16-2750(L)

16-2752(CON)

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 16-2750(L), 16-2752(CON)

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

Plaintiff-Counter-Defendant - Appellee,

—v.—

UBER TECHNOLOGIES, INC.,

Defendant-Counter-Claimant - Appellant,

TRAVIS KALANICK,

Defendant-Appellant,

ERGO,

Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SPENCER MEYER,

Plaintiff,

v.

TRAVIS KALANICK,

Defendant.

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New York, N.Y.

15 Civ. 9796(JSR)

January 6, 2016
11:12 a.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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(Case called)

THE COURT: Good morning. I should note for the record that Mr. Park is my former law clerk. I never recuse myself when either friends or law clerks appear before me but I cut off all one-on-one personal communication. Usually by the end of the case they are former friends.

So, thank you for your case management plan.

Now, I take it the plaintiff does want a jury trial?

MR. WADSWORTH: Yes, your Honor.

THE COURT: Very good.

So the real dispute, I gather so far as the case management plan is concerned, is whether or not to stay discovery while there is a motion to dismiss. My usual practice is to give the parties the following choice. Either we will have an expedited motion to dismiss schedule and then stay discovery for that very brief period of time, or we will have a more leisurely motion to dismiss schedule but begin discovery, not depositions but document discovery. So the proposal here doesn't seem to fit either of those patterns. So let's see what we can come up with.

So assuming you want to stay discovery on the defense side, what is the quickest you could file your motion to dismiss?

MR. SKINNER: Your Honor, I think the schedule we

proposed is a pretty quick one, given the fact that --

THE COURT: Not by my standards.

MR. SKINNER: What would the Court consider to be accelerated?

THE COURT: You have already thought about your motion to dismiss. In fact, you sort of in what you sent me indicated the grounds that you think you have. If I recall correctly, you are talking about personal jurisdiction and failure to state a claim, right?

MR. SKINNER: Yes. It is really more failure to state a claim.

THE COURT: So, you know, I know there are only a few hundred lawyers in your firm or maybe more than a few hundred but --

MR. SKINNER: There is much less than a few hundred, your Honor.

THE COURT: Well, I remember when Boies, Schiller was about three people. How many lawyers are you now?

MR. SKINNER: About 250.

THE COURT: Oh, OK, a tiny mom-and-pop operation. So why can't you file in a week?

MR. SKINNER: The only reason I would hesitate to commit to a week is that not only did we just come into the case two days ago, so we do have -- while we read the complaint, we processed it and we think we know what our

arguments are, we have to coordinate with our client to allow him the opportunity to review whatever it is we file and build in some time for that.

THE COURT: I understand all of that, but my point is it delays the case to hold up discovery. So I'm very reluctant to do that unless we can get a motion to dismiss done quickly. Otherwise, I mean, if you prefer to have document discovery go forward, then I'm perfectly happy with giving you more time, but I think that's the dilemma, if you will.

MR. SKINNER: I understand, your Honor. I think what I would ask the Court to do is to split the difference and give us to the end of next week so we would have essentially ten days rather than seven.

THE COURT: All right. So that would be moving papers on -- let's see. Today is the 6th. So that would be moving papers on the 15th.

MR. SKINNER: Yes.

THE COURT: All right. And how about on the plaintiff's side for answer?

MR. WADSWORTH: So, your Honor, we, of course, would prefer the plan B between the two choices, with written discovery proceeding now, with a schedule like the one that we proposed in the case management plan. If we were to go with the stay with the more accelerated motion practice, which is not the route we would --

THE COURT: I'm sorry. I don't see how you are prejudiced by a quick motion to dismiss schedule. If this case is going to disappear, you might as well know it before you expend time on discovery. Where you would be prejudiced is if this became the basis for a long drawn out delay in your lawsuit. That never happens in my court. I move my cases, as you may know, very quickly.

So I think the question really is -- you know already, at least in general terms, what their grounds are -- so how long would it take you to file answering papers?

MR. WADSWORTH: We would ask in that case for two weeks.

THE COURT: OK. Two weeks is very reasonable. So that's January 29th.

Reply papers, let's see, February 4th. And let's look at February 11th for oral argument.

THE CLERK: You are out.

THE COURT: I'm out, OK. How about February 10th?

THE CLERK: February 10th, a Wednesday, all we have is argument in the morning.

