] Defendant does not contest the nationwide geographic market that Plaintiff alleges.

[13] The holding in *Commercial Data Servers* supports Plaintiff, not Defendant. There, the court noted that "'a pronouncement as to market definition is not one of law, but fact,'" and went on to "find that the allegation of a market limited to existing IBM customers owning 'low-end IBM mainframe S/390 computers with processing power of 10 MIPS, or less' is plausible on its face." 2002 U.S. Dist. LEXIS 5600, at *19.

analyzing the proper market definition. *Id.* ¶ 104. A more than plausible inference that follows from these allegations is that a change in price for mobile app-generated ride-share services does not affect demand for legacy taxi service or public transport. Indeed, Uber itself has expressly disavowed that it competes with taxis. *See id.* ¶ 105 ("Among other things, Uber has stated, 'It's not Uber versus taxis, we don't see them as a ride-sharing competition,'" and that Uber "is not 'in competition with taxi[s].'").

These allegations are more than sufficient. In *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007), Judge Lynch held that Lime Wire had alleged a plausible relevant product market "for the digital distribution of copyrighted music over the Internet." *Id.* at 576. The court explained:

> Lime Wire alleges sufficient facts to offer a plausible explanation of why the relevant product market should be limited to the digital distribution of copyrighted music over the internet. The FAC expressly distinguishes this market from the 'sale and distribution of physical products (i.e., records, audio cassettes and CDs),' discusses the differences between physical recordings and digital music files 'unburdened by any tangible media such as a CD,' and describes consumers' ability to arrange, place, and play digitally recorded music on their personal computers, iPods, and other hand held devices. Read broadly, these allegations provide at least a 'plausible' reason why consumers would not respond to a 'slight increase' in the prices charged by digital distributors of music by switching to physical products such as audio cassettes or CDs—i.e., that such physical products are not readily compatible with consumers' preferences and expectations regarding the portability, arrangement, and playing of music.

Id. (citing *Todd*, 275 F.3d at 200, 202; other internal citations omitted). The complaint includes similar allegations to support the proposed product market, with rational explanations for why traditional taxi service, or public transit, or traditional cars for hire are not "clear substitutes" for the services provided by Uber driver-partners. *See* FAC ¶¶ 104-108.

The plausibility of Plaintiff's market is highlighted by the absurdity of Defendant's proposed "market for transportation services." *See* Def. Mem. at 16. Defendant would include not only mobile app-generated ride-share service providers like Uber and Lyft, but also "legacy

taxi companies, public transit such as subway and bus travel, and private transit such as personal vehicle use and walking." *Id.* at 18. This boundless transportation market theory culminates with the conclusion that "[e]ach of these alternatives is a clear substitute for the services provided by driver-partners, rendering Plaintiff's market definition irrational." *Id.* Defendant has it backwards—Plaintiff's market definition is rational; Defendant's is not.

Markets are often more much limited than Defendant insists. Contrary to his position that "new or innovative features [cannot] lead[] to the creation of a distinct market," Def. Mem. at 19, "courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers." *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring); *see also United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52-60 (D.D.C. 2011) (relevant product market consisted of digital do-it yourself tax preparation products, such as TurboTax, but not "pen and paper" tax returns or "assisted preparation" through a CPA; defendant's proposed relevant market of "all methods of tax return preparation" was overbroad).[14]

Here, Plaintiff has met his burden of defining a rational market. *See Todd*, 275 F.3d at 200. The market question "is too fact-intensive an inquiry to appropriately resolve at this stage of the proceedings" and should await "[f]urther discovery." *New York Jets LLC*, 2005 U.S. Dist. LEXIS 23763, at *17-18.

[14] Plaintiff's submarket of Uber car service is also plausible. Uber controls more than 80% of the mobile app-generated ride-share market, a dominant position that has already helped eliminate Sidecar as a competitor. Many consumers who use the Uber App may not view its remaining competitor, Lyft, as a reasonable substitute. An August 2015 study revealed that, while 6% of sampled smart phones had the App installed, only 1% had the Lyft App. FAC ¶ 100. These consumers may view various Uber experiences (*e.g.*, UberX and UberSUV) as reasonable substitutes for each other, as they are all available through the App, but may not consider Lyft rides a substitute. *Cf. New York v. Actavis, PLC*, No. 14 Civ. 7473, 2014 U.S. Dist. LEXIS 172918, at *97-99 (S.D.N.Y. 2014), *aff'd*, 787 F.3d 638 (2d Cir. 2015) (single product memantine used in the treatment of Alzheimer's constituted a relevant market by itself).

C. PLAINTIFF HAS ALLEGED ADVERSE EFFECTS.

Finally, the complaint alleges adverse effects from Defendant's pricing algorithm. These effects include decreased output. *See* FAC ¶ 110 ("Kalanick's actions have further restrained competition by decreasing output") (citing studies). They also include "higher prices in the market as a whole." FAC ¶ 101. In addition, the complaint explains that "Uber's dominant position and considerable name recognition has also made it difficult for potential competitors to enter the marketplace." *Id.* at 103. Finally, "[a]s a result of Kalanick's anticompetitive actions, competition in the market for mobile app-generated ride-share service, and the sub-market for Uber car service, has been restrained." *Id.* at 112. These allegations more than suffice to support the Sherman Act claims under the "quick look" doctrine and rule of reason.

III. PLAINTIFF HAS STATED A VALID CLAIM UNDER THE DONNELLY ACT.

Plaintiff's Donnelly Act claims, *see* FAC ¶¶ 134–140, survive even if his Sherman Act claims fail because the Donnelly Act sweeps more broadly than the Sherman Act.

First, Defendant's orchestration of an App-based price-fixing conspiracy across driver-partners is unlawful under the Donnelly Act because the Act proscribes "arrangements" in restraint of trade, N.Y. Gen. Bus. Law § 340, which are not prohibited by the Sherman Act. The New York Court of Appeals in *State of New York v. Mobil Oil Corp.* recognized that the term "arrangement" under the Donnelly Act is similar to but "undoubtedly" broader than the terms "agreement" or "conspiracy"; it brings within the state statute circumstances in which there is "a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract', 'combination' or 'conspiracy'." 38 N.Y.2d 460, 464 (N.Y. 1976); *see also Capitaland United Soccer Club v. Capital Dist. Sports & Entm't, Inc.*, 238 A.D.2d 777, 779 (N.Y. App. Div. 1997) (an allegation of "a conspiracy or reciprocal relationship" is needed); *People v. B. P. Oil Corp.*, 80 Misc. 2d 566, 568 (N.Y. Sup.

Ct. 1975) ("the tone of the statute is broad enough to reach the unilateral exertion of power by the defendant in stifling competition among its own classes of dealers having varying purchasing arrangements"); *Eagle Spring Water Co. v. Webb & Knapp, Inc.*, 236 N.Y.S.2d 266 (N.Y. Sup. Ct. 1962) ("[t]he word 'arrangement' in the [Donnelly Act] has a broader meaning than the words 'contract', 'agreement' or 'combination'"); *Dunkel v. McDonald*, 57 N.Y.S.2d 211, 211 (N.Y. Sup. Ct. 1945) (the federal antitrust statute "is not as broad as the Donnelly Act"). Defendant's App-based price-fixing arrangement with driver-partners fits comfortably with this proscription of "arrangements" in restraint of trade.

Second, vertical price restraints remain *per se* unlawful under the Donnelly Act. Before *Leegin*, New York courts followed the rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and held vertical price restraints *per se* unlawful. *E.g.*, *George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 2 A.D.3d 1341 (N.Y. App. Div. 2003), *explained in George C. Miller Brick Co. v. Stark Ceramics, Inc.*, 9 Misc. 3d 151, 165-67 (N.Y. Sup. Ct. 2005) (New York adheres to the *Dr. Miles* rule in Donnelly Act cases). Post-*Leegin*, the New York Court of Appeals has not undermined the viability of the *Dr. Miles* doctrine under the Donnelly Act. Thus, as a matter of New York law, the rule in *Dr. Miles* has not been overruled. *See WorldHomeCenter.Com v. KWC America, Inc.*, No. 10 Civ. 7781 (NRB), 2011 U.S. Dist. LEXIS 104496, at *8, *11 (S.D.N.Y. Sept. 15, 2011) (explaining that "[a]fter *Leegin*, it is uncertain whether New York courts evaluating vertical RPM claims brought under the Donnelly Act will continue to apply the *per se* rule or will follow *Leegin* in adopting the rule of reason" and declining to reach the question).[15] As the Office of the New York Attorney General has opined,

[15] Contrary to Defendant's argument, *see* Def. Mem. at 21, the court in *Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556 (S.D.N.Y. 2007), did not dismiss the Donnelly Act under *Leegin*. There, the court decided only that the defendant had not demonstrated "the requisite

following *Leegin*, "minimum vertical price-fixing [remains] a per se antitrust violation that violates the Donnelly Act in and of itself, without any need for inquiry into market conditions or other circumstances." Jay L. Himes, N.Y. Attorney General Antitrust Bureau Chief, "New York's Prohibition of Vertical Price-Fixing," New York Law Journal, Jan. 29, 2008.

IV. PLAINTIFF HAS NOT WAIVED HIS RIGHT TO BRING A CLASS ACTION.

Defendant's class action waiver argument fails for at least three independent reasons.

First, the User Agreement's class action waiver is unenforceable under California law. As Defendant correctly notes, California contract law governs the User Agreement. *See* Def. Mem. at 23. California law is clear that class action waivers are unenforceable in consumer contracts such as the one between Plaintiff and Uber. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated on other grounds*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011); *see also America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Cal. Ct. App. 2001) (holding outside the arbitration context that contractual class action waiver violates "strong California public policy" and California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*).

Nothing in the Federal Arbitration Act ("FAA") preempts California law here because Defendant is not seeking to arbitrate. *See* Def. Mem. at 22 n.10. In *Concepcion*, the Supreme Court enforced a class-arbitration waiver despite California law, reasoning that "it [is] beyond dispute that the FAA was designed to promote arbitration" and that California law "interfere[d] with arbitration." 563 U.S. at 345–46; *cf. DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). The logic of preemption has no application here, however, because Defendant does not seek to arbitrate. Thus, California law controls; the waiver is unenforceable.

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antitrust injury necessary to establish standing" for a price-fixing challenge, *id.* at 570; and, for that same reason, the defendant's Donnelly Act counterclaim was also dismissed, *id.* at 582.

Second, even if the waiver were enforceable, Defendant Kalanick could not enforce it because he is not a party to the User Agreement. Defendant concedes that, under governing California law, he cannot seek to enforce the User Agreement under the doctrine of equitable estoppel unless Plaintiff's allegations are "founded in or intimately connected with the obligations of the underlying agreement." *Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534, 541 (Cal. Ct. App. 2009); *see* Def. Mem. at 23 (citing case quoting *Goldman*). This element requires a showing that Plaintiff's claims are "dependent upon, or inextricably bound up with, the obligations imposed by the contract." *Goldman*, 92 Cal. Rptr. 3d at 550.

Defendant's equitable estoppel argument fails because Plaintiff's price-fixing claim does not depend on any obligation in the User Agreement. Under California law, estoppel does not apply where a plaintiff "seek[s] to enforce [antitrust laws]" and "is clearly not seeking to enforce or otherwise take advantage of any portion" of the underlying contract. *UFCW & Employers Benefit Trust v. Sutter Health*, 194 Cal. Rptr. 3d 190, 206 (Cal. Ct. App. 2015); *accord In re Wholesale Grocery Prods. Antitrust Litig.*, 707 F.3d 917, 923 (8th Cir. 2013) (rejecting equitable estoppel argument because antitrust claims independent of underlying contract). Here, Plaintiff seeks only to enforce the Sherman Act and the Donnelly Act, not any portion of the User Agreement. Indeed, Plaintiff would have an identical cause of action even if Uber distributed its App without any user terms and conditions. Defendant's one-sided benefit narrative is thus fictional, and there is no basis for equitable estoppel.

Third, Defendant's waiver of arbitration also precludes him from cherry-picking the arbitration provision's class action waiver. The class waiver does not operate independently of the arbitration provision. Rather, it is woven into a single paragraph containing arbitration-specific terms in a "Dispute Resolution" section wholly devoted to arbitration. *See* User

Agreement at 9. That paragraph is further tied to the arbitration section by its severability clause, which provides that "[i]f this specific paragraph is held unenforceable, then the entirety of this 'Dispute Resolution' section will be deemed void." *Id*. Moreover, the waiver must be limited to the arbitration section; otherwise, it would absurdly forfeit Plaintiff's right to participate "in any purported class action or representative proceeding" against anyone about anything. *Id.* For these reasons, Plaintiff has not waived his right to proceed by class action.

CONCLUSION

For the reasons set forth above, the Court should deny Defendant's motion to dismiss or, in the alternative, should provide Plaintiff an opportunity to replead.

Dated: February 18, 2016

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IN THE UNITED STATES DISTRICT COURT
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SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, v. TRAVIS KALANICK, Defendant.	**Case No. 1:15-cv-9796 (JSR)**

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TRAVIS KALANICK'S MOTION TO DISMISS

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In his Opposition, Plaintiff recognizes the many benefits consumers enjoy from Uber Technologies, Inc.'s ("Uber") innovative technology. Plaintiff further recognizes that he cannot establish a horizontal conspiracy among tens of thousands of independent Uber driver-partners to fix prices. Instead, Plaintiff 's concedes that his entire First Amended Complaint ("Amended Complaint") is premised on proving a horizontal conspiracy through exclusively vertical conduct, alleging that driver-partners independently enter into an agreement with Uber and, by doing so, "relinquish all pricing responsibility to Uber." Even if this allegation were correct, nothing about such vertical agreements violates the Sherman Act or the Donnelly Act. To the contrary, this Court, the Second Circuit, New York courts, and the Supreme Court itself have all concluded that such agreements are lawful and, indeed, pro-competitive. This Court should reject Plaintiff's unprecedented and implausible second attempt to plead a horizontal conspiracy based on purely vertical conduct and dismiss the Amended Complaint with prejudice.

I. Plaintiff's Horizontal Conspiracy Allegation Is Based On Perfectly Legal Vertical Conduct.

The entire premise of Plaintiff's Amended Complaint is an alleged horizontal agreement among tens of thousands of Uber driver-partners. Def. Opening Br. at 6-13. Yet Plaintiff's Opposition begins by effectively conceding that there is no such horizontal conspiracy. His brief opens by stating that "Uber drivers are competitors who do not compete," but only because competition is rendered "impossible" *by the Uber App*. Pl. Br. at 1. Over and over, the Opposition describes a wholly vertical arrangement whereby prices are determined by Uber in competition with app-based transportation providers like Lyft and Gett and other transportation providers, such as taxi companies and traditional car services (many of which also have apps, a fact Plaintiff ignores). Uber driver-partners "retain no direct control over the App's algorithm or resulting prices." *Id.* at 1, 4. In a fatal admission, Plaintiff states that "[i]n agreeing to use the

App, drivers relinquish *all pricing responsibility* to Uber," *id.* at 4 (emphasis added).[1]

In assessing the plausibility of a Sherman Act § 1 claim, "the crucial question is whether the challenged anticompetitive conduct stems from independent decision, or from an agreement." *Bell Atlantic Corp. v. Twombly*, 555 U.S. 550, 556 (2007). Plaintiff dismisses *Twombly* as "irrelevant," Pl. Br. at 7, and fails to set forth any facts—required under *Twombly*—showing a horizontal agreement to set prices among driver-partners. Plaintiff instead contends there is a horizontal conspiracy though "written contracts." *Id.* But those written contracts are between Uber—who Plaintiff has pointedly not named as a defendant here—and its driver-partners, not among the driver-partners themselves. Put simply, Plaintiff cannot carry his burden to plausibly allege a horizontal agreement to fix prices among driver-partners through a written vertical contract.[2]

Indeed, the conduct Plaintiff alleges in the Amended Complaint is wholly legal. As the FTC has explained,

> If a manufacturer, on its own, adopts a policy regarding a desired level of prices, the law allows the manufacturer to deal only with retailers who agree to that policy. . . . That is, a manufacturer can implement a dealer policy on a "take it or leave it" basis.[3]

The same would be true if Uber were a car service that contracted with drivers and told them what to charge—like all car services do—and which the Supreme Court has held is neither

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[1] The Driver Terms do provide that driver-partners have the discretion to charge less than the suggested price determined by Uber's pricing algorithm. Driver Terms ¶ 4.1. This discretion is not material to this motion because Plaintiff's Amended Complaint fails in its allegations of a horizontal agreement related to pricing, with or without discretion.