THE COURT: OK. So 4 o'clock on February 10th.

And I will undertake to get you a bottom-line ruling -- this will obviously not be the full opinion but at least you'll know whether the case is going forward or not -- by no later than February 24th.

So going backwards now to the rest of the case management plan, it seems to me that document requests can be served anytime up to February 17th -- but can be served much earlier than that -- but the response will not be due until March 1st, one week after my ruling. Is that right?

(Pause)

I guess one week after the ruling is March 2nd. So I am going to just write that in. So the plaintiff is free to not wait around to February 17th, which is the last date to file -- you can file earlier than that -- but the normal rules for when a response is due will be changed to March 1st. So the responses will be due on March 1st. Ditto the very limited interrogatories that I permit under Local Rule 33.3(a).

Now, I think all the other dates are fine. We'll talk about class certification in a minute, but we'll put this down now for a final pretrial conference on July 6 at 4 p.m. There is a possibility I may be out that first week of July, in which case I'll let you know well in advance and we'll just move it a few days into the next week.

In terms of class certification, my suggestion is, assuming the case goes forward, that when plaintiff is ready to move for class certification, you just convene a joint conference call with the plaintiff and defendant and the Court. I will set a date for it then. I think it is probably premature to set the schedule for it. OK?

All right. So I've signed the case management plan and it will be filed electronically and therefor available to both sides.

Anything else we need to take up today?

MR. WADSWORTH: Not from the plaintiff, your Honor.

MR. SKINNER: One matter I want to note for the Judge or comment. I know the plaintiff is seeking a jury trial. I just want to note defendant reserves his right to oppose that request. There may be some contractual provisions relevant to that with respect to the possible waiver of a jury trial in the defendant's user agreement.

THE COURT: OK. That's fine. I'm just putting it down now as a jury trial that's being asked for by one party because if they don't ask for it now they waive that right, so.

MR. SKINNER: And one other question, your Honor. Does the stay of discovery, is that a blanket stay that also covers the 26(a)(1) disclosures?

THE COURT: Yes. I think that makes sense.

MR. SKINNER: Thank you, your Honor.

THE COURT: All right. Very good.

MR. WADSWORTH: Your Honor, just some clarification.

Third-party discovery, can that go forward?

THE COURT: What do you have in mind?

MR. WADSWORTH: I am not sure at this point. I wanted to at least ask it.

THE COURT: Well, I think that's going to present the same issue. I think the answer to that is no absent some specific reason why it ought to go forward. If you come up with a specific reason and want to convene a conference call with the Court, of course all of this is always subject to revision in light of changed circumstances.

MR. WADSWORTH: Understood, your Honor. Thanks.

THE COURT: Very good. Thanks very much.

THE CLERK: All rise.

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SA-9

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 Complaint nonetheless invokes that same antitrust law to attack Uber's innovative technology and its benefits to consumers and competition. The Complaint attempts this feat by alleging 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 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 Complaint fails 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 Complaint 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 independent decisions to enter

[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. *See* 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 Jan. 15, 2016).

into vertical agreements with Uber. The Complaint 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. The Complaint does not explain how Mr. Kalanick supposedly joined the conspiracy.

The Complaint also contains no mention at all of 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 Complaint's only indication 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 between the alleged co-conspirators to fix prices, that the Supreme Court held insufficient in *Bell Atlantic Corp. v. Twombly*, 555 U.S. 550 (2007).

The Complaint hypothesizes that the decisions of independent driver-partners to adhere to Uber's pricing algorithm for setting fares can *only* be explained by an impossibly unwieldy conspiracy to engage in unlawful conduct. Yet an alternative, and unquestionably true, explanation for these parallel actions is immediately apparent: 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.

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 Complaint, with prejudice.

STATEMENT OF FACTS ALLEGED IN THE COMPLAINT

Defendant Travis Kalanick is the Chief Executive Officer and co-founder of Uber. Compl. at 1. He is the sole defendant named in Plaintiff's 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, competing with each other for riders"). "The Uber App utilizes dispatch software to send the nearest independent driver to the requesting party's 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.* ¶¶ 2, 5, 24, 27. 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.* ¶ 42. The pricing algorithm is primarily based on a trip's "time and distance." *Id.* ¶ 50. 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.* ¶ 52. 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. Declaration of Michael Colman, Ex. 2 ("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 without support of any kind 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." Compl. ¶¶ 60-61. Uber offers a variety of "different car service experiences," *id.* ¶ 25, with each "experience" providing a different level of service and price point.[3]

Plaintiff alleges that "[v]arious 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." *Id.* ¶ 20. Specifically, the Complaint asserts that all driver-

[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, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citations and quotations marks omitted).

[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). Plaintiffs allege that Uber is a vertical actor vis-à-vis driver-partners, who are in a horizontal relationship with one another. Compl. ¶ 95.

partners who have accepted so much as a single ride request through the Uber App have entered into "a horizontal agreement *amongst themselves* to adhere to the artificial price setting embodied in the Uber pricing algorithm." *Id.* ¶ 96 (emphasis added). Mr. Kalanick is the only person or entity identified by name as a party to the purported horizontal conspiracy. *See id.* ¶ 66 ("Kalanick is not only the CEO and co-founder of Uber; he has been a driver who has used the Uber App"). The Complaint 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.* ¶ 67 (alleging that Mr. Kalanick "tweeted" about his experience as a driver-partner).

The Complaint alleges that this conspiracy spans across the entire United States, *id.* ¶ 84, and includes an estimated 20,000 driver-partners operating in New York City in October 2015, *id.* ¶ 39. 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.* ¶ 36; *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 "coordinated" the unlawful horizontal agreement among all of these driver-partners. Compl. ¶ 93; *see also id.* ¶ 72 (alleging that "Kalanick, in his position as Uber CEO, has orchestrated collusion among driver-partners"); *id.* ¶ 49 ("Kalanick and Uber control the fare charged to riders").

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] 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" between each of the alleged co-conspirators to violate the Sherman Act); *Fisher v. Berkeley*, 475 U.S. 260, 266 (1986) ("there can be no liability under § 1 [of the Sherman Act] in the absence of agreement" between separate entities). 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 conspiracy existed." *Id.*

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

Plaintiff's 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. Instead, the Complaint's sole allegation of a conspiracy is its conclusory statement that there is "an unlawful agreement among the . . . driver-partners to adhere to the Uber pricing algorithm." Compl. ¶ 93. 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").

The facts included in the Complaint fall far short of what is required to support the inference that any agreement existed, let alone an agreement to engage in unlawful conduct. Other than Mr. Kalanick, the Complaint fails to identify by name any individual and fails to even delineate the precise numerical scope of the co-conspirator class (probably because the enormity of the class itself proves the implausibility of Plaintiff's claims). The Complaint is also silent on the timing of the alleged agreement, or where the agreement was entered. It offers no guidance whatsoever as to how such a numerous and geographically diffuse group of co-conspirators came to reach a single, common agreement. And it fails to indicate how new driver-partners become party to the supposed conspiracy.

Further, while the Complaint includes the conclusory suggestion that Mr. Kalanick, as CEO, somehow "orchestrated" this conspiracy, Compl. ¶ 72, it offers nothing to explain how he

could have possibly coordinated a horizontal agreement among such a large and diverse group of independent transportation providers.[4] Even more glaring, there is no allegation of any identified 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).

Indeed, the 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

[4] 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. While Mr. Kalanick, as Uber's CEO, may play a distant role in determining the nature of *Uber's* contractual relationships with downstream driver-partners, the Complaint does not allege that Mr. Kalanick has ever met or communicated with any driver-partner in his capacity *as a driver-partner*. *See* Compl. ¶¶ 33-40, 66-71. 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. 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.*, 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").

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 the driver-partners, nor does he attempt to identify particular individuals who had such discussions. Put simply, the poverty of plausible allegations in Plaintiff's Complaint—the absence of any factual allegations to support a nationwide conspiracy between hundreds of thousands of driver-partners—is reason enough to dismiss this Complaint.