[2] *E.g.*, *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 618 (S.D.N.Y. 2013) (JSR) (written distribution contracts irrelevant to the conspiracy alleged because terms of the contracts did not contain an agreement to restrain trade); *PepsiCo Inc. v. Coca-Cola Co.*, 315 F. 3d 101, 110 (2d Cir. 2002) (same).

[3] FTC, *Manufacturer-imposed Requirements*, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-imposed

horizontal nor forbidden by the antitrust laws. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). On the contrary, manufacturer-imposed price requirements have been recognized as pro-competitive because they foster interbrand competition.[4] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-90 (2007). Put simply, sustaining Plaintiff's claims would mean that each and every vertical price restriction would be per se illegal.

II. Plaintiff Fails To Allege A Horizontal Agreement Among Driver-Partners.

Plaintiff imagines that when each of the driver-partners agrees to Uber's Driver Terms, they are also entering into a horizontal agreement *with each other*. Lacking any factual allegations to support this sprawling conspiracy, Plaintiff contends that he need not point to any evidence of an actual agreement and can instead simply plead that driver-partners have acted in parallel to prove his horizontal conspiracy. Pl. Br. at 1. Plaintiff would hold every driver-partner jointly and severally liable for treble damages that would bankrupt them based on their mere adherence to Uber's proposed terms of dealing. Am. Compl. ¶ 20.

That is not the law. It is long-settled that parallel action among competitors cannot alone support a claim of antitrust conspiracy. Courts may infer the existence of an agreement based on parallel action only when it is taken in a context that "'tends to exclude the possibility' that the alleged conspirators acted independently." *Twombly*, 555 U.S. at 586 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). Plaintiff's Amended Complaint does not exclude the possibility that driver-partners acted independently. Instead, he simply ignores the far more plausible (and true) explanation for this parallel conduct: that driver-partners act

[4] Indeed the price competition between Uber and one of its many competitors, Lyft, is well-documented and inures to the benefit of consumers. *Facing a Price War Uber Bets on Volume*, Bloomberg Business Week, Jan. 21, 2015, available at http://www.bloomberg.com/news/articles/2016-01-21/facing-a-price-war-uber-bets-on-volume.

independently because they each believe it is in their own self-interest to do so.

A. The *Interstate Circuit* Doctrine Does Not Apply.

In his Opposition, Plaintiff largely relies on the *Interstate Circuit* doctrine, which Plaintiff contends permits him to use circumstantial evidence to infer the existence of an agreement. This argument fares no better.

Interstate Circuit permits a horizontal agreement to be inferred from circumstantial evidence showing that (1) a party entered a vertical agreement on the condition that its competitors do the same, and (2) that the vertical agreement was against the party's own immediate economic self-interest. *United States v. Apple*, 791 F.3d 290, 320 (2d Cir. 2015). Plaintiff has satisfied none of these requirements.

Plaintiff's "circumstantial evidence" is that no driver-partner would agree to Uber's Driver Terms unless they knew the Driver Terms bound all other driver-partners, because that is the only way they could be assured that their competitors "will not undercut them on price." Pl. Br. at 9. This is not "circumstantial evidence" at all. Indeed, under Plaintiff's theory, all vertical relationships that are attractive to contractors, distributors or franchises would be treated as a horizontal agreement among them. Despite the FTC's statements to the contrary, manufacturers would no longer be permitted to adopt a policy regarding a desired price.

Second, Plaintiff cannot show any driver-partner's willingness to agree to the Driver Terms was "contingent upon" any other driver-partner agreeing to "identical terms." *Laumann v. NHL*, 907 F. Supp. 2d 465, 486 (S.D.N.Y. 2012). Instead, "the complaint simply alleges that drivers are drawn to Uber" because they know the Driver Terms are standardized. Pl. Br. at 11.[5]

[5] The cases cited in the Opposition all require specific allegations that the vertical agreements were actually *contingent on* competitors making the same agreement. In *Toys "R" Us v. FTC*,

As this Court held in *Bookhouse*, "[t]hat simply is not enough. Under *Monsanto*, it is certainly not illegal for one party to announce terms of dealing and the counterparty to acquiesce to those terms." 985 F. Supp. 2d at 619.[6]

Third, the Amended Complaint does not plausibly allege, as it must, that individual driver-partners acted against their "immediate self interest" in agreeing to the Driver Terms. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996). Circumstantial evidence is probative if it shows competitors acting in the same competitively irrational manner. In *Interstate Circuit*, a group of movie distributors acceded to a requested price increase from a vertical actor, even while knowing that doing so independently posed the "risk of a substantial loss of . . . business and good will." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939); *see Toys "R" Us*, 221 F.3d at 932 (parallels acts were "against their independent economic self-interest"). The Amended Complaint itself indicates that driver-partners act in their independent self-interest by contracting with Uber in order to receive the benefits of Uber's lead generation and payment processing services. Am. Compl. ¶¶ 22-27. The Opposition goes further, stating that Uber driver-

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the Seventh Circuit held the FTC reasonably inferred the existence of a horizontal agreement based on a series of vertical agreements because "the manufacturers were unwilling to limit sales to the clubs without assurances that their competitors would do likewise." 221 F.3d 928, 932 (7th Cir. 2000). In *Nexium*, the Court inferred the existence of a conspiracy among competitors based on written contractual provisions in "three separate [bilateral] agreements" in which "each agreed to delay its market entry on the express condition that every other . . . Defendant do the same." *In re Nexium Antitrust Litig.*, 42 F. Supp. 3d 231, 253 (D. Mass. 2014). *See also Laumann*, 907 F. Supp. 2d at 486 (inferring agreement where it is "plausible that the *terms* of the agreement between the clubs and the RSNs are contingent upon th[e] knowledge" "that all other RSNs have analogous agreements with the respective individual clubs") (emphasis added)

[6] Plaintiff's Amended Complaint contains even fewer indicia of a horizontal agreement than those the Second Circuit found insufficient in *Pepsi*. That case involved Coca-Cola's policy requiring distributors to sign "loyalty agreements" agreeing not to contract with Pepsi. Coca-Cola expressly "assured each of [its distributors] that it would uniformly enforce similar loyalty agreements with other [distributors]" and "encouraged them to report violations." 315 F. 3d at 109-110. The Second Circuit concluded Pepsi failed to state a Section 1 claim because it "failed to proffer sufficient evidence of a horizontal agreement among the [distributors]." *Id.* at 110.

partners would still use the App to access these services even if the pricing algorithm were "turned off." Pl. Br. at 17. By Plaintiff's own admission, therefore, this is far from the situation presented by the *Apple* e-books case, where the Court inferred the existence of a horizontal agreement because the vertical "contracts were *only attractive* to the Publisher Defendants to the extent they acted collectively." *Apple*, 791 F.3d at 320 (emphasis added).

Fourth, Plaintiff asserts that the App's pricing algorithm "guarantee[s] that . . . Uber drivers will not undercut [each other] on price." Am. Compl. ¶ 72. Yet Plaintiff does not dispute that the Driver Terms are non-exclusive, in that they explicitly permit driver-partners to provide transportation services independent of the Uber App. Driver Terms ¶ 2.4. Driver-partners can drive for taxi companies, for traditional car service companies (many of whom have their own app), and based on leads generated by competing app-based platforms such as Lyft and Gett.[7] Agreeing to the Driver Terms does not provide driver-partners a "built-in guarantee against [price] competition from other participating driver-partners," as Plaintiff maintains. Pl. Br. at 11. Instead, Driver-partners are free to compete on price, or any other basis, by running another company's app simultaneously or by turning off Uber's App.

B. Plaintiff's Allegations Regarding Uber's Pricing Are Inconsistent With A Horizontal Conspiracy.

Plaintiff's theory that Mr. Kalanick orchestrated a horizontal conspiracy to raise prices to supra-competitive levels is not just implausible, it is wrong. Uber's pricing algorithm helps it compete by *reducing* prices. Plaintiff asserts that the surge pricing component of Uber's pricing algorithm leads to increased prices during periods of high demand as a mechanism for increasing

[7] An article cited by Plaintiff notes: "When Uber entered Dallas in 2012, many of the drivers were either independent hired-car operators or contractors for limousine companies." These drivers "had their own business . . . [and] just used Uber as a complement." *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. Times (Feb. 2, 2016).

supply. Am. Compl. ¶¶ 52, 57-62. But these "higher prices" during high demand periods are "higher" only in comparison to Uber prices in lower demand periods. A firm raising its own prices unilaterally is not horizontal price fixing. And the fact Uber sets prices based on demand is fatal to an allegation that Uber sets a supra-competitive price through a horizontal agreement.[8]

C. The Uber App Does Not Create a Hub-and-Spoke Conspiracy in This Case.

Plaintiff cites to the criminal law's notion of hub-and-spoke conspiracies, and to the recent case of *United States v. Ulbricht* in particular, to argue that the Uber App itself is evidence of a horizontal conspiracy between driver-partners. Pl. Br. at 12-14. Plaintiff fundamentally misunderstands criminal conspiracy law, as well as Judge Forrest's reasoning in *Ulbricht*.

For a criminal conspiracy to exist, each conspirator must agree to participate in what "he knew to be a collective venture directed towards a common goal." *United States v. Eppolito*, 543 F.3d 25, 47 (2d Cir. 2008). Plaintiff hypothesizes a "wheel" conspiracy with Mr. Kalanick as the hub, driver-partners as the spokes, and the Uber App as the rim. Pl. Br. at 14. This analogy fails because Plaintiff has pled no facts indicating that driver-partners entered into agreements *with Mr. Kalanick*. Plaintiff has not connected the spokes to the hub.

Plaintiff's argument that the Uber App provided the "rim" for the conspiracy is likewise mistaken because Plaintiff does not and cannot claim that the driver-partners' common objective in using the Uber App was to set prices. Plaintiff concedes that driver-partners use the Uber App

[8] For example, Plaintiff highlights Uber's September 2014 reversal of a price reduction in New York City. Pl. Br. at 15. As detailed in the Amended Complaint, Uber "initially required drivers . . . to accept a lower fare," but then backtracked when faced with a "strike" among driver-partners. But the mere possibility that driver-partners *could* strike in one city hardly supports a wide-ranging, multi-year, nation-wide conspiracy among thousands driver-partners. And there is no allegation that Uber's CEO participated in or organized this strike. To the contrary, the Amended Complaint suggests the strike was contrary to his and Uber's desire to lower prices. Simply put, it is preposterous to assert that a vertical actor "orchestrates" a horizontal price-fixing conspiracy when it faces pricing pressure from downstream actors.

for lead generation and payment processing, distinguishing this case from *Ulbricht*. 31F Supp 3d 540 (S.D.N.Y. 2014) (drug dealers using the Silk Road website had "a common aim or purpose . . . to sustain the online market place" to sell narcotics). There is simply no common purpose amongst the driver-partners here.

III. Plaintiff's Sherman Act Claim Fails Under the Rule of Reason.

The Amended Complaint purports to allege a single, horizontal conspiracy among driver-partners. Am. Compl. ¶ 76 ("Kalanick is the chief architect of *the* price-fixing conspiracy" that "driver-partners have joined"). It does not allege a vertical restraint in violation of the antitrust laws (and such an allegation against a new technology company would also be implausible). The allegation that Mr. Kalanick is also liable "[i]n the alternative . . . under a 'quick look' or 'rule of reason' analysis," *id.* ¶ 130, fails under any analysis because the Complaint has failed to allege a plausible horizontal agreement.

Even if the Court were to consider Plaintiff's Sherman Act claim under the rule of reason, that effort fails because Plaintiff offers no basis for his market definition rooted in the "methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand." *Bookhouse*, 985 F. Supp. 2d at 620. Rather, Plaintiff defines the relevant market as, effectively, Uber itself, in "another failed attempt to limit a product market to a single brand . . . that competes with potential substitutes." *Id.* (quotation marks and brackets omitted). He offers no plausible explanation for why taxis and other traditional car services-—not to mention the many other public and private transportation options available to consumers—are not "potential substitutes" for rides provided by Uber driver-partners. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (courts must apply "judicial experience and common sense" in assessing a claim's plausibility). Plaintiff provides no

explanation for his illogical position that a change in Uber's prices would not at minimum affect demand for taxis and car services, and vice versa.

Plaintiff's Sherman Act claim also fails under the rule of reason given the many acknowledged pro-competitive benefits provided by Uber's innovative technology. The Supreme Court has explicitly recognized that new market entrants like Uber may use vertical pricing arrangements to deliver innovative products and services that benefit consumers, promote competition, and reduce prices. *Leegin*, 551 U.S. at 891 ("by facilitating market entry for new firms and brands," resale price maintenance can introduce "valuable services" into the market").[9]

IV. Plaintiff Fails To State A Claim Under The Donnelly Act.

"The Donnelly Act, New York's antitrust statute, was modeled on the Sherman Act and has generally been construed in accordance with federal precedents." *Williams v. Citigroup Inc.*, 659 F.3d 208, 211 (2d Cir. 2011). Plaintiff contends that, post-*Leegin*, New York courts continue to adhere to the rule that vertical price restraints are per se illegal, yet cites only New York cases that pre-date *Leegin*. In fact, the Appellate Division cited *Leegin* when it rejected the New York Attorney General's position that vertical price restraints are per se violations of the Donnelly Act. *People v. Tempur-Pedic Int'l, Inc.*, 95 A.D.3d 539, 540 (1st Div. 2012). Because Plaintiff's Sherman Act claim fails, so does his Donnelly Act claim.

V. Plaintiff Waived His Right To Bring A Class Action.

Plaintiff relies on *Discover Bank v. Superior Court*—subsequently substantially abrogated by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)—for the proposition that

[9] For this reason, the Amended Complaint also cannot state a claim for antitrust liability under quick-look analysis. *California Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999) (If an arrangement "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," quick look scrutiny does not apply).

class action waivers are unenforceable in all consumer contracts. *See* Pl. Br. at 23. Not so. While it remains possible post-*Concepcion* to conclude that a given class waiver is unconscionable, it is plaintiff's burden to establish unconscionability. *Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012). Plaintiff has not even attempted to meet his burden here. Nor could he. Class action waivers are unconscionable where "they operate to insulate a party from liability that otherwise would be imposed under *California* law." *Discover Bank*, 36 Cal.4th at 161 (emphasis added). Here, Plaintiff raises claims under federal and New York State law, not California law. Plaintiff therefore could not establish that the class action waiver in the User Terms was unconscionable.

Plaintiff's contention that Mr. Kalanick, a non-party to the User Terms, cannot enforce those terms also fails. Plaintiff claims Mr. Kalanick used the Uber App to illegally fix prices. The Amended Complaint therefore turns entirely on the Uber App and its associated terms. *See* User Terms at 1, 3 (limiting use of the App to those who agree to the terms). Because Plaintiff's "allegations of interdependent misconduct" by Mr. Kalanick were "founded in or intimately connected with the obligations of the underlying agreement," he is equitably estopped from avoiding the class waiver. *Kramer v. Toyota Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013).

Finally, the class action waiver is not dependent on the arbitration clause. It provides for waiver of "the right to a trial by jury **or** to participate as a plaintiff or class User in any purported class action or representative proceeding." User Terms at 9 (emphasis removed). Nothing here ties the class waiver to arbitration.

Dated: February 25, 2016

Respectfully submitted,

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SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, v. TRAVIS KALANICK, Defendant.	**Case No. 1:15-cv-9796 (JSR)**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TRAVIS KALANICK'S MOTION FOR RECONSIDERATION OF THE COURT'S HOLDING REGARDING PLAINTIFF'S CLASS ACTION WAIVER

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April 14, 2016

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Rules

PRELIMINARY STATEMENT

Defendant Travis Kalanick respectfully requests that this Court reconsider a narrow and discrete issue. Namely, Defendant requests that the Court reconsider its conclusion that Plaintiff Spencer Meyer is not bound by the class waiver to which he expressly agreed. The Court's conclusion that Plaintiff is not bound by this waiver is premised on two errors of law: (1) that the waiver of Plaintiff's right to bring a class action is effective only if Defendant moves to compel arbitration, and (2) that Defendant cannot enforce Plaintiff's class waiver as a non-signatory to the User Agreement between Plaintiff and Uber Technologies, Inc. ("Uber").