B. Plaintiff has failed to plead a plausible conspiracy.

Plaintiff's Complaint also fails because the alleged conspiracy is impossible. Indeed, beyond proffering a legal conclusion and with no citation to any communications whatsoever between driver-partners, Plaintiff relies on nothing more than the independent decisions of hundreds of thousands of driver-partners to use the Uber App as evidence of parallel conduct to support a conspiracy. Compl. ¶¶ 60. This reliance is misplaced. 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 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 decision of each driver-partner to sign up with Uber and accept the contractual terms offered, which include use of the pricing algorithm.

i. 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. Compl. ¶ 76; *see id.* ¶¶ 42-44. In a direct contradiction of that statement, Plaintiff also alleges that surge pricing "is not always in the individual driver-partner's best interest" because it can "result in greater rider dissatisfaction and fewer rides for drivers." *Id.* ¶ 62.

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 Complaint fails to even hint at how such a common motive could plausibly translate into an actual agreement among hundreds of thousands of transportation providers around the nation. More to the point, the Complaint is entirely devoid of facts indicating that driver-partners' collective agreement to surge pricing somehow confers collective benefits that overwhelm each driver-partner's individual interest in avoiding it. *Cf. Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 327 (2d Cir. 2010) (complaint survived motion to dismiss because "plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals").

Plaintiff also 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 surge pricing as a component of its pricing algorithm. The Complaint 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, and independent driver-partners may either accept or reject those terms. Compl. ¶¶ 41-44, 49-52.

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

Under Plaintiff's theory, all driver-partners who ever 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. Each Class member may therefore recover his or her full loss from any defendant who can be shown to have participated in the alleged conspiracy"). This theory 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 that yielded a particularized agreement to raise prices. *Id.* at 657-58 ("On the heels of their initial meetings with Apple, the Publisher Defendants enthusiastically shared the good news

that Apple was willing to enter the e-book market with a significantly higher price point" that would force Amazon to also raise prices). 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.[5]

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; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (courts must apply "judicial experience and common sense" in assessing a claim's plausibility). 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 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.

[5] Indeed, even an alleged conspiracy among a discrete number of actors who have had communications between each other and have a common motive may be insufficient to survive a pleading challenge where the alleged conspirators have a plausible alternative motive for their actions. *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").

Here, there is a far more "natural 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 for suggested pricing. Driver Terms ¶ 4.1; Compl ¶ 60 ("All of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm").

The only reasonable inference to be drawn from the 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 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. *See* Compl. ¶ 93.

That is not the law. *See 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"). 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). The instant Complaint similarly supplies nothing by which this Court could reasonably infer that any driver-partner ever came to an agreement *with a competing driver-partner*, as opposed to completely independent and lawful vertical agreements *with Uber*. The Complaint should be dismissed for this independent reason.

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. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5-7 (2006). Vertical price restraints, by contrast, are judged by the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898-99 (2007). 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 among the Publisher Defendants to raise ebook prices"); *Commercial Data Servers*, 2002 WL 1205740 at *3 (vertical actor may not be held per se liable based on "horizontal effects" of a series of vertical agreements; "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 illegality is the exception, not the rule, because "[p]er 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"); *id.* at 886 ("To justify a *per se* prohibition a restraint must have ''manifestly anticompetitive'' effects, and ''lack any redeeming virtue") (quotation marks and citation omitted).

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

Not only does the Complaint fail to allege a plausible horizontal conspiracy among driver-partners to support its theory of per se liability, the facts set forth in the Complaint establish only that a legal structure was in place—specifically, a single firm acting vertically. The 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, 41, 60. These allegations, if accepted as true, only establish a single firm acting vertically.

The Supreme Court and this 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. 3, 15 (1997) ("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 broader market for transportation services offers a perfect illustration for 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"

that has expanded consumer welfare and prompted competition on a wide variety of fronts, including price.[6] 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.

Leegin, 551 U.S. at 891. 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.

If Plaintiff's theory of proving conspiracy were credited, every vertical resale price maintenance arrangement would automatically support an inference of a horizontal price-fixing conspiracy. The Supreme Court has squarely rejected that theory. *Id.* at 895.

B. The Complaint does not allege a rule of reason theory of liability and, in any event, such a theory would fail given the facts alleged.

The Complaint never uses the words "rule of reason," nor does it attempt to plead facts necessary to satisfy the standard by which rule of reason claims are evaluated. *See Khan*, 522 U.S. at 10. As the Supreme Court has advised repeatedly, courts are not permitted to supplement a plaintiff's allegations in search of possible antitrust violations that have not been pled. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("As the case comes to us, we must assume that the [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the

[6] FTC Comment Letter at 2-3.

[plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."); *Twombly*, 550 U.S. at 563 n.8 (same).[7]

Even assuming that Plaintiff had sought to state a rule of reason claim, the Complaint would fail. First, as described *supra*, the facts as alleged actually establish a single firm acting vertically in a legal manner. Second, Plaintiff's market definition is facially inadequate to satisfy a rule of reason analysis. *See In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 448 (S.D.N.Y. 2015) ("to engage in rule of reason analysis, the Court must determine what the relevant market is, and then examine that market" to determine whether the alleged restraint of trade had an actual adverse effect on competition). The Complaint proposes a relevant market defined as "mobile app-generated ride-share service, with a relevant sub-market of Uber car service." Compl. ¶ 91. This market definition fails because it offers no "theoretically rational explanation" for excluding non-mobile app generated ride-share services, such as legacy taxi companies, or other transportation methods including public transit such as subway and bus travel, and private transit such as personal vehicle use and walking.[8] *Commercial Data Servers*, 2002 WL 1205740, at *4. Each of these alternatives is a clear substitute for the services provided by driver-partners.

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[7] *See also Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If [the single entity's] price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. But it would be inconsistent with this Courts antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.") (footnotes omitted); *Leegin*, 551 U.S. at 907-08 (refusing to consider theory of antitrust liability that was not alleged in the Complaint).

[8] Not only does Uber compete with other transportation services such as public and private transit, as well as taxis and drivers using competing platforms such as Lyft and Gett, driver-partners utilizing the Uber App are free to provide competing services as taxi drivers or by using competing platforms, and they frequently do. Driver Terms ¶ 2.4.

In *Bookhouse*, this Court rejected plaintiffs' limitation of the relevant market to "the market for e-books" where the Complaint did not allege facts indicating that "e-books and print books are not acceptable substitutes." 985 F. Supp. 2d at 621. Similarly here, the Complaint contains nothing to rebut the commonsense proposition that "mobile app generated ride share services" provided by driver-partners, traditional taxi services, and public transit are reasonably interchangeable such that the change in price for one service would affect demand in the others (*i.e.*, these services have a positive cross-elasticity of demand). The "failure to define the relevant market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal" of a rule of reason claim. *Commercial Data Servers*, 2002 WL 1205740, at *4 (citing cases); *see also 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 rule of reason further requires a Plaintiff to 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." *Khan*, 522 U.S. at 10. The only factual allegations in the 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 user the Uber App." Compl. ¶ 52. But as the 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.* ¶¶ 52-56, 63. An increase in supply cannot be alleged to be anticompetitive. Accordingly, even the surge pricing aspect of the pricing algorithm is a procompetitive measure that plainly benefits consumers.

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, 161 (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, setting the price of their products at an artificially high rate" 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 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[9] and to waive class actions with respect to disputes arising out of their use of the App. User Terms at 9 ("**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.**") (bold in original). Plaintiff seeks to avoid that waiver by raising class action claims against the company's CEO as opposed to Uber itself.[10] But Plaintiff's claims do not arise out of the CEO's actions; they arise out of the pricing algorithm administered by Uber through the Uber App.

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

[10] 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 individuals 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) (noting that individuals may be subject to criminal penalties for organizing a horizontal price-fixing conspiracy in violation of § 1 of the Sherman Act).

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 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. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009).[11] In this case, the relevant contract law is the law of California. *See* 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); *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.

First, the 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." Compl. ¶ 93. Were that not enough, the Complaint is rife with allegations that Mr. Kalanick and Uber worked closely together.[12]

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[11] 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).

[12] *See, e.g.*, Compl. ¶ 9 ("Kalanick is the public face of Uber, its co-founder and manager of its operations."); *id.* ¶¶ 42-45 (raising allegations about an "Uber-generated algorithm" that Mr. Kalanick allegedly "conceived of," "implemented" and "defend[ed]"); *id.* ¶ 47 (alleging Mr.

Moreover, many of Plaintiff's allegations—at least 28 of the 110 paragraphs in the Complaint—refer exclusively to Uber, not Mr. Kalanick. *See, e.g.*, Compl. ¶¶ 22-34, 36-37, 39-42, 50, 52-54, 60-62, 76, 79. In short, Plaintiff does little, if anything, to distinguish between Mr. Kalanick and Uber. *See Jacobson v. Snap-on Tools Co.*, 15 Civ. 2141 (JD), 2015 WL 8293164, at *6 (N.D. Ca. De. 9, 2015) (finding conduct "interdependent" where, as here, plaintiff treated two entities "as a single actor" and "consistently refer[ed] to them collectively").