The Court's first conclusion—that the class waiver is effective only if the arbitration provision is enforced—is at odds with both the User Agreement (which Plaintiff indisputably agreed to when he signed up), and relevant authority both within and outside this Circuit. The plain language of Plaintiff's User Agreement provides: "You acknowledge and agree that you and Company are each waiving the right to a trial by jury *or* to participate as a plaintiff or class User in any purported class action or representative proceeding." (emphasis added). The Supreme Court has held—twice—that such class waivers are enforceable, and two district courts—one within this district—have held that such waivers are enforceable regardless of whether a party enforces an arbitration provision. These decisions are consistent with the universal principle of contract law that a party may choose not to enforce a contractual right without affecting the enforceability of other rights.

The Court's second conclusion—that Defendant cannot enforce the class waiver against Plaintiff as a non-signatory to the User Agreement—is also at odds with the law. There are two bases for Defendant to enforce the class waiver: (1) agency, and (2) equitable estoppel. Agency allows a non-signatory agent to enforce a contract entered into by a signatory principal. As

alleged, Defendant is Uber's co-founder and Chief Executive Officer who can enforce the class waiver as to Plaintiff. Defendant can also enforce the class waiver through equitable estoppel. Equitable estoppel applies where, as here, a signatory has benefited from the underlying agreement—as Plaintiff has by using the Uber App—and where, as here, the signatory's claims are inextricably intertwined with the underlying Agreement—which here includes a specific provisions regarding pricing, which are at the heart of Plaintiff's case. Both agency and equitable estoppel then apply here and permit Defendant to enforce the class waiver in the User Agreement.

Defendant does not bring this motion lightly. He is sensitive to the Court's busy docket and wary of adding to the Court's burden. But this issue is important—indeed critical—to the shape and scope of this case. Given its import, and given the relative brevity of the Court's Order on this issue—one short footnote—Defendant requests that the Court reconsider Plaintiff's class waiver and conclude, consistent with both the law and Plaintiff's agreed-upon class waiver, that Plaintiff's case cannot proceed as a class action and dismiss Plaintiff's class claims.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Spencer Meyer, like all users of the Uber App, expressly agreed to Uber's terms and conditions "in exchange for [an] Uber Account[] and access to the Uber App." Am. Compl. ¶¶ 28-29. Meyer agreed that "[i]n order to use the [Uber App] you must agree to the terms and conditions that are set out below." Declaration of Michael Colman to Defendant's Travis Kalanick's Motion To Dismiss, Dkt No. 29, Ex. 1 ("User Agreement") at 1 (Feb. 8, 2016); *see*

[1] This Court ordered Defendant to file both its motion for reconsideration and its Answer to the First Amended Complaint on the same day. As the Court stated, the filing of the Answer will not moot consideration of the issues raised by Defendant's motion and to the extent the Court's decision on the motion changes any legal or procedural stance in this case, Defendant will have an opportunity to amend its Answer as necessary.

also id. ("By using or receiving any services supplied to you by [Uber], . . . you hereby expressly acknowledge and agree to be bound by the terms and conditions of the Agreement"). Among those conditions was the Dispute Resolution provision, which provides as follows:

> **Dispute resolution**
>
> You and [Uber] agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof or the use of the Services (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and [Uber] are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.**

User Agreement at 8 (bold in original).

Notwithstanding his unambiguous waiver of his right to bring a class action, Mr. Meyer nonetheless filed this case as a class action on behalf of "all persons in the United States who, on one or more occasions, have used the Uber App to obtain rides from Uber driver-partners and paid fares for their rides set by the Uber pricing algorithm," alleging that "Uber has a simple but illegal business plan: to fix prices." Am. Compl. ¶¶ 1, 113. Plaintiff alleges that Mr. Kalanick—acting in his role as "the chief executive officer and co-founder of Uber"—is the "chief architect" of this conspiracy. *Id.* at 1, ¶ 76; *see also id.* ¶ 1 ("Kalanick is the proud architect of [Uber's] business plan and, *as CEO*, its primary facilitator") (emphasis added).

Defendant Mr. Kalanick is the sole defendant named in Plaintiff's Amended Complaint. *Id.* On February 8, 2016, Mr. Kalanick moved to dismiss the Amended Complaint on multiple grounds, including that Plaintiff is equitably estopped from avoiding the class action waiver contained in the User Agreement. As Mr. Kalanick explained, principles of equitable estoppel

and agency require enforcement of the User Agreement's' class waiver because Plaintiff's claims are intimately intertwined with the User Agreement. *See* Memorandum Of Law In Support Of Defendant Travis Kalanick's Motion To Dismiss ("Def. Mem."), Dkt No. 28 ("Def. Mem.") at 21-25 (Feb. 8, 2016).

On March 31, 2016, the Court denied Mr. Kalanick's motion to dismiss. At the end of a lengthy opinion otherwise devoted to examining whether Plaintiff had stated a claim under Section 1 of the Sherman Act, the Court, in a footnote, addressed Plaintiff's class action waiver without discussion of any applicable law. The Court found that "since defendant is not seeking to compel arbitration, and plaintiff is not seeking to enforce the User Agreement against defendant, plaintiff is not equitably estopped from pursuing a class action suit against Mr. Kalanick, nor has plaintiff waived the right to proceed through this mechanism." Opinion and Order Dkt. No. 37 at 23 n.8 (March 31, 2016) ("Order"). On April 11, 2016, the Court granted leave for Mr. Kalanick to move for reconsideration of the Court's determination that Plaintiff's class action waiver does not apply to the instant dispute.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure provides district courts with wide discretion to alter or amend their intermediary rulings prior to final judgment. Fed. R. Civ. P. 54(b) ("any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). To prevail on a motion for reconsideration, the movant must "point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusions reached by the court." *Shrader v. CSX*

Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); SDNY Local Civil Rule 6.3 (same). A motion for reconsideration should also be granted when necessary to correct "clear error" or to "prevent manifest injustice." *Munafo v. Metro. Transp. Auth*, 381 F.3d 99, 105 (2d Cir. 2004).

ARGUMENT

The Court's Opinion and Order on Defendant's Motion to Dismiss states that Plaintiff's class action waiver is inapplicable because "defendant is not seeking to compel arbitration, and plaintiff is not seeking to enforce the User Agreement against defendant." Order at 23 n.8. That holding is incorrect and is premised on two errors of law. Defendant does not need to compel arbitration to enforce the class waiver, and Defendant can enforce the class waiver as a non-signatory to the User Agreement. The Court should reconsider its ruling to the contrary, enforce the class waiver to which Plaintiff agreed, and dismiss Plaintiff's class claims.

I. Defendant Can Seek to Enforce the Class Waiver Without Compelling Arbitration

In its Order, the Court states that "since defendant is not seeking to compel arbitration," he cannot seek to enforce the class waiver. Order at 23 n.8. This ruling is contrary to the express provisions of the Plaintiff's User Agreement, which explicitly precludes Plaintiff from bringing a class action *irrespective* of whether he is compelled to arbitrate. Equally important, the Court's ruling is contrary to controlling law that permits parties to enforce their contractual rights selectively. Put simply, the Court's statement that the class action waiver was somehow contingent upon compelling arbitration was a mistake of law and should be reconsidered here.

A. The Plain Language of Plaintiff's User Agreement Bars Class Actions Irrespective of Arbitration

The text of the User Agreement is clear: Plaintiff's agreement to arbitrate some types of disputes and his waiver of class action rights are separate and distinct issues. The "Dispute Resolution" section in Plaintiff's User Agreement provides that both parties agree that all

disputes arising out of or relating to the User Agreement would be "settled by binding arbitration." User Agreement at 8. In the very next sentence, the User Agreement provides: "**You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.**" *Id*. (bold in original).

The key word in the Agreement is "*or*". Here, the Agreement's use of the word "or" creates two distinct waivers: the right to a trial by jury and, separately, the right to participate in a class action. *See United States v. Woods*, 469 U.S. 70, 73 (1984) ("the operative terms are connected by the conjunction 'or'. . . . Its ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings'"). Put simply, Plaintiff's agreement to arbitrate and his agreement to waive his right to participate in a class action do not rely on one another; Plaintiff could—and did—agree to both.[2] The Supreme Court has concluded—twice—that such waivers are enforceable, and therefore this Court should enforce the class waiver in the User Agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (in a consumer contract); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013). The fact that a class action waiver provision is being invoked absent arbitration does not change that analysis.

[2] Moreover, even if the Court were to consider Plaintiff's class action waiver alongside his waiver of jury trial rights, this would only confirm that both waivers are wholly distinct from the User Agreement's arbitration provisions. Arbitration, of course, is not conducted before juries, but before private arbitrators. The User Agreement's juxtaposition of the jury trial waiver and the class action waiver therefore indicates that the latter must apply, at minimum, to disputes before a court where arbitration has not been invoked. *See Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) (observing that "arbitration represents a more dramatic departure from the judicial forum than does a bench trial from a jury trial" and upholding enforcement of contractual jury waiver and adjudication of plaintiff's claims in a bench trial).

B. Controlling Law Permits Defendant to Enforce the Class Waiver Without Arbitrating this Dispute

Beside the plain language of the User Agreement, the Court also erred in concluding that Defendant could not enforce the class waiver without also enforcing its right to arbitrate. Controlling law[3] is to the contrary.

In *U1it4Less v. FedEx Corp.*, No. 11 Civ. 1713(KBF), 2015 WL 3916247, *4 (S.D.N.Y. June 25, 2015), plaintiff, an internet retailer, argued that FedEx's class action waiver provision did not apply to its RICO claims absent a corresponding arbitration provision. *Id.* at *3. Reviewing the Supreme Court's decision in *Italian Colors*, Judge Forrest rejected this contention finding: "Nothing in *Italian Colors* suggests that class action waivers contained in a provision also containing an arbitration agreement should be treated as more sacrosanct than waivers in context of a contract without an arbitration provision." *Id.* at *4. "No legal principle or policy principle," Judge Forrest concluded, suggests that the rationale underlying the *Italian Colors*

[3] New York courts apply an "interest analysis" to determine choice of law for contract issues, "pursuant to which the law of the jurisdiction having the greatest interest in the litigation controls" construction of the contract. *See Philips Credit Corp. v. Regent Health Grp.*, 953 F. Supp. 482, 502 (S.D.N.Y. 1997). The relevant factors in this analysis are the "place of contracting," "place of contract negotiations," and "place of performance"; the "location of the subject matter of the contract"; and the parties' contacts with a given jurisdiction. *Id.* Uber is a California-headquartered company and versions of the User Agreement explicitly reference a California choice of law provision. The Amended Complaint alleges that Plaintiff is a resident of Connecticut, and has used the Uber App "[i]n both New York City and elsewhere." Am. Compl. ¶ 7. Plaintiff does not specify where he executed the User Agreement, or where in particular he has used the Uber App outside of New York.

In its initial ruling on this issue, the Court did not expressly determine choice of law with respect to the enforceability of the User Terms, but cited a Ninth Circuit case applying California law. *See* Order at 23 n.8. Given the facts pled in the Complaint, California law would appear to apply given Uber's connections to California; the only other alternative is New York. To the extent any dispute concerning the choice of law exists, the laws of California and New York do not conflict. *See, e.g., Choctaw Generation Ltd. Partnership v. American Home Assur. Co.*, 271 F.3d 403, 405 (2d Cir. 2001) ; *JSM Tuscany, LLC v. Superior Court*, 193 Cal. App. 4th 1222, 1241 (2011). As shown in this Memorandum, Plaintiff's class action waiver bars his right to bring the instant class action in either jurisdiction. *See Finance One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005).

decision differed when applied solely to a class action waiver provision. After assessing the class waiver to determine if it was unconscionable or violated legislative intent or policy, the court held that the class action waiver provision was applicable and enforceable. *Id.* at *5; *see also Palmer v. Convergys Corp.*, No. 10 Civ. 145 (HL), 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012) ("Class action waivers, like many other contractual terms, are proper subjects for contractual bargaining because there is no substantive right associated with class action litigation. Further, these waivers are not limited to the context of arbitration, which would unreasonably restrict parties from the freedom to contract in non-arbitration settings.").

U1it4Less's conclusion is entirely consistent with the general principle of contract law—true in this Circuit, New York, and California—that a party can choose not to enforce a contractual right without affecting the enforceability of other rights. *See, e.g., California Bank & Trust, Inc. v. Tate-Mann*, No. B234477, 2012 WL 1330446, at *2 (Cal. Ct. App. Apr. 18, 2012) (enforcing contract because "[d]efendants have not demonstrated that Plaintiff's acceptance of Defendants' partial payments constituted a waiver of the contractual payment requirements"); *Benedict v. Greer-Robbins Co.*, 26 Cal.App. 468, 487 (1915) (acceptance of partial payment under property sale contract does not waive right to take the property); *Ass'n of Veterinarians for Animal Rights v. Sacramento Cty. Animal Care & Regulation*, No. C049105, 2006 WL 1413428, at *5 (Cal. Ct. App. May 23, 2006) (it is permissible for "a party entitled to certain performance [to] accept partial or defective performance"); *EchoStar Satellite L.L.C. v. ESPN, Inc.*, 79 A.D.3d 614, 618 (N.Y. App. Div. 1st Dept. 2010) (accepting late payments under a contract does not mean that a party waived its right to collect interest under the contract); *see also NetTech Solutions, L.L.C. v. ZipPark.com*, No. 01 Civ. 2683, 2001 WL 1111966, *6 (S.D.N.Y. Sept. 20, 2001) ("a waiver may be established as a matter of law by the express declaration of a party or in

situations where the party's undisputed acts or language are so inconsistent with his purpose to stand upon his rights as to leave no opportunity for a reasonable inference to the contrary.") (quotation marks omitted); *Irwin v. UBS Painewebber, Inc.*, 324 F. Supp. 2d 1103, 1110 (C.D. Cal. 2004) (Under California law, "waiver of the right to arbitrate is disfavored because it is a contractual right; thus the party arguing waiver bears a heavy burden of proof"). If there were any doubt on this front, the parties resolved it by explicitly agreeing that Uber retains the right to selectively enforce certain provisions in the parties' agreement. The User Agreement states: "The failure of the Company to enforce any right or provision in this Agreement shall not constitute a waiver of such right or provision unless acknowledged and agreed to by the Company in writing." User Agreement at 9.

Accordingly, under both the plain language of the parties' contract and the law of this Circuit, New York, and California, Defendant's decision not to invoke its right to arbitration has no bearing on its independent right to enforce Plaintiff's class action waiver.

II. Mr. Kalanick, a Non-Signatory, Can Enforce the Class Waiver Provision.

This Court's ruling in footnote 8 was also premised on the implicit conclusion that Defendant, as a non-signatory to the User Agreement, could not enforce the User Agreement's class waiver, stating the waiver does not apply because "plaintiff is not seeking to enforce the User Agreement against defendant." Opinion and Order (3/31/16) at 23 n.8. This conclusion was also in error. Defendant can enforce the User Agreement's class waiver under principles of both agency and equitable estoppel.

A. Defendant, as Uber's CEO and as an Alleged Agent of Uber, Can Enforce the Class Waiver in Uber's User Agreement

Where a complaint alleges that "the individual defendants, though not signatories, were acting as agents for [their principal], then they are entitled to the benefit" of the contract's

provisions. *Dryer v. L.A. Rams*, 40 Cal. 3d 406, 418 (1985); *see also Merrill Lynch Int'l Fin. Inc. v. Donaldson*, 28 Misc. 3d 391, 396-97 (N.Y. Sup. Ct. 2010) (non-signatory may enforce arbitration clause where it has "a close and connected relationship" with the signatory); *Ross v. Am. Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008) (non-signatory agent can enforce dispute resolution provision of contract); *Rowe v. Exline*, 153 Cal. App. 4th 1276, 1284 (2007) (Under California law, "a nonsignatory sued as an *agent* of a signatory may enforce the terms of an arbitration agreement.") (emphasis in original)..