The Complaint's allegations are founded in and interconnected with the User Agreement. Plaintiff alleges that he "used Uber car services on multiple occasions," Compl. ¶ 7, and "paid higher prices for car services" as a result, *id.* ¶ 8. Plaintiff further alleges that drivers charged prices set by the pricing algorithm in the Uber App. *E.g.*, *id.* ¶ 3 ("*Through the Uber App*, Kalanick's direct competitors thus empowered him to set his and their fares.") (emphasis added); *id.* ¶ 30 ("Uber account holders can obtain a 'Fare Quote' directly from the Uber App"). The Complaint contains no allegations that prices were set outside of the Uber App's pricing algorithm. To resolve Plaintiff's antitrust claim at trial, the trier of fact would need to resolve questions—such as Plaintiff's right to use Uber's services, the services Uber was obligated to provide Plaintiff, and whether payment was made using the Uber App—that turn on interpretation of the User Agreement. *See id.* ¶ 29 ("To become an Uber account holder, an individual first must agree to Uber's terms and conditions"); User Terms at 1-2.

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-

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Kalanick posted statements on the Uber website); *id.* ¶ 49 ("the pricing algorithm and its surge pricing component, Kalanick and Uber artificially set the fares for its driver-partners to charge to riders."); *id.* ¶ 73 ("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.") *id.* ¶ 82 (referring to the Uber App as "Kalanick's Uber ride-share service"); *id.* ¶ 96 ("Through Kalanick's and Uber's actions . . .").

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. 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 id.* at 1185-86.[13]

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*

[13] *See also id.* ("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"); *Lau v. Mercedes-Benz USA, LLC*, No. CV 11-1940 MEJ, 2012 WL 370557, at *4 (N.D. Cal. Jan. 31, 2012) (applying California law to compel arbitration with non-signatory because, among other things, 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).

Under California law, moreover, "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). This same principle should apply to Plaintiff's class action waiver. The Complaint alleges that Mr. Kalanick acted "in his position as Uber CEO" to orchestrate the asserted price-fixing conspiracy. Compl. ¶ 72; *see also id.* ¶ 1 (describing Mr. Kalanick as Uber's "CEO" and "primary facilitator").

CONCLUSION

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

Dated: January 15, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-v-

TRAVIS KALANICK,

Defendant.

15 Civ. 9796

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

On December 16, 2015, plaintiff Spencer Meyer, on behalf of himself and those similarly situated, filed this putative antitrust class action lawsuit against defendant Travis Kalanick, CEO and co-founder of Uber Technologies, Inc. ("Uber"). See Complaint, Dkt. 1. Mr. Meyer's First Amended Complaint, filed on January 29, 2016, alleged that Mr. Kalanick had orchestrated and facilitated an illegal price-fixing conspiracy in violation of Section 1 of the federal Sherman Antitrust Act, 15 U.S.C. § 1, and the New York State Donnelly Act, New York General Business Law § 340. See First Amended Complaint ("Am. Compl."), Dkt. 26, ¶¶ 120-140. Plaintiff claimed, in essence, that Mr. Kalanick, while disclaiming that he was running a transportation company, had conspired with Uber drivers to use Uber's pricing algorithm to set the prices charged to Uber riders, thereby restricting price competition

among drivers to the detriment of Uber riders, such as plaintiff Meyer. See id. ¶¶ 1, 7.

On February 8, 2016, defendant Kalanick moved to dismiss the Amended Complaint. See Notice of Motion, Dkt. 27. Plaintiff opposed on February 18, 2016; defendant replied on February 25, 2016; and oral argument was held on March 9, 2016.[1] Having considered all of the parties' submissions and arguments, the Court hereby denies defendant's motion to dismiss.