Here, Plaintiffs allege that Mr. Kalanick—a non-signatory—was acting as an agent for Uber—a signatory. Indeed, the Amended Complaint's allegations against Mr. Kalanick relate exclusively to his role as "the chief executive officer and co-founder of Uber." Am. Compl. at 1. Plaintiff alleges that Mr. "Kalanick is the proud architect of [Uber's] business plan and, as CEO, its primary facilitator." *Id.* ¶ 1; *see also id.* ¶ 76 (alleging Mr. Kalanick is the "chief architect" of Uber's business model). The Amended Complaint also leaves no doubt that Plaintiff is claiming "concerted misconduct" by Uber and Mr. Kalanick, alleging: "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination and conspiracy in restraint of trade." *Id.* ¶ 123. The Amended Complaint almost uniformly portrays Mr. Kalanick's role in the alleged conspiracy as interchangeable with that of Uber. *See, e.g., id.* ¶ 54; ("Kalanick and Uber are authorized by drivers to control the fares charged to riders"); *id.* ¶ 111 (referring to the Uber App as "Kalanick's Uber ride-share service").[4] Under these facts, the law is clear: Mr.

[4] Notably, a plaintiff's failure to meaningfully differentiate a signatory defendant from a non-signatory defendant is itself sufficient to equitably estop a plaintiff from barring a non-signatory from enforcing the signatory's contractual rights. *See Jacobson v. Snap-on Tools Co.*, 15 Civ. 2141 (JD), 2015 WL 8293164, at *6 (N.D. Cal. Dec. 9, 2015) (where complaint treated two entities "as a single actor" and "consistently refers to them collectively," defendants' conduct is "interdependent" and the two entities are treated as a single actor for purposes of enforcement of an agreement); *Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration Int'l,*

Kalanick, as Uber's alleged agent, is entitled to enforce the class waiver. The Court's ruling to the contrary was in error.[5]

B. Because Plaintiff Benefited from the User Agreement and Because His Claims Are Intertwined with the User Agreement, He is Equitably Estopped From Avoiding the User Agreement's Class Waiver

While Mr. Kalanick can enforce the class waiver as a non-signatory under principles of agency, he can also do so under principles of equitable estoppel. Plaintiff benefited from the User Agreement by requesting and taking rides on the Uber App and Plaintiff's claims are intertwined with the User Agreement, which concern alleged price fixing, the Uber App, and Uber's pricing algorithm, which are covered in the pricing provision of the User Agreement.

Equitable estoppel prevents Plaintiff from enjoying the benefits of User Agreement, while simultaneously evading its obligations. *See Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause"); *Dataserv, Ltd. v. Mgmt. Techs., Inc.*, No. 90 Civ. 7759 (SWK), 1993 WL 138852, at *4 (S.D.N.Y. Apr. 27, 1993) ("the doctrine of equitable estoppel is supported by the rule that a person who accepts and retains the benefits of a particular transaction will not thereafter be permitted to avoid its obligations or repudiate the disadvantageous portions") (quotations omitted); *R.A.C. Holding, Inc. v. City of Syracuse*, 258 A.D.2d 877, 877 (N.Y. App. Div. 4th Dept. 1999) ("Parties cannot accept benefits under a contract fairly made and at the same time

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Inc., 198 F.3d 88, 98 (2d Cir. 1999) (party equitably estopped from circumventing arbitration because it had treated non-signatory companies and their signatory assignees "as a single unit" in its complaint in a related lawsuit).

[5] Mr. Kalanick's role as Uber's CEO, provides a separate ground for permitting him to enforce the class waiver. Namely, principles of equitable estoppel apply to permit enforcement of dispute resolution provisions where "the parties have sufficient relationship to each other and to the rights created under the agreement" in question. *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 209 (2d Cir. 2005); *Choctaw Generation Ltd. Partnership v. American Home Assur. Co.*, 271 F.3d 403, 405 (2d Cir. 2001); *JSM Tuscany*, 193 Cal. App. 4th at 1241.

question its validity"); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) ("Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes."); *Metalclad Corp. v. Ventana Envt'l Org. P'ship*, 109 Cal. App. 4th 1705, 1713 (2003) (principles of equitable estoppel apply where a party "seeks enforcement of other provisions of the same contract that benefit him").[6]

Here, the entire purpose of the User Agreement was to allow Plaintiff to use the Uber App to connect with independent third-party transportation providers. Indeed, an explicit term of the User Agreement was that his assent to the User Agreement was a prerequisite to use the Uber Service. *See* User Agreement at 1 ("In order to use the Service (defined below) and the associated Application (defined below) you must agree to the terms and conditions that are set out below."). Part of that bargain was, again, Plaintiff's agreement to waive any right or ability to bring a class claim. *Id*. at 8. Put simply, Plaintiff enjoyed the benefit of his bargain—using the Uber App. Am. Compl. ¶ 7. He cannot now avoid the class waiver that was attendant to that benefit. Mr. Kalanick, as a non-signatory, can enforce the class waiver under the same principle.

Moreover, courts equitably enforce dispute resolution provisions where the subject matter of the lawsuit is "intertwined with" or "dependent upon" the contract at issue. *JLM Indus. v.*

[6] While equitable estoppel is most commonly applied where a plaintiff seeks to evade an arbitration clause, the "same principle" governs the enforceability of other types of contractual dispute resolution provisions by non-signatories. *See, e.g.*, *Int'l Chartering Servs., Inc., v. Eagle Bulk Shipping Inc.*, No. 12 Civ. 3463 (AJN), 2015 WL 5915958, at *5 (S.D.N.Y. Oct. 8, 2015) (the "same principle" that bars a party from denying its obligation to arbitrate "applies to bind non-signatories to choice-of-law clauses"); *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 723 (2d Cir. 2013) ("We hold that a non-signatory to a contract containing a forum selection clause may enforce the forum selection clause against a signatory when the non-signatory is 'closely related' to another signatory" such that "the non-signatory's enforcement of the forum selection clause is 'foreseeable' to the signatory against whom the clause is enforced.")

Stolt-Nielsen SA, 387 F.3d 163, 177-78 (2d Cir. 2004); *JSM Tuscany, LLC v. Superior Court*, 193 Cal. App. 4th 1222, 1241 (2011).

That is exactly the case here. Plaintiff's price-fixing claims fall within the ambit of the User Agreement. The centerpiece of the Amended Complaint is Uber's pricing algorithm, which can only be utilized through the Uber App. *See* Am. Compl. ¶ 2 ("The apps provide a standard fare formula, the Uber pricing algorithm"); *id.* ¶ 30 ("Uber account holders can obtain a 'Fare Quote' directly from the Uber App by entering their pickup location and destination"). But pricing—including pricing through the "Uber pricing algorithm"—is specifically contemplated by the User Agreement. Under the User Agreement, Uber "reserve[d] the right to determine final prevailing pricing." User Agreement at 4. The Amended Complaint directly challenges this practice.

Likewise, as Plaintiff acknowledges, his access to the App—and the alleged damages that he suffered as a result—resulted from him accepting the User Agreement. *See* Am. Compl. ¶ 29 ("To become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy."). Put simply, all of Plaintiff's causes of action relate to the App and pricing for transportation services received through the Uber App, which Uber—through the User Agreement—reserves the right to determine.

Because the claims "touch matters covered by the [terms of the contract between the parties]," the claims are subject to the User Agreement's dispute resolution provision. *JLM*, 387 F.3d at 173 (brackets in original) (citing and quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985)); *see JSM Tuscany*, 193 Cal. App. 4th 1222, 1238 (2011) ("Claims that rely upon, make reference to, or are intertwined with claims under the subject contract ar arbitrable"); *Kerr-McGee Refining Corp. v.*

M/T Triumph, 924 F.2d 467, 470 (2d Cir. 1991) (holding that plaintiffs RICO claims were subject to arbitration because "any and all differences and disputes of whatsoever nature arising out of" an agreement could be subject to the arbitration provision in the agreement).[7]

CONCLUSION

For the reasons described in this Memorandum, Defendant Travis Kalanick respectfully requests this Court reconsider its prior decision and hold that Plaintiff Spencer Meyer has agreed to waive his right to bring this action as a class action and, on that basis, dismiss the class claims in his Amended Complaint.

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[7] Plaintiff has not pled and cannot prove the only exception to the application of equitable estoppel that remains – that the agreement is unconscionable. Standard form contracts and other contracts of adhesion are not unconscionable prima facie. *U1it4Less*, 2015 WL 3916247 at * 4 (finding standard form contract not unconscionable where there was no use of "high pressure tactics or deceptive language," and plaintiff acknowledged in the Amended Complaint that other firms provided the same services); *see also Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 787 (2d Cir. 2003); *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir. 1981) ("California law requires a party to show more than simply that a standardized legal form was used and that the party had less bargaining strength than the other contracting party. A party wishing to avoid the contract must also show that the contract contained harsh or unconscionable terms that the party would not have agreed to but for his weak bargaining position"). Plaintiff previously argued that California law prevents the enforcement of class action waivers, but, as stated before, California cases like *Discover Bank v. Superior Court*, 36 Cal.4th 148, 161 (2005) were decided prior to and were expressly abrogated by the Supreme Court. *See Concepcion*, 563 U.S. at 352 (Invalidating "California's *Discover Bank* rule" "[b]ecause it stands an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) ("this Court . . . held in *Concepcion* that the *Discover Bank* rule was invalid. Thus the underlying question of contract law at the time the Court of Appeal made its decision was whether the 'law of your state' included *invalid* California law"). As such, they are irrelevant as to whether alternative dispute resolution or waiver provisions are applicable here. Moreover, it is Plaintiff's burden to establish unconscionability, *Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012). Even under California law before *Concepcion*, class action waivers were unconscionable only where "they operate to insulate a party from liability that otherwise would be imposed *under California law*." *Discover Bank v. Superior Court*, 36 Cal.4th 148, 161 (2005) (emphasis added). Plaintiff could not establish that the class action waiver in the User Agreement was unconscionable under this standard because he only brings claims for violations of federal and New York law.

Dated: April 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Ryan Y. Park
Ryan Y. Park

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, v. TRAVIS KALANICK, Defendant.	**Case No. 1:15-cv-9796 (JSR)**

ANSWER OF DEFENDANT TRAVIS KALANICK TO THE FIRST AMENDED COMPLAINT

Defendant Travis Kalanick ("Kalanick"), by and through his undersigned attorneys, and for his Answer to the First Amended Complaint ("Complaint") filed by Plaintiff Spencer Meyer ("Meyer") states and alleges as follows:

NATURE OF THE SUIT

1. Defendant admits that Kalanick is the co-founder and CEO of Uber Technologies, Inc. ("Uber") but denies all other allegations of Paragraph 1.

2. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that Uber offers a smartphone application that connects riders looking for transportation with independent transportation providers (the "Uber App"). Defendant denies the remaining allegations of Paragraph 2.

3. Defendant admits that he is the co-founder and CEO of Uber, and admits that he live tweeted about his experience when he drove a vehicle on the app, which started at 9:19 p.m. on February 21, 2014 and ended at 1:57 a.m. on February 22, 2014. Defendant denies the remaining allegations in Paragraph 3.

4. Defendant denies the allegations in Paragraph 4.

5. Defendant admits to stating that Uber's business model is procompetitive but denies the remaining allegations and legal conclusions in Paragraph 5.

6. Defendant denies the allegations and legal conclusions in Paragraph 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the assertion that notice of commencement of this action was served upon the New York State

Attorney General and therefore denies it.

PARTIES

7. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, and therefore denies them.

8. Defendant denies the allegations in Paragraph 8.

9. Defendant denies the allegations in Paragraph 9, except that Kalanick is a resident of California, Uber's CEO, an Uber Board member, its co-founder, and has, for one night -- starting at 9:19 p.m. on February 21, 2014 and ending at 1:57 a.m.. on February 22, 2014 -- driven on the Uber platform.

JURISDICTION AND VENUE

10. Paragraph 10 contains legal conclusions to which no response is required.

11. Defendant admits that, only because he voluntarily appeared in this action, the Court has personal jurisdiction over him. Defendant reserves and expressly does not waive his right to object on personal jurisdiction grounds in other actions in the State of New York.

12. Defendant admits that solely in his role as CEO of Uber, he has conducted business either directly or through intermediaries in the State of New York; Defendant denies that this subjects him to personal jurisdiction in the State of New York, however.

13. Defendant denies the allegations of Paragraph 13.

14. Paragraph 14 contains legal conclusions to which no response is required.

15. Defendant responds that the term "lobby", as used in this allegation, is vague and ambiguous. Subject to and notwithstanding that objection, Defendant admits that he appeared as a guest on the Late Show with Stephen Colbert in September 2015, he has made public statements and provided interviews regarding Uber, and that Uber has engaged in lobbying efforts, but denies the remaining allegations in Paragraph 15.

16. Paragraph 16 contains legal conclusions to which no response is required.

17. Paragraph 17 contains legal conclusions to which no response is required.

18. Paragraph 18 asserts a legal conclusion, to which no response is required. .

19. Paragraph 19 asserts a legal conclusion, to which no response is required.

CO-CONSPIRATORS

20. Defendant denies the allegations in Paragraph 20.

BACKGROUND

21. Defendant admits that he founded Uber in 2009.

22. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that Uber offers a smartphone application that connects riders looking for transportation with independent transportation providers.

23. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that it is Uber's position that it is not a transportation company. Defendant

denies the allegations in Paragraph 23.

24. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that Uber offers a smartphone application that connects riders looking for transportation with independent transportation providers. Uber denies the remaining allegations in Paragraph 24.

25. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits the allegations in paragraph 25.

26. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in Paragraph 26.

27. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in Paragraph 27.

28. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding this, Defendant

denies the allegation in paragraph 28.

29. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits the allegations in Paragraph 29.

30. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits the allegations in Paragraph 30.

31. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the Uber App facilitates payment between an Uber user and an independent transportation provider. Uber denies the remaining allegations in Paragraph 31.

32. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that paragraph 32 describes one way that Uber facilitates the collection of a fare.

33. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing,

Defendant lacks knowledge sufficient to admit or deny this allegation.

34. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in Paragraph 34.

35. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that when agreed between the user and the driver-partner, users pay driver partners through the Uber App.

36. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation.

37. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. The terms "actively recruit" and "partners," are, as used in this allegation, vague and ambiguous. Subject to and notwithstanding the foregoing, Defendant admits the allegation in paragraph 37. .

38. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing,

Defendant admits that independent transportation providers must agree to written agreements with Uber.

39. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the following language appears in the operative agreement with driver partners: "No joint venture, partnership, employment, or agency relationship exists between you, the Company or any third party provider as a result of this Agreement or use of the Service or Application."

40. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Defendant further denies that he "and his subordinates decide to offer Uber App services" as it conflates Defendant and Uber. Subject to and notwithstanding the foregoing, Defendant admits that when Uber decides to offer Uber App services in a new geographic location, Uber may use social media as one of several ways to advertise for new independent transportation providers.

41. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation, and, on that basis, denies it.

42. Defendant denies this allegation to the extent it seeks an implied admission that

Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the language quoted in paragraph 42 has appeared on Uber's website.

43. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the independent transportation providers who use the Uber app have discretion to accept or decline an Uber user request.

44. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation, and, on that basis, denies the allegation.

45. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Defendant further responds that the terms "mobilize" and "lobby" are, as used in this allegation, vague and ambiguous, and, for that reason, Defendant lacks knowledge sufficient to admit or deny this allegation.

46. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Uber further objects that the phrase "steadfastly maintained," is vague and ambiguous, and, for that reason, Defendant lacks knowledge

sufficient to admit or deny this allegation, and, on that basis, denies the allegation. Subject to and notwithstanding the foregoing, Defendant admits that it has maintained that the independent service providers who use the Uber App are not employees of Uber. Defendant denies the remaining allegations in paragraph 46.

47. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the Uber App generates a suggested fare for its independent transportation providers based on an Uber-generated algorithm. Defendant admits that Uber's pricing algorithm is dynamic, and when demand outstrips supply in a given area, the Uber algorithm temporarily increases the factor applied to the calculation of the fare in that area to encourage more independent transportation providers to become available to offer rides and therefore expand supply. Defendant denies the remaining allegations of paragraph 47.

48. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 48.

49. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny the allegations in paragraph 49, and, on that basis, denies the allegations.

50. Defendant admits that he publicly advocates the procompetitive benefits of the "surge pricing" model. Defendant denies the remaining allegations in paragraph 50.

51. Defendant admits that the quoted language in paragraph 51 appears among his comments on market pricing for the Wired article.

52. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that the quoted language in paragraph 52 appears on Uber's website. Defendant denies the remaining allegations in paragraph 52.

53. Defendant denies the allegations in paragraph 53.

54. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 54..

55. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, lacks knowledge sufficient to admit or deny this allegation, and, on that basis, denies the allegation as alleged.

56. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing,

Defendant denies the allegations in paragraph 56.

57. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that and when demand outstrips supply in a given area, the Uber algorithm temporarily increases the factor applied to the calculation of the fare in that area to encourage more independent transportation providers to become available to offer rides and therefore expand supply. Defendant further admits that the Uber App may notify independent service providers of the increased fares.

58. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits the allegations in paragraph 58.

59. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 59.

60. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 60.

61. Defendant admits that the quoted language in paragraph 61 is among the

comments he made in an article in Vanity Fair magazine from an interview that he gave.

62. Defendant admits that the quoted language in paragraph 62 is among statements made by him in a television interview on Late Show with Stephen Colbert.

63. Defendant admits that the quoted language in paragraph 63 is among the statements made by him in a television interview on Late Show with Stephen Colbert.

64. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 64.

65. Defendant denies the allegations in paragraph 65.

66. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation.

67. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation, and, on that basis, denies the allegation.

68. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing,

Defendant denies the allegation in paragraph 68.

69. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 69.

70. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations of paragraph 70.

71. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 71.

72. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 72.

73. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation.

74. Defendant admits that on or about December 16, 2013, he made a post to his

Facebook account that contained the quoted language.

75. Paragraph 75 contains legal conclusions to which no response is required. To the extent that a response is required, Defendant denies the allegations in paragraph 75.

76. Paragraph 76 contains legal conclusions to which no response is required. To the extent that a response is required, Defendant denies the allegations in paragraph 76..

77. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 77.

78. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 78.

79. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant lacks knowledge sufficient to admit or deny this allegation, and, on that basis, denies the allegation.

80. Defendant admits that he is the CEO and co-founder of Uber and that on one night -- starting at 9:19 p.m. on February 21, 2014 and ending at 1:57 a.m. on February 22, 2014 -- Defendant acted as a driver-partner on the Uber platform

81. Defendant admits to tweeting the quoted language.

82. Defendant denies the allegations in paragraph 82.

83. Defendant denies the allegations in paragraph 83.

84. Defendant denies the allegations and legal conclusions in paragraph 84.

85. Defendant denies the allegations and legal conclusions in paragraph 85.

86. Defendant denies the allegations and legal conclusions in paragraph 86.

87. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 87.

88. Defendant denies the allegations and legal conclusions in paragraph 88.

89. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations and legal conclusions in paragraph 89.

90. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations and legal conclusions in paragraph 90.

91. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations and legal conclusions in paragraph 91.

92. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. To the extent this paragraph seeks information about the mindset or beliefs of people who are not the Defendant, Defendant lacks sufficient knowledge to admit or deny the allegation. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 92.

93. Paragraph 93 contains legal conclusions and hypotheses to which no response is required.

94. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 94.

95. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegation in paragraph 95..

96. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegation in paragraph 96.

97. Defendant lacks knowledge sufficient to admit or deny the allegation in paragraph 97, and, on that basis, denies it.

98. Defendant admits that the chart displayed in paragraph 98 may be found as part of an article by Daniel Miller entitled "Lyft vs. Uber: Just How Dominant Is Uber in the Ridesharing Business?," May 24, 2015, available at www.fool.com/investing/general/2015/05/24/lyft-vs-uber-just-how-dominant-is-uber-ridesharing.aspx.

99. Defendant admits that the chart displayed in paragraph 99 may be found as part of an article by Daniel Miller entitled "Lyft vs. Uber: Just How Dominant Is Uber in the Ridesharing Business?".

100. Defendant admits that a study by Wefi published in Forbes Magazine in August 2015 reported that 6% of sampled smart phones had the Uber App installed, and 1% had the Lyft App installed. Defendant denies the remaining allegations in paragraph 100.

101. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations asserted in paragraph 101.

102. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations asserted in paragraph 102.

103. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations asserted in paragraph 103.

104. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant admits that using a mobile app-generated ride-share service like the Uber App means that riders need not have cash or credit card on hand, and they can simply get out of the car when they reach their destination without further delay and that the Uber App allows a rider to rate his or her driver and view their driver's name, headshot, the make and model of his car, and overall rating before entering the vehicle. Defendant denies all other allegations in this paragraph.

105. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations of paragraph 105.

106. Defendant denies the allegations in paragraph 106.

107. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 107.

108. Defendant denies the allegations in paragraph 108.

109. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. To the extent paragraph 109 calls for a legal

conclusion, no response is required. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 109.

110. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations and legal conclusions in paragraph 110.

111. Defendant denies the allegations in paragraph 111.

112. Defendant denies the allegations and legal conclusions in paragraph 112.

113. Defendant admits that Plaintiff seeks to sue "on behalf of a class of persons pursuant to Federal Rule of Civil Procedure 23". Defendant denies that this case can proceed as a class action and denies the remaining allegations set forth in paragraph 113. Defendant further states that Plaintiff cannot maintain this action in this forum or as a class action because Plaintiff expressly agreed to not to participate as a plaintiff in a class.

114. Defendant admits that Plaintiff also seeks to "bring certain of the claims on behalf of himself and a portion of the Class described as the Surge Pricing Subclass." Defendant denies that this case can proceed as a class action and deny the remaining allegations set forth in paragraph 114. Defendant further states that Plaintiff cannot maintain this action as a class action because Plaintiff expressly agreed to not to participate as a plaintiff in a class.

115. Defendant denies the allegations in paragraph 115.

116. Defendant denies the allegations in paragraph 116 (and its subparts).

117. Defendant denies the allegations in paragraph 117.

118. Defendant denies the allegations in paragraph 118.

119. Defendant denies the allegations in paragraph 119.

FIRST CAUSE OF ACTION
(Violation of the Sherman Act, 15 U.S.C. § 1)

120. Defendant incorporates his responses to Paragraphs 1 through 119 as if fully rewritten herein.

121. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 121 and contests Plaintiff's assertion that he is not required to allege a relevant market.

122. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 122.

123. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 123.

124. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding this denial, Defendant denies the allegations in paragraph 124.

125. Defendant denies this allegation to the extent it seeks an implied admission that

Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 125.

126. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 126.

127. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 127.

128. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 128.

129. Defendant denies the allegations in paragraph 129.

130. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 130.

131. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf.

Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 131.

132. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 132.

133. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 133.

SECOND CAUSE OF ACTION
(Violation of the Donnelly Act, N.Y. Gen. Bus. Law § 340)

134. Defendant incorporates his responses to Paragraphs 1 through 133 as if fully rewritten herein.

135. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 135.

136. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 136.

137. Defendant denies this allegation to the extent it seeks an implied admission that

Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 137.

138. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 138.

139. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 139.

140. Defendant denies this allegation to the extent it seeks an implied admission that Defendant and Uber are one in the same, or requires Defendant to answer on Uber's behalf. Uber is not a named defendant in this action. Subject to and notwithstanding the foregoing, Defendant denies the allegations in paragraph 140.

JURY DEMAND

141. Defendant admits that "Plaintiff requests a jury trial of all issues triable of right to a jury" but also avers that Plaintiff has expressly waived his right to jury trial.

142. Defendant specifically denies any unlawful conduct and further specifically denies that Plaintiff (or the proposed class members) is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

Based on Defendant's knowledge of the facts to date, Defendant states and further responds:

143. Plaintiff is precluded from proceeding in this action under the terms of his binding User Agreement. Plaintiff expressly agreed to resolve "any dispute, claim, or controversy arising out of or relating to" the Agreement via binding arbitration. Plaintiff also agreed to waive "the right to a trial by jury, to participate as a plaintiff or class User in any purported class action or representative proceeding."

144. Plaintiff's proposed class definition is vague and overly broad, and otherwise fails to satisfy the requirements for maintaining a class action.

145. Plaintiff cannot establish the requirements of Rule 23 of the Federal Rules of Civil Procedure for a class action.

146. This action is not a proper class action under Federal Rule of Civil Procedure 23 because, inter alia, Plaintiff's claims are futile, Plaintiff's claims are not typical or common of those of the putative class, Plaintiff is not an adequate representative of the putative class, common issues do not predominate over individual issues, damages cannot be proven on a class-wide basis, the class is based on a faulty definition of the relevant market, and a class action is not a superior method of adjudication of this case.

147. Plaintiff's claims are subject to arbitration by virtue of Plaintiff's agreement to an arbitration clause.

148. Plaintiff's claims are barred, in whole or part, because the conduct alleged in the Amended Complaint has had no actual, adverse effect on competition or, if there were any such effects, they are outweighed by the pro-competitive benefits of that conduct.

149. Plaintiff has failed to state a cause of action for which relief may be granted in whole or in part.

150. Plaintiff's claims are barred, in whole or part, because plaintiff has not suffered actual, cognizable antitrust injury.

151. The relief sought by Plaintiff and members of the putative class is barred, in whole or in part, because the alleged damages sought are too speculative and uncertain, and because of the impossibility of the ascertainment and allocation of such alleged damages.

152. The claims of Plaintiff and the members of the putative class are barred, in whole or in part, because to the extent any Plaintiff or member of the putative class has been damaged, such damage was not proximately caused by the conduct of Defendant.

153. The claims of Plaintiff and the members of the putative class are barred, in whole or in part, because they have suffered no injury in fact.

154. The claims of Plaintiff and the members of the putative class are barred, in whole or in part, because recovery on such claims would result in unjust enrichment to Plaintiff.

155. The claims of Plaintiff and the members of the putative class are barred, in whole or in part, because any conduct engaged in by Defendant has been reasonable, based on independent, legitimate business and economic justifications, without any purpose or intent to injure competition.

156. Plaintiff's claims are barred to the extent Plaintiff impermissibly seeks equitable relief against non-parties to this litigation.

157. The claims of Plaintiff and the members of the putative class are barred, in whole or in part by the doctrine of laches, waiver, and/or estoppel.

158. The claims of Plaintiff and the members of the putative classes are barred, in whole or in part, because the Complaint fails to plead conspiracy with the particularity required under applicable law.

159. The claims of Plaintiff and the members of the putative classes are barred, in whole or in part, because the alleged conduct of Defendant did not lessen competition in a relevant market or unreasonably restrain trade.

160. The claims of Plaintiff and the members of the putative class are barred, in whole or in part, because the Complaint does not adequately define the relevant market or products allegedly affected by the alleged conduct of Defendant that is the subject of the Complaint.

161. Plaintiff has failed to name a necessary and indispensable party to the proceedings.

162. Plaintiff both directly and indirectly improperly implies that Defendant and Uber are one in the same, or require Defendant to answer on Uber's behalf. Uber is not a named defendant in this action.

163. To the extent not specifically admitted, each factual assertion by Plaintiff is denied. To the extent that the headings and non-numbered statements in the Complaint contain any averments, Defendant denies each and every such averment.

164. Because Plaintiff's Amended Complaint is phrased in conclusory terms, Defendant cannot fully anticipate all affirmative defenses that may be applicable to this action. Accordingly, Defendant has done his best to anticipate the possible affirmative defenses consistent with the requirements of FRCP 8(c). Defendant reserves the right to assert additional defenses, to the extent such defenses are or become applicable, as well as to develop facts in

support of their affirmative defenses. To the extent any affirmative defense is, ultimately, not applicable, in whole or in part, it will be, in good faith, amended or withdrawn.

Dated: April 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Ryan Y. Park
Ryan Y. Park

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, Plaintiff, v. TRAVIS KALANICK, Defendant.	Case No. 1:15-cv-9796 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT TRAVIS KALANICK'S MOTION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Defendant Travis Kalanick respectfully asks this Court to compel arbitration of Plaintiff's claims. The Court has already found, and Plaintiff has never disputed, that Plaintiff agreed to Uber's Terms and Conditions (the "Terms" or "Rider Terms") as a condition of using Uber's services. DE 44 at 9. Those Terms include a clear and conspicuous agreement to arbitrate disputes (the "Arbitration Agreement"), which mandates dismissing this action in favor of arbitration. Because the Arbitration Agreement delegates arbitrability issues to the arbitrator, the Court should allow the arbitrator to address any arbitrability issues in the first instance, including whether Mr. Kalanick can avail himself of the Arbitration Agreement.

Even if the Court decides to address arbitrability issues itself, however, it should grant Mr. Kalanick's motion to compel. In a transparent attempt to avoid the Arbitration Agreement, Plaintiff filed this lawsuit challenging ***Uber's*** business model as a purported price-fixing scheme, but named ***Uber's CEO*** Mr. Kalanick, a non-signatory to the Arbitration Agreement, as the sole defendant, while omitting Uber, a signatory, from the proceedings. This procedural sleight of hand does not relieve Plaintiff of his contractual obligation to arbitrate.

First, Mr. Kalanick has not waived his right to compel arbitration. Mr. Kalanick has consistently asserted his right to arbitration, including—most recently—in the form of affirmative defenses based on the Arbitration Agreement. *See* DE 42 ¶¶ 143, 147. Any statements that he was not seeking to compel arbitration were limited specifically to his motion to dismiss—predicated on a class waiver that he believed could be enforced separate and apart from the Arbitration Agreement, *e.g.*, DE 23 at 21 & n.9; DE 28 at 28 & n.10; DE 34 at 10; DE 41 at 2—and did not relinquish Mr. Kalanick's right to compel arbitration *separate from* that motion.

Second, the law is well settled that a non-signatory employee is covered by his signatory-employer's arbitration agreement where the employee acted as the signatory's agent. *See Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003); *Dryer v. L.A. Rams*, 40 Cal. 3d 406, 418 (1985). Because Plaintiff alleges that Mr. Kalanick was involved in Uber's purported price-fixing scheme in his capacity as Uber's CEO and manager of operations (*see* Am. Compl. ¶¶ 1, 3, 9, 86), Mr. Kalanick is protected by Uber's Arbitration Agreement.

Third, Plaintiff should be estopped from avoiding arbitration of his claims against Mr. Kalanick because those claims are intertwined with the Terms that include the Arbitration Agreement, and because Plaintiff consistently treats Mr. Kalanick and Uber as interchangeable in his pleadings and in nearly identical discovery requests served on Mr. Kalanick and Uber. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004); *JSM Tuscany, LLC v. Super. Ct.*, 193 Cal. App. 4th 1222, 1238 (2011).

Fourth, the Arbitration Agreement is valid and enforceable (*see, e.g.*, *Lanier v. Uber Techs., Inc.*, No. 15-cv-09925 (BRO), DE 25 at 4-7 (C.D. Cal. May 11, 2016) (confirming the validity of a similar Uber rider agreement and compelling arbitration)), and encompasses Plaintiff's claims. The terms of the Arbitration Agreement are fair—indeed generous—to the rider, as demonstrated below. These terms require that "any" claim "arising out of or relating to this Agreement or the use of [Uber's] Service or Application" must be "settled by binding arbitration." DE 29-1 at 8-9. Plaintiff's claims that Uber's business model amounts to price-fixing and that his alleged injuries arise from his use of the application and service fall squarely within the broad scope of the Arbitration Agreement.

For all of these reasons and those discussed further below, the Court should dismiss this action and compel arbitration of Plaintiff's claims.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a Complaint against Travis Kalanick, CEO of Uber, alleging violations of the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen. Bus. Law § 340, based on allegations that he "paid higher prices for car service" requested through Uber's "application for smartphone devices." Am. Compl. ¶¶ 8, 24. But when Plaintiff registered for an Uber account, he agreed that "any dispute, claim or controversy arising out of or relating to" the Rider Terms or Uber's services "will be settled by binding arbitration." DE 29-1 at 9; Am. Compl. ¶ 29.

A. The Uber Registration Process

Uber is a technology company that enables riders to request transportation services from third-party transportation providers. Am. Compl. ¶ 2. Mr. Kalanick is the co-founder and CEO of Uber, and an Uber employee. *Id.* ¶¶ 1, 9. Riders can request transportation services by using the Uber App on their smartphones, and these requests are then transmitted to independent transportation providers who are available to receive transportation requests. *Id.* ¶ 24.

Before riders can request transportation services via the Uber App, they must first register by creating an Uber account. *Id.* ¶ 28. Riders can create an account either through the company's website, at https://get.uber.com/sign-up/, or within the Uber App itself. Plaintiff registered with Uber in order to create his user account. *Id.* ¶¶ 7, 29. Uber's records show that Plaintiff registered using the Uber App on his Samsung Galaxy S5 phone with an Android operating system on October 18, 2014. Declaration of Vincent Mi, DE 59-3 (filed May 24, 2016) ("Mi Decl.") ¶ 3. Registration using the Uber App is straightforward. During late 2014, when Plaintiff registered for Uber, this process involved two basic steps, each of which was confined to a single screen on the user's smartphone with no scrolling required: (1) Register; and (2) Payment. *Id.*

After successfully downloading the Uber App and clicking the "Register" button, the user was prompted on the first screen, titled "Register," to enter his name, email address, mobile phone number, and a password, or to sign up with the user's Google+ or Facebook account. *Id.* ¶ 5a. According to Uber's records, Plaintiff did not sign up using Google+ or Facebook. *Id.* For users who do not sign up using Google+ or Facebook, after filling in the above fields, the user can then advance to the next screen by clicking "Next." *Id.*

On the second and final screen, the user is prompted to enter his credit card information, or to opt to make payments using PayPal or Google Wallet. *Id.* ¶ 5b. Plaintiff entered his credit card information in the text box provided. *Id.* The second screen includes the following notice: "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." *Id.* The phrase "TERMS OF SERVICE & PRIVACY POLICY" is in all-caps, underlined, and in bright blue text, all of which set the text apart from other text on the screen and indicate a hyperlink. *Id.* The hyperlink is immediately visible when the user arrives on this second screen. If the hyperlink is clicked, the user is taken to a screen that contains a button that accesses the "Terms and Conditions" and "Privacy Policy" then in effect. *Id.* The user must then click the "Register" button, which appears directly above the link to the terms on the final screen, to complete the registration process. *Id.* ¶ 5c. Plaintiff could not have completed the registration process and requested a ride without completing these steps. *Id.*

B. The Arbitration Agreement

The Uber Rider Terms to which Plaintiff agreed contain several sections, separated by bolded subheadings. The first section provides that the Terms "constitute a legal agreement" between the rider and Uber, and "[i]n order to use the Service … and the associated Application … [the rider] must agree to the terms and conditions that are set out below." DE 29-1 at 2.

Another section, entitled "Dispute Resolution" (DE 29-1 at 8-9), states:

> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **"Disputes"**) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding**….
>
> . . . .
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section.

Id. at 9.

The terms of the Arbitration Agreement favor the rider: (1) They permit the rider to arbitrate a dispute in the county where he or she resides. (2) They allow for recovery of attorneys' fees only by the rider, not Uber. (3) They require Uber to cover arbitrator fees for non-frivolous claims. *Id.*

C. Procedural History

On December 16, 2015, notwithstanding his agreement to arbitrate "any dispute, claim or controversy arising out of or relating to" Uber's services or application (DE 29-1 at 9), Plaintiff filed his Complaint in this Court (DE 1), which he then amended on January 29, 2016 (DE 26).

Although all of Plaintiff's claims arise out of or relate to Uber's Rider Terms, application, and services, Plaintiff brought his claims against Mr. Kalanick individually, as co-founder and CEO of Uber. Mr. Kalanick moved to dismiss on February 8, 2016 (DE 28), asserting that this dispute is subject to arbitration under the Rider Terms (*id.* at 28 n.10). The Court denied the motion on March 31, 2016, concluding that, because Mr. Kalanick had not yet sought to compel

arbitration, Plaintiff could continue pursuing his class action. DE 37 at 23 n.8. Mr. Kalanick moved for reconsideration of the class waiver ruling, which the Court denied. DE 44 at 1-2, 7.

On April 22, 2016, Uber and Mr. Kalanick were both named as defendants in a copycat litigation asserting the same claims set forth in Plaintiff's Amended Complaint. *Swink v. Uber Techs., Inc.*, No. 16-cv-1092 (KPE), DE 2 (S.D. Tex. Apr. 22, 2016). Based in part on this lawsuit, and the risk that Uber may be collaterally estopped from disputing antitrust liability in the *Swink* case if this Court were to rule in favor of Plaintiff on the merits, Uber moved to intervene, and Mr. Kalanick moved to join Uber, in this case. DE 47 at 10; DE 59 at 11.

ARGUMENT

Congress's "clear intent" in enacting the Federal Arbitration Act (the "FAA") was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). The Second Circuit recognizes this "preference for enforcing arbitration agreements applies even when the claims at issue are federal statutory claims …." *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 486 (2d Cir. 2013). Accordingly, an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Khanna v. Am. Express Co.*, No. 11-cv-6245 (JSR), 2011 WL 6382603, at *2 (S.D.N.Y. Dec. 14, 2011) (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000)); *accord Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev.*, 55 Cal. 4th 223, 247 (Cal. 2012).

A. Where the FAA Governs the Parties' Agreement and This Dispute, the Arbitrator Should Decide All Questions of Arbitrability

There is no dispute that Plaintiff agreed to be bound by the Arbitration Agreement. Plaintiff created an Uber account on October 18, 2014 (Mi Decl. ¶ 3) and concedes that, "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy" (Am. Compl. ¶ 29). Because the Arbitration Agreement in the Terms is governed by the FAA, and because Plaintiff's claims fall within the scope of the Arbitration Agreement, Plaintiff is bound by the agreement's provisions requiring the resolution of disputes by binding arbitration, delegating threshold arbitrability issues to the arbitrator, and waiving any right to representative or class proceedings. Accordingly, the Court should refer the entire proceeding to arbitration.

Both the express terms of the Arbitration Agreement and the nature of the transactions at issue confirm that the FAA governs. First, the Arbitration Agreement's statement that "[t]he Federal Arbitration Act will govern the interpretation and enforcement" of the Agreement (DE 29-1 at 9) mandates application of the FAA. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442-43, 447 (2006). In addition, the FAA applies when the transactions at issue affect interstate commerce (*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-77 (1995); *see, e.g.*, Am. Compl. ¶¶ 13, 19 (alleging conduct affecting "interstate trade and commerce")), including transactions where Internet technologies transmit user requests across the country (*Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 n.11 (2d Cir. 2002)).

Because "arbitration is a matter of contract, parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center West v. Jackson*, 561 U.S. 63, 68-69 (2010). Gateway arbitrability questions that are properly delegated to the arbitrator include

whether the arbitration right has been waived and whether a non-signatory may compel arbitration under principles of equitable estoppel. *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 45 (2d Cir. 2003) ("disputes about such defenses to arbitrability as waiver [and] estoppel … are presumptively reserved for the arbitrator's resolution"). As this Court recently recognized, "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Queens Boulevard 40th Owners Corp. v. Figueroa*, No. 15-cv-1433 (JSR), 2015 WL 1938185, at *3 (S.D.N.Y. Apr. 22, 2015) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). Similarly, the Second Circuit has expressly held that the question whether a signatory to an arbitration agreement is estopped from avoiding arbitration with the non-signatory is properly delegated to an arbitrator to resolve in the first instance. *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209 (2d Cir. 2005) ("a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration").[1]

The Arbitration Agreement in this case delegates gateway questions of arbitrability to the arbitrator by incorporating the AAA Commercial Arbitration Rules. DE 29-1 at 9. Specifically, Rule 7(a) of the AAA Rules provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Commercial Arbitration Rules at R-7(a) (https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103) (effective October 1, 2013; last accessed May 31, 2016). The Second Circuit has held that an arbitration agreement incorporating this very AAA rule "serves as clear and unmistakable

[1] For issues that turn on application of state law, such as whether an arbitration agreement is unconscionable, the choice of law analysis is also properly delegated to the arbitrator. *See Zurich Ins. Co. v. Ennia Gen. Ins. Co.*, 882 F. Supp. 1438, 1440 (S.D.N.Y. 1995) ("the issue of the law to be applied in the arbitration proceeding . . . is for the arbitration panel").

evidence of the parties' intent to delegate such issues to an arbitrator." *Contec*, 398 F.3d at 208; *see id.* ("whether the arbitration rights under [an agreement] were validly assigned [to a non-signatory defendant] is an issue …. within the jurisdiction of the arbitrator pursuant to AAA Rule R-7(a) as incorporated into the [agreement]"); *accord Laumann v. N.H.L.*, 989 F. Supp. 2d 329, 334 & n.18, 338 (S.D.N.Y. 2013) (applying AAA Rule R-7, where "there is a legitimate dispute about the scope and applicability of the [arbitration] clause, the threshold question of arbitrability must be referred to the arbitration").

Because "[t]here can be no doubt that the parties' Arbitration Agreement delegates issues of arbitrability to an arbitrator, not a court" under the AAA rules incorporated into Meyer's User Agreement with Uber (*Contec*, 398 F.3d at 208), the Court must leave any arbitrability questions, including questions about Mr. Kalanick's right to invoke the Arbitration Agreement and any claim that he has waived that right, for the arbitrator to decide in the first instance.

B. Even if the Court Were to Address Questions of Arbitrability, Mr. Kalanick Is Entitled to Invoke the Valid and Enforceable Arbitration Agreement

Given the foregoing, this Court need not proceed any further to determine that this dispute rightfully belongs in arbitration. However, if this Court rules on arbitrability, the Court's role under the FAA is to determine "(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (citation omitted). "[T]he [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

1. The Dispute Falls Within the Scope of the Arbitration Agreement

Under the FAA, a court must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc.*, 475 U.S. at 650. Here, the Arbitration Agreement provides that "any dispute, claim or controversy arising out of or relating to this Agreement … or the use of the Service or Application (collectively, 'Disputes') will be settled by binding arbitration [or] in small claims court." DE 29-1 at 9. Courts are especially deferential to "broad" arbitration agreements, such as this one, which are "presumptively applicable to disputes involving matters going beyond the interpretation or enforcement of particular provisions of the contract." *JLM Indus.*, 387 F.3d at 172 (quotations and alterations omitted).

Plaintiff's self-described "Nature of the Suit" demonstrates that this case arises out of and relates to Uber's services and application, both of which are at the heart of the Rider Terms. Plaintiff challenges the very lawfulness of Uber's service and application: "Uber has a simple but illegal business plan" (Am. Compl. ¶ 1); Uber was "designed … to be a price fixer" (*id.* ¶ 2); "Uber's essential role … [is] to fix prices among competing drivers" (*id.* ¶ 4). All of Plaintiff's allegations, in one way or another, "arise out of or relate" to Uber's services and application. *See, e.g.*, Am. Compl. ¶¶ 8-9, 21-37, 77, 89. Indeed, Plaintiff claims that his injuries flow from overpaying for car service by virtue of the allegedly "price-fixed fares" "set by the Uber algorithm," and that the Uber algorithm is a core function of the Uber App. *See id.* ¶¶ 2, 8, 54.

Moreover, "[i]f the allegations underlying the claims touch matters covered by the parties' contracts, then those claims must be arbitrated." *JLM Indus.*, 387 F.3d at 172; *see also In re Currency Conversion Fee Antitrust Litig.(Currency Conversion I)*, 265 F. Supp. 2d 385, 406 (S.D.N.Y. 2003). Plaintiff's price-fixing claims are "collateral matters" and "touch matters" within the Rider Terms. *Currency Conversion I*, 265 F. Supp.2d at 410 (plaintiffs' price-fixing

claims "touch matters" covered by cardholder agreements containing arbitration clause); *JLM Indus.*, 387 F.3d at 176 (the term "collateral matters," however defined, encompassed plaintiff's Sherman Act claims). Moreover, broad arbitration clauses cover price-fixing claims even where the plaintiff alleges "a conspiracy which was formed *independently* of the specific contractual relations between the parties." *JLM Indus.*, 387 F.3d at 173, 175.

2. Mr. Kalanick Has Not Waived His Right to Arbitration

Mr. Kalanick has timely filed this motion, which seeks to vindicate his right to arbitration while avoiding any unnecessary expenditure of judicial resources or unfair prejudice to Plaintiff. *See La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 160 (2d Cir. 2010) (linking timeliness with "concern for judicial economy"). "In determining whether a party has waived its right to arbitration by expressing its intent to litigate the dispute in question, we consider the following three factors: (1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice." *Id.* at 159.

"In view of the 'overriding federal policy favoring arbitration,'" federal courts apply a strong presumption *against* waiver of a party's right to arbitration, such that "any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 229 (2d Cir. 2001); *see Moses H. Cone*, 460 U.S. at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). Accordingly, "waiver is not to be lightly inferred." *Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461 (2d Cir. 1985); *see Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 981 (2d Cir. 1996) ("The waiver

determination must be [made] . . . with a healthy regard for the policy of promoting arbitration"). "The party seeking to establish a waiver of arbitration carries a heavy burden." *Application of ABN Int'l Capital Markets Corp.*, 812 F. 418, 420 (S.D.N.Y.) *aff'd* 996 F.2d 1478 (2d Cir. 1993).

Mr. Kalanick has consistently asserted that Plaintiff signed a valid and enforceable arbitration agreement, and that he has the right to compel arbitration of Plaintiff's claims. Specifically, Mr. Kalanick has repeatedly indicated:

> Although Mr. Kalanick does not seek to compel arbitration here, arbitration would be mandated for the reasons explained below if Mr. Kalanick sought to enforce the arbitration provision of the User Agreement. Mr. Kalanick does not waive and expressly reserves his right to move to compel arbitration in other cases arising out of the User Agreement.

DE 23 at 21 & n.9; DE 28 at 28 & n.10 (same). As a result, Mr. Kalanick has not "relinquished" his right to arbitration. DE 44 at 9. Mr. Kalanick repeatedly underscored that although he did not seek to enforce the arbitration agreement in the motion to dismiss, but "arbitration would be mandated if [he] sought to enforce the arbitration provision of the User Agreement." *Id.* (emphasis added). These statements were limited specifically to the motion to dismiss, which was predicated on a class waiver that Mr. Kalanick believed could be enforced separate from the Arbitration Agreement, and was without prejudice to Mr. Kalanick's right to seek arbitration at a later date.[2]

[2] Mr. Kalanick argued in the motion to dismiss, and in his subsequent motion for reconsideration, that he did "not need to compel arbitration to enforce the class waiver" in the User Terms, which he contended was a stand-alone provision, separate from the Arbitration Agreement. DE 41 at 2; *see id.* at 5-9; DE 34 at 10 ("the class action waiver is not dependent on the arbitration clause"); DE 23 at 21. He never stated that he was voluntarily relinquishing his right to seek to compel arbitration pursuant to the terms of the Arbitration Agreement in a subsequent motion.

Moreover, Mr. Kalanick's statement that he "reserves his right to move to compel arbitration in other cases" cannot constitute an express waiver of his right to enforce arbitration *in this case*. *Id.* To hold otherwise would be to lightly infer an express waiver of Mr. Kalanick's arbitration rights based on mere negative implication—in direct contravention of the well-established rule that any ambiguity is to be resolved *against* a finding of waiver. *See, e.g.*, *Cont'l Ins. M/V NIKOS N*, No. 00-cv-7985 (RLC), 2002 WL 530987, at *6 (S.D.N.Y. Apr. 9, 2002) ("Resolving all ambiguities in favor of arbitration, … the court cannot say that these particular actions by [defendant] constitute a waiver of its right to compel arbitration."); *Bechtel do Brasil Construcoes Ltda. UEG Araucaria Ltda.*, 638 F.3d 150, 158 (2d Cir. 2011) (all "ambiguities must be resolved in favor of arbitration"); *LG Elecs., Inc. Wi-Lan USA, Inc.*, 623 F. App'x 568, 569 (2d Cir. 2015) (doubts must be resolved against waiver of arbitration right). Considered in their full context, these statements do not clearly and unambiguously convey any intent to relinquish Mr. Kalanick's right to arbitration. Indeed, in his Answer to the Complaint, Mr. Kalanick expressly asserted affirmative defenses based on the Arbitration Agreement. *See* DE 42 ¶¶ 143, 147.

In any event, Mr. Kalanick has not engaged in conduct demonstrating any intent to waive his right to arbitrate. Mere participation in a lawsuit through preliminary motion practice is wholly consistent with a party retaining its right to invoke arbitration rights at a later point in the litigation. *See Jock v. Sterling Jewelers, Inc.*, 564 F. Supp. 2d 307, 311 (S.D.N.Y. 2008) (Rakoff, J.) (holding that initiating a lawsuit did not constitute waiver, as "[t]he Second Circuit … has held that courts should find such a waiver only if a party engages in protracted litigation that results in prejudice") (quotations omitted); *Mahmoud Shaban & Sons Co. v. Mediterranean Shipping Co., S.A.*, 2013 WL 5303761, at *1-2 (S.D.N.Y. Sept. 20, 2013) ("it is well established

that [filing] a motion to dismiss before moving to compel arbitration does not in itself waive [the] right to enforce the arbitration clause after the motion to dismiss is resolved.").

Moreover, preliminary motion practice does not, by itself, constitute unfair prejudice. *See Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 105 (2d Cir. 2002) ("The key to a waiver analysis is prejudice"). Prejudice can come in two forms: (1) "substantive prejudice," which may occur where a party loses a legal issue on the merits and attempts to relitigate it through arbitration; and (2) "prejudice due to excessive cost and time delay." *Id.* Neither form is present here.

First, Plaintiff has not been substantively prejudiced because the "mere filing" and litigation of a motion to dismiss does not constitute substantive prejudice. *Murray v. UBS Securities, LLC*, 2014 WL 285093, at *5 (S.D.N.Y Jan. 27, 2014). Courts have consistently declined to find prejudice where parties have done little more than litigate a pleadings challenge. *See Rush v. Oppenheimer & Co.*, 779 F.2d 885, 888 (2d Cir. 1985) ("a motion [to dismiss], however, does not waive the right to arbitrate"); *Scott v. Merrill Lynch*, No. 89-cv-3479 (MJL), 1992 WL 245506, at *3 (S.D.N.Y. Sept. 14, 1992) (no waiver despite motion to dismiss, document productions, interrogatory responses, document demands, and answer to complaint). The filing of a motion to dismiss does not constitute "the litigation of substantial issues" such that arbitration assumes the form of relitigation. *Sweater Bee by Banff*, 754 F.2d at 461-66 (citing cases illustrating litigation of substantial issues, which involved a full judicial trial on the merits or a motion for summary judgment). Rather than inflict prejudice, a motion to dismiss may actually *improve* the other party's position in arbitration by "alert[ing] [him] to glaring deficiencies in his complaint and present[ing] an opportunity for their rectification." *Jung v. Skadden, Arps, Slate, Meagher & Flom LLP*, 434 F. Supp. 2d 211, 217 (S.D.N.Y. 2006);

Murray, 2014 WL 285093, at *5 ("Plaintiff has been provided with a preview of what to expect during arbitration").

Second, the short duration of the litigation so far—just two months after the Court's motion to dismiss opinion and five months after the case has been filed—has not created unduly prejudicial cost or delay. *See, e.g.*, *Becker v. DPC Acquisition Corp.*, 2002 WL 1144066, at *12 (S.D.N.Y. May 30, 2002) (no prejudice after 14 months of litigation); *Thomas v. A.R. Baron & Co.*, 967 F. Supp. 785, 789 (S.D.N.Y. 1997) (no waiver after 18 months of litigation); *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F.2d 978, 980 (2d Cir. 1942) (no waiver despite waiting nine months to invoke arbitration, two months before trial).[3] Moreover, "legal expenses inherent in litigation, without more, do not constitute prejudice requiring a finding of waiver." *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997) (quotations omitted).[4]

3. New York Law Governs Other Arbitration Agreement Enforceability Issues

With respect to other enforceability issues, this Court should apply New York substantive law. The Arbitration Agreement contains no choice-of-law provision, and in diversity cases, federal courts must follow the prevailing rules in the state where they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386,

[3] *See also, e.g.*, *Rush*, 779 F.2d at 887 (no waiver where party waited eight months before invoking arbitration, during which time it participated in "extensive discovery, [and brought] a motion to dismiss"); *Mahmoud Shaban*, 2013 WL 5303761, at *1-2 (no waiver despite motion to dismiss and expense and delay of seven depositions).

[4] Mr. Kalanick has not waived his right to compel arbitration as to putative class members, who are not parties until class certification. *See, e.g.*, *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (it is "surely erro[r]" to conclude unnamed class member is a party "before the class is certified"). Mr. Kalanick expressly reserves his right to file a motion to compel arbitration of claims asserted by putative class members if and when a class is certified.

393 (2d Cir. 2001).[5] New York law therefore governs any contract enforceability issues that are not governed by the FAA.

Although Mr. Kalanick previously observed that either New York or California law could apply based on the pleadings alone (DE 41 at 7 n.3), material facts now available to the Court confirm that Plaintiff has no relevant contacts with California. *See* Mi Decl. ¶ 4 (explaining that Plaintiff has taken as many rides in New York as he has in any other location, and has not taken any rides in California).[6] Further, Plaintiff has admitted that all of his "claims in this case arise out of activities that relate to New York State." Am. Compl. ¶ 16; *see also id*. ¶ 7 (alleging that the "place of performance" and the "subject matter of the contract" included New York); ¶¶ 12-16, 18, 87-89 (alleging that Mr. Kalanick and Uber conduct significant business in New York, and that those activities give rise to his claims); *id*. ¶¶ 134-40 (asserting claim under New York law). Thus, New York law applies given that New York's "choice-of-law rules require application of the law of the state having the most significant contacts with the matter in dispute." *Philips Credit Corp. v. Regent Health Grp., Inc*., 953 F. Supp. 482, 501 (S.D.N.Y. 1997). In light of the evidence now available, no factor favors application of California law

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[5] *See, e.g., Loreley Fin. No. 3 Ltd. v. Wells Fargo Sec.*, 797 F.3d 160, 170 & n.5 (2d Cir. 2015) (concluding that because "Defendants transacted business within New York giving rise to Plaintiffs' causes of action," the choice-of-law result is "the same, regardless of whether we analyze choice of law under federal or New York law"); *see, e.g., Bruster v. Uber Techs., Inc.*, No. 15-CV-2653, DE 19 at 7-8 (N.D. Ohio May 23, 2016) (same; applying Ohio law); *Suarez v. Uber Techs., Inc.*, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) (same; applying Florida law); *Varon v. Uber Techs., Inc.*, 2016 WL 1752835, at *3 (D. Md. May 3, 2016) (same; applying Maryland law).

[6] On the motion to dismiss, Mr. Kalanick did not—and could not—introduce evidence regarding the place of performance, as those facts were not alleged in Plaintiff's pleading. *See Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 425 (2d Cir. 2008) ("a district court must confine itself to the four corners of the complaint when deciding a motion to dismiss"). However, this evidence may be considered on a motion to compel arbitration. *See Walsh v. WOR Radio*, 531 F. Supp. 2d 623, 626 n.3 (S.D.N.Y. 2008).

other than the location of Uber's headquarters. But even if California law applied, this Court should resolve this motion in the same way—compel arbitration. *See* Sections B.4-B.6.

4. Mr. Kalanick Has a Right to Enforce the Arbitration Agreement

Plaintiff has deliberately attempted to skirt his agreement to arbitrate disputes with Uber by filing suit against Mr. Kalanick individually. *See* DE 59 at 9-14. The Court should not allow Plaintiff to evade his contractual obligations so easily. *See Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003) ("were claims against employees or disclosed agents not also subject to arbitration, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves") (quotations omitted); *Coleman v. Nat. Movie-Dine, Inc.*, 449 F.Supp. 945, 948 (E.D. Pa. 1978) ("Arbitration should not be foreclosed simply by adding persons to a civil action who are not parties to the arbitration agreement because such an inclusion would thwart the federal policy in favor of arbitration.").[7]

As ***CEO of Uber***, Mr. Kalanick is covered by the protections of the Arbitration Agreement in Plaintiff's Rider Terms ***with Uber***. *See Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993) ("employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement"); *Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 216 (S.D.N.Y. 1989) ("Acts by employees of one of the parties to a customer agreement are equally arbitrable as acts of the principals as long as the challenged acts fall within the scope of the customer agreement."); *Mosca v. Doctors Assocs.*, 852 F. Supp. 152, 155 (E.D.N.Y. 1993) ("This court will not permit Plaintiffs to avoid arbitration simply by naming individual agents of the party to the arbitration clause and suing them in their individual capacity."). Additionally, Plaintiff should be estopped from avoiding arbitration of his claims against Mr. Kalanick,

[7] The Court has not yet addressed whether "Mr. Kalanick, as a non-signatory to the User Agreement, may enforce th[e Arbitration Agreement] against plaintiff Meyer." DE 44 at 7.

because his claims against Mr. Kalanick are intimately entwined with the Rider Terms, and he consistently treats Mr. Kalanick and Uber as interchangeable, both in the Complaint and the nearly identical discovery served on Mr. Kalanick and Uber. *See JLM Indus.*, 387 F.3d at 177; *accord JSM Tuscany*, 193 Cal. App. 4th at 1238.

a. The Agreement Between Plaintiff and Uber Covers Mr. Kalanick, an Employee of Uber

The law is well settled that a non-signatory employee is covered by his employer's contract. *See Roby*, 996 F.2d at 1360; *see also Mosca*, 852 F. Supp. at 155 ("all of the named defendants are bound by the arbitration clause" given that "[e]ach Defendant employee is an agent of [the employer] and is bound by the arbitration agreement since the acts ascribed to them occurred during and as a result of their employment and agency"). Mr. Kalanick is entitled to invoke the Arbitration Agreement because, as described above, Plaintiff alleges that Mr. Kalanick is the co-founder, CEO, board member, and manager of operations of Uber, and, ***in those capacities***, was personally involved in the alleged antitrust violations. Am. Compl. ¶¶ 1, 2, 9, 86; *see Arrigo v. Blue Fish Commodities*, 704 F. Supp. 2d 299, 303, 305 (S.D.N.Y. 2010) (even if the CEO "is not a party to the [arbitration agreement], it nevertheless protects him from the instant suit"); *Roby*, 996 F.2d at 1360 (directors of defendant's insurance syndicates, though non-signatories, were entitled to rely on arbitration provisions incorporated into their employers' agreements); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 451 (S.D.N.Y. 1985) (same); *accord Dryer v. L.A. Rams*, 40 Cal. 3d 406, 418 (Cal. 1985) ("If . . . the individual defendants, though not signatories, were acting as agents for [their principal], then they are entitled to the benefit of the arbitration provisions.").

b. Plaintiff Should Be Estopped from Avoiding Arbitration of His Claims Against Mr. Kalanick

Plaintiff must also arbitrate his claims against Mr. Kalanick under principles of equitable estoppel, which "estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to arbitrate are intertwined with the contract." *Currency Conversion I*, 265 F. Supp. 2d at 402. In evaluating whether the claims are sufficiently "intertwined" to apply estoppel, "the court must determine: (1) whether the signatory's claims arise under the subject matter of the underlying agreement; and (2) whether there is a close relationship between the signatory and the non-signatory." *Id.* (quotations omitted); *accord JSM Tuscany*, 193 Cal. App. 4th at 1238. Both factors are satisfied here.[8]

First, Plaintiff's claims are intertwined with the Rider Terms. Specifically, Plaintiff alleges that "[r]iders using the Uber App have suffered by paying artificially increased fares resulting from this price-fixing conspiracy." Am. Compl. ¶ 89; *In re A2p SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 478 (S.D.N.Y. 2013) (applying estoppel in an antitrust suit where "the scheme, the harm, and the damages alleged . . . directly relate to and arise from the subject matter" of an agreement containing an arbitration clause). The Uber App is a primary subject matter of the Rider Terms. DE 29-1 at 2 ("In order to use the Service (defined below) and the associated Application (defined below) you must agree to the terms and conditions that are set out below."). Because Plaintiff's claims revolve around allegedly increased fares charged by the

[8] In its ruling on Mr. Kalanick's motion to dismiss, this Court held that Plaintiff "is not equitably estopped from *pursuing a class action suit* against Mr. Kalanick" on the ground that Mr. Kalanick was "not seeking to compel arbitration" at that time. DE 37 at 23 n.8 (emphasis added). In ruling on Mr. Kalanick's motion for reconsideration, however, the Court expressly declined to again reach this issue, observing that it "has no occasion to reach" the issue of equitable estoppel. DE 44 at 6-7. Now that Mr. Kalanick has moved to compel arbitration, the factual basis for the Court's earlier rulings on this issue has fundamentally changed such that those rulings are no longer operative.

Uber App, which is "at the heart of the underlying contract containing the arbitration agreement," Plaintiff's claims arise under the "subject matter" of the underlying agreement. *See Currency Conversion I*, 265 F. Supp. 2d at 403 (holding that plaintiffs' price-fixing claims arise under the "subject matter" of the cardholder agreement where plaintiffs alleged that their credit cards were unlawfully charged fixed-currency conversion fees); *accord Turtle Ridge Media Grp. v. Pac. Bell Directory*, 140 Cal. App. 4th 828, 833 (Cal. Ct. App. 2006) (concluding that plaintiff's claims were intertwined with the contract where "its claims against [defendant] arose from its business dealings with [defendants], which the contract and subcontract governed").

Second, Plaintiff has undeniably alleged a "close relationship" between Mr. Kalanick and Uber. The Amended Complaint alleges collusion and interdependent conduct by Mr. Kalanick and Uber: "Kalanick, Uber, and Uber's driver-partners have entered into an unlawful agreement, combination or conspiracy in restraint of trade." Am. Compl. ¶ 123; *see Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 75 n.6 (S.D.N.Y. 2012) (holding that estoppel would apply, in the alternative, "given the Amended Complaint's pervasive allegations of interdependent and coordinated misconduct between the nonsignatories and signatory"). Further, Plaintiff consistently treats Mr. Kalanick and Uber as a single unit, alleging that Mr. Kalanick is the "primary facilitator" of Uber's "illegal business plan," and "ultimately controlled" the prices charged through the Uber App. Am. Compl. ¶¶ 1, 3. He alleges, for instance, that "Kalanick and Uber are authorized by drivers to control the fares charged to riders," and "Kalanick and Uber artificially set the fares for its driver-partners to charge to riders." *Id.* ¶ 54. Although Mr. Kalanick denies that he and Uber are interchangeable or that any basis exists to disregard Uber's corporate form (*see* DE 42 ¶ 2), it is *Plaintiff's* treatment of Mr. Kalanick and Uber that determines whether it may be estopped from avoiding arbitration. *See Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97-98 (2d Cir. 1999)

(applying estoppel principles where plaintiff treated non-signatory companies and their signatory assignees as though they were "interchangeable" and "as a single unit"); *accord Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1718 (Cal. Ct. App. 2003) (plaintiff estopped from avoiding arbitration where it alleged an "integral relationship between" signatory and non-signatory defendant). Indeed, the expansive document requests Plaintiff served on Mr. Kalanick seek information regarding all aspects of ***Uber's*** business operations.

5. Plaintiff Assented to the Arbitration Agreement

Plaintiff agreed to be bound by the Rider Terms, including the Arbitration Agreement, because he had adequate notice of the Terms when he registered for an Uber account. *See Specht*, 306 F.3d at 31. Well-settled contract principles instruct that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Id.* at 29. When determining whether parties assented to contract terms, "courts eschew the subjective and look to objective manifestations of intent as established by words and deeds." *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032, at *8 (S.D.N.Y. Oct. 16, 2006). "[A]n individual who signs or otherwise assents to a contract without reading it (despite having an opportunity to do so) is bound by that contract, including its arbitration provision." *Id.*

When terms and conditions are made available by hyperlink to a separate screen, "the validity of the ... agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Applying New York law, the Ninth Circuit recently identified several factors affecting whether a plaintiff would be bound by hyperlinked terms and conditions, including: "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice" of the terms and conditions. *Id.*; *see Whitt v.*

Prosper Funding LLC, No. 15-cv-136 (GHW), 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (same).

Plaintiff admits that "[t]o become an Uber account holder, an individual first must agree to Uber's terms and conditions and privacy policy" (Am. Compl. ¶ 29), and he was put on inquiry notice of those terms, including the Arbitration Agreement, when he completed the clear, simple, two-step account registration process. The second screen of the registration process expressly informed potential registrants: "By creating an Uber account, you agree to the 'Terms of Service & Privacy Policy,'" with the "Terms of Service & Privacy Policy" distinguished in all-caps, underlined text, and a bright blue color, indicating a hyperlink. Mi Decl. ¶ 5b. The registration process ends with a push of a button just above this notice. *Id.* The registration process thus provides "immediately visible notice of the existence of license terms" (*Specht*, 306 F.3d at 31), and "explicit textual notice that" creating an Uber account "will act as a manifestation of the user's intent to be bound" by those terms (*Nguyen*, 763 F.3d at 1177; *see also, e.g.*, *Lanier v. Uber Techs., Inc.*, No. 15-cv-09925-BRO, DE 25 at 4-7 (C.D. Cal. May 11, 2016) (confirming the validity of a similar Uber rider agreement and compelling arbitration); *Whitt v. Prosper Funding LLC*, No. 15-cv-136-GHW, 2015 WL 4254062, at *5 (S.D.N.Y. July 14, 2015) (plaintiff bound by terms, including arbitration clause, accessible by "conspicuous hyperlink" immediately above a "continue" button, citing an "abundance of persuasive authority")).[9]

[9] *Accord 5381 Partners LLC v. Shareasale.com, Inc.*, 2013 WL 5328324, at *4 (E.D.N.Y. Sept. 23, 2013); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837-38 (S.D.N.Y. 2012).

6. The Arbitration Agreement Is Not Unconscionable

Plaintiff cannot establish any basis for avoiding his agreement to arbitrate disputes under New York's law of unconscionability.[10] On this question, the Court's analysis is limited to whether the Arbitration Agreement—standing alone—is unconscionable. *See Rent-A-Center*, 561 U.S. at 70-71. A contract is unconscionable only when it is "so grossly unreasonable … in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 828 (N.Y. 1988). "[U]nconscionability generally requires both procedural and substantive elements." *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002). The party opposing arbitration bears the burden of proving unconscionability. *Bynum v. Maplebear Inc.*, No. 15-cv-6263, 2016 WL 552058, at *6 (E.D.N.Y. Feb. 12, 2016). Thus, Plaintiff must show a complete "absence of meaningful choice on … [his] part … together with contract terms which are unreasonably favorable to [Uber]." *Desiderio v. Nat'l Assoc. of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999); *accord Gillman*, 534 N.E.2d at 828. Plaintiff cannot meet this heavy burden.

Far from being "unreasonably favorable" to either party, the Arbitration Agreement is bilateral and contains rider safeguards. The agreement: (1) permits riders (but not Uber) to collect attorneys' fees and expenses if they prevail in arbitration; (2) eliminates potentially prohibitive travel expenses by providing that arbitration proceedings "will be conducted in the county" where the rider resides; and (3) if a rider's claim for damages does not exceed $75,000,

[10] Although New York law applies to unconscionability issues, the standards under California law are the same. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914 (Cal. 2015); *Pinnacle Museum Towers*, 55 Cal. 4th at 246 (requiring proof that an arbitration provision is "so one-sided as to 'shock the conscience'").

Uber will pay ***all*** of the rider's "filing, administrative and arbitrator fees." DE 29-1 at 9. These provisions comprehensively safeguard the rider's access to the arbitral forum.[11]

Plaintiff has characterized the Rider Terms as a contract of adhesion, but this is both incorrect and insufficient to render the Arbitration Agreement invalid. Indeed, *even if* the Arbitration Agreement had been offered "on a 'take it or leave it' basis …. [that] is not sufficient under New York law to render the [arbitration] provision procedurally unconscionable." *Ragone*, 595 F.3d at 122; *accord Peng v. First Republic Bank*, 219 Cal. App. 4th 1462, 1470 (Cal. Ct. App. 2013) ("Assuming the Agreement here is adhesive in character, this adhesive aspect of an agreement is not dispositive") (internal quotations omitted).[12] This is particularly true where Plaintiff simply "could … have chosen another service" rather than consent to the Arbitration Agreement. *Ranieri*, 759 N.Y.S.2d at 449; *Desiderio*, 191 F.3d at 207 (requiring proof of complete "absence of meaningful choice").[13] The same is true under California law. *See Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482 (Cal. Ct. App. 2006) ("There can be no

[11] Even if the Court determines that any provision is unconscionable, "the appropriate remedy … is to sever the improper provision of the arbitration agreement, rather than void the entire agreement." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 124-25 (2d Cir. 2010) (internal citations omitted); *accord Roman v. Super. Ct.*, 172 Cal. App. 4th 1462, 1477 (Cal. Ct. App. 2009) ("the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement"); Cal. Civ. Code § 1670.5 (authorizing severance).

[12] *See also Carr v. Credit One Bank*, No. 15-cv-6663, 2015 WL 9077314, at *3 (S.D.N.Y. Dec. 16, 2015) ("If acceptance of unwanted vendor terms rendered a contract unconscionable, then *any* contract containing a provision that a counterparty insisted upon would be unconscionable"); *U1it4Less v. FedEx Corp.*, No. 11 Civ. 1713(KBF), 2015 WL 3916247, *4 (S.D.N.Y. June 25, 2015) (standard form contract not unconscionable where there were no "high pressure tactics or deceptive language," and plaintiff acknowledged that other firms provided the same services); *see also Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 787 (2d Cir. 2003); *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009).

[13] *See also U1it4Less, Inc. v. FedEx Corp.*, 2015 WL 3916247, at *4 (S.D.N.Y. June 25, 2015) (no unconscionability where "FedEx was not the only provider of shipping services available to plaintiff"); *Anonymous v. JP Morgan Chase & Co.*, 2005 WL 2861589, at *6 (S.D.N.Y. Oct. 31, 2005); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

oppression establishing procedural unconscionability … when the customer has meaningful choices."); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758, 771 (Cal. Ct. App. 1989) (same); *see also McCabe v. Dell, Inc.*, 2007 WL 1434972, at *3 (C.D. Cal. Apr. 12, 2007) (distinguishing between employment agreements and agreements concerning a "consumer *non-essential* good," such as Uber's service). If Plaintiff did not like Uber's Terms, he was free to choose from *any number* of alternative methods for locating transportation services in New York—e.g., similar peer-to-peer ridesharing apps, like Lyft, Gett, or Curb, or traditional providers, like taxi, black car, or other private car services. Indeed, Plaintiff identified such alternatives in his Complaint. Am. Compl. ¶¶ 96, 100.

Finally, to the extent Plaintiff contends that the class waiver in the Arbitration Agreement is unconscionable, the Supreme Court has squarely foreclosed this argument in the context of arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 340, 344 (2011); *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1137 (Cal. 2013) ("[T]he FAA preempts the unconscionability of class arbitration waivers in consumer contracts.").[14]

CONCLUSION

For the foregoing reasons, the Court should dismiss this action and compel arbitration of Plaintiff's claims.

Dated: June 7, 2016

Respectfully submitted,

/s/ Karen L. Dunn

BOIES, SCHILLER & FLEXNER LLP

[14] Indeed, although this Court held that the class waiver as a *stand-alone provision* could be unconscionable under California's *Discover Bank* rule, both Plaintiff and the Court recognized that such state rules are no longer valid with respect to class waivers in arbitration agreements. *See* DE 44 at 17-19; DE 43 at 11 (same); *see also Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013).

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2016, I filed and therefore caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of New York on all parties registered for CM/ECF in the above-captioned matter.

/s/ Ryan Y. Park
Ryan Y. Park

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiff,

-v-

TRAVIS KALANICK,

Defendant.

15 Civ. 9796

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On December 16, 2015, plaintiff Spencer Meyer filed this putative antitrust class action lawsuit against defendant Travis Kalanick, CEO and co-founder of Uber Technologies, Inc. ("Uber"). See Complaint, Dkt. 1. Although many of the allegations of the complaint related to practices identified with Uber, plaintiff Meyer named only Mr. Kalanick in the suit, and not Uber itself, possibly in order to avoid an arbitration clause in the User Agreement between plaintiff and Uber. See User Agreement, Dkt. 24-1, at 7-8. Defendant Kalanick thereafter made a motion to dismiss, which was denied on March 31, 2016, as well as a motion for partial reconsideration of the Court's opinion on the motion to dismiss, which was denied on May 9, 2016. See Opinion and Order dated March 31, 2016, Dkt. 37; Opinion and Order dated May 7, 2016, Dkt. 44.

On May 20, 2016, defendant Kalanick moved to join Uber as a necessary party to the litigation pursuant to Fed. R. Civ. P. 19(a) (compulsory joinder).[1] See Memorandum of Law in Support of Defendant Travis Kalanick's Expedited Motion for Joinder of Uber Technologies, Inc. as a Necessary Party ("Def. Br."), Dkt. 47. Third party Uber, for its part, moved to intervene in the litigation pursuant to Fed. R. Civ. P. 24(a) (intervention as of right) or, alternatively, Fed. R. Civ. P. 24(b) (permissive intervention). See Proposed Intervenor Uber Technologies, Inc.'s Memorandum of Law in Support of Motion to Intervene for the Limited Purpose of Compelling Arbitration,[2] ("Uber Br."), Dkt. 59. Plaintiff opposed the motions of both defendant Kalanick and Uber on June 6, 2016. See Plaintiff's Memorandum of Law in Opposition to (1) Defendant Travis Kalanick's Expedited Motion

[1] Defendant Kalanick also moved, in the alternative, for permissive joinder of Uber pursuant to Fed. R. Civ. P. 20. See Def. Br. at 11-12. However, counsel for Mr. Kalanick withdrew this motion at oral argument on June 16, 2016. See Transcript, 6/16/16. Even if he had not withdrawn this motion, the motion would have been denied, as a defendant may not use Rule 20 to join parties unless that defendant has asserted a counter-claim or cross-claim. In any event, the motion for permissive joinder is hereby denied. See Fed. R. Civ. P. 20(a)(2)(A).

[2] Uber styled its motion to intervene as one made "for the limited purpose of compelling arbitration" and attached to its intervention motion a brief in support of a motion to compel arbitration. See Uber Br., Exhibit 2, Dkt. 59-2. As Uber acknowledged at oral argument, however, if the Court grants defendant Kalanick's motion to join Uber or Uber's motion to intervene, then Uber will be a part of the case regardless of whether it succeeds in compelling arbitration. See Transcript, 6/16/16. In fact, Kalanick has also moved to compel arbitration. See Notice of Motion, Dkt. 80. The Court in this Memorandum Order is not considering the merits of any motion to compel arbitration, and the Court's decision on the instant joinder and intervention motions has no bearing whatsoever on the arbitration question.

for Joinder of Uber Technologies, Inc. as a Necessary Party, and (2) Proposed Intervenor Uber Technologies, Inc.'s Motion to Intervene for the Limited Purpose of Compelling Arbitration ("Pl. Opp. Br."), Dkt. 75. Defendant Kalanick and Uber each replied on June 9, 2016, and the Court heard oral argument on both motions on June 16, 2016. Having considered the parties' submissions and arguments, the Court hereby grants defendant Kalanick's motion to join Uber pursuant to Fed. R. Civ. P. 19(a), and, concomitantly, denies Uber's motion for intervention as moot.[3]

> Fed. R. Civ. P. 19(a) reads, in its entirety:
>
> (a) Persons Required to Be Joined if Feasible. (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19. "Rule 19(a) requires the Court to join any person who is necessary to effect 'complete relief,' where such joinder is feasible." Jota v. Texaco, Inc., 157 F.3d 153, 162

[3] Both Mr. Kalanick and Uber confirmed at oral argument that the granting of Mr. Kalanick's motion to join Uber would obviate any need for the Court to reach Uber's motion. See Transcript, 6/16/16.

(2d Cir. 1998). In this case, the Court finds that it could not, in Uber's absence, accord "complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

This point is apparent from the face of plaintiff's Amended Complaint. For example, plaintiff "demands judgment against Kalanick as follows: . . . C. A declaration that the use of the [Uber] pricing algorithm for setting fares as described above is unlawful." First Amended Complaint ("Am. Compl."), Dkt. 26, at 25-26. Moreover, the "descri[ption] above" includes such statements as that "[d]river-partners agree, in writing, to collect fares through the Uber App. Driver-partners understand and agree that they will not compete with other driver-partners on price because Uber controls the fare. Driver-partners agree to participate in a combination, conspiracy, or contract to fix prices when they swipe 'accept' to accept the terms of Uber's written agreement," id. ¶ 70, and "[f]ares are calculated based on an Uber-generated algorithm. As demand for car services increases among users, applying the Uber algorithm results in increased fares ('surge pricing')," id. ¶ 47. Furthermore, after describing allegedly unlawful agreements between "Kalanick, Uber, and Uber's driver-partners," the complaint states that plaintiff and putative class members "are entitled to an injunction that terminates the ongoing violations alleged in this Complaint." Id. ¶ 133.

Thus, fairly read, the Amended Complaint alleges that Uber's scheme for setting prices, as well as the terms of Uber's contracts with drivers, constitute an antitrust violation. Plaintiff then seeks declaratory and injunctive relief against the operation of these mechanisms. While plaintiff now pretends that he "seeks no relief whatsoever against Uber," Pl. Opp. Br. at 8, such an assertion is at odds with any fair reading of plaintiff's claim.[4] Any antitrust violation that defendant Kalanick is claimed to have committed could only have resulted from his orchestration of, and participation in, an alleged conspiracy facilitated by the Uber app and Uber's contracts with drivers. The declaration plaintiff seeks, that the use of the Uber pricing algorithm for setting fares is unlawful, is no mere appendage to the Complaint: it is a fundamental part of the relief necessary to remedy plaintiff's claimed injury.[5] Consequently, the Court determines that it cannot, in Uber's

[4] Plaintiff's arguments in opposition to defendant Kalanick's motion to dismiss also make amply clear that plaintiff's basic demand for relief is, to a significant extent, directed against Uber. See Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss, Dkt. 33, at 1 ("Uber drivers are competitors who do not compete. . . . This price-fixing holds because participating drivers commit to charge fares set by the Uber app.").

[5] Plaintiff has not sought to further amend its already-amended complaint. Moreover, the Court finds that plaintiff could not amend its complaint to suggest that relief is being sought only against defendant Kalanick, not against Uber, while maintaining the essential elements of its antitrust claim. It would still be the case that Uber "claims an interest relating to the subject of the action and is so situated that disposing of the action in [Uber's] absence may . . . as a practical matter impair or impede [Uber's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). See infra.

absence, "accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

An additional basis for mandatory joinder, the Court finds, is that Uber "claims an interest relating to the subject of the action and is so situated that disposing of the action in [Uber's] absence may . . . as a practical matter impair or impede [Uber's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Specifically, Uber has an interest in defending the legality and continued use of Uber's pricing algorithm and its contracts with drivers against the claim that these instruments violate the antitrust laws. These interests could be impaired as a result of an adverse finding against Mr. Kalanick in this action. See Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 700-01 (2d Cir. 1980).

Defendant Kalanick also points out that if Uber is not joined in this action, Uber might be bound by an injunction against Mr. Kalanick, and/or might be collaterally estopped from contesting antitrust liability in other suits against it. See Def. Br. at 8-11. While the Court need not reach the merits of these collateral arguments, such possibilities are by no means difficult to envisage. See, e.g., 7 W. 57th St. Realty Co., LLC v. Citigroup, Inc., No. 13-cv-981, 2015 WL 1514539, at *26 (S.D.N.Y. Mar. 31, 2015); Discon Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 166 (W.D.N.Y. 2000); Spectacular Venture, L.P. v.

World Star Int'l, Inc., 927 F. Supp. 683, 684-85 (S.D.N.Y. 1996); Reliance Ins. Co. v. Mast Const. Co., 84 F.3d 372, 377 (10th Cir. 1996). And the very risk involved is an additional reason for granting the joinder motion. See Takeda v. Nw. Nat. Life Ins. Co., 765 F.2d 815, 821 (9th Cir. 1985). As Rule 19 recognizes, it is the practical effects of non-joinder on which the Court must focus, and Uber faces real-world impediments to its interests that justify the application of mandatory joinder.

It is true, as plaintiff notes, that "[i]n a suit to enjoin a conspiracy not all the conspirators are necessary parties." State of Ga. v. Pennsylvania R. Co., 324 U.S. 439, 463 (1945); see also Ward v. Apple Inc., 791 F.3d 1041, 1048 (9th Cir. 2015). But it does not follow that a co-conspirator cannot be a necessary party. See Ward, 791 F.3d at 1049. In this case, the Court finds that Uber is a necessary party given Uber's interest in maintaining its pricing algorithm and its contracts with drivers.

For all these reasons, the Court hereby grants defendant Kalanick's motion to join Uber pursuant to Fed. R. Civ. P. 19(a). The parties are directed to phone Chambers on Monday, June 20, 2016 to discuss scheduling for the motions to compel arbitration filed by defendant Kalanick and Uber. The Clerk of Court is directed to close docket entries 46 and 58, and to add Uber Technologies, Inc. as a defendant in this case.

SO ORDERED.

Dated: New York, NY
June 19, 2016

JED S. RAKOFF, U.S.D.J.