In ruling on a motion to dismiss, the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in favor of the plaintiff. Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 227 (2d Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). In the antitrust context, stating a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough

[1] During oral argument, the Court invited both sides to submit letters regarding certain studies cited by plaintiff in the Amended Complaint. See Transcript of Proceedings dated March 9, 2016 ("Tr."), 24:12-16. These letters, respectively dated March 11, 2016 ("Pl. Letter") and March 15, 2016 ("Def. Letter"), will be docketed along with this Opinion.

fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

The relevant allegations of the Amended Complaint are as follows. Uber, founded in 2009, is a technology company that produces an application for smartphone devices ("the Uber App") that matches riders with drivers (called "driver-partners"[2]). See Am. Compl. ¶¶ 2, 21, 24, 27. Uber states that it is not a transportation company and does not employ drivers. See id. ¶¶ 2, 23. Defendant Kalanick, in addition to being the co-founder and CEO of Uber, is a driver who has used the Uber app. See id. ¶ 3. Plaintiff Meyer is a resident of Connecticut, who has used Uber car services in New York. See id. ¶ 7.

Through the Uber App, users can request private drivers to pick them up and drive them to their desired location. See id. ¶ 24. Uber facilitates payment of the fare by charging the user's credit card or other payment information on file. See id. ¶ 32. Uber collects a percentage of the fare as a software licensing fee and remits the remainder to the driver. See Am. Compl. ¶ 27. Drivers using the Uber app do not compete on price, see id. ¶ 2, and cannot negotiate fares with drivers for rides, see id. ¶ 34.

[2] The Court uses "drivers" and sometimes "Uber drivers" instead of Uber's term "driver-partners" for the sake of simplicity, but this usage is not meant to imply any employment relationship between Uber and these drivers, which defendant firmly denies.

Instead, drivers charge the fares set by the Uber algorithm. See id. ¶ 2. Though Uber claims to allow drivers to depart downward from the fare set by the algorithm, there is no practical mechanism by which drivers can do so. See id. ¶ 69. Uber's "surge pricing" model, designed by Mr. Kalanick, permits fares to rise up to ten times the standard fare during times of high demand. See id. ¶¶ 26, 48, 50. Plaintiff alleges that the drivers have a "common motive to conspire" because adhering to Uber's pricing algorithm can yield supra-competitive prices, Am. Compl. ¶ 90, and that if the drivers were acting independently instead of in concert, "some significant portion" would not agree to follow the Uber pricing algorithm. See id. ¶ 93.

Plaintiff further claims that the drivers "have had many opportunities to meet and enforce their commitment to the unlawful agreement." Am. Compl. ¶ 92. Plaintiff alleges that Uber holds meetings with potential drivers when Mr. Kalanick and his subordinates decide to offer Uber App services in a new geographic location. See id. ¶ 40. Uber also organizes events for its drivers to get together, such as a picnic in September 2015 in Oregon with over 150 drivers and their families in attendance, and other "partner appreciation" events in places including New York City. See id. ¶ 41. Uber provides drivers with information regarding upcoming events likely to create high demand for transportation and informs the drivers what their

increased earnings might have been if they had logged on to the Uber App during busy periods. See id. ¶ 58. Moreover, plaintiff alleges, in September 2014 drivers using the Uber App in New York City colluded with one another to negotiate the reinstitution of higher fares for riders using UberBLACK and UberSUV services (certain Uber car service "experiences"). See id. ¶¶ 25, 87. Mr. Kalanick, as Uber's CEO, directed or ratified negotiations between Uber and these drivers, and Uber ultimately agreed to raise fares. See id. ¶ 87.

As to market definition, plaintiff alleges that Uber competes in the "relatively new mobile app-generated ride-share service market," of which Uber has an approximately 80% market share. Amended Complaint ¶ 94-95. Uber's chief competitor in this market, Lyft, has only a 20% market share, and a third competitor, Sidecar, left the market at the end of 2015. See id. ¶¶ 95-96. Although, plaintiff contends, neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber's own experts have suggested that in certain cities in the U.S., Uber captures 50% to 70% of business customers in the combined market of taxis, cars for hire, and mobile-app generated ride-share services. See id. ¶ 107.

Plaintiff claims to sue on behalf of the following class: "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," with certain exclusions, such as Mr. Kalanick. See id. ¶ 113. Plaintiff also identifies a "subclass" of riders who have paid fares based on surge pricing. See id. ¶ 114. Plaintiff alleges that he and the putative class have suffered antitrust injury because, were it not for Mr. Kalanick's conspiracy to fix the fares charged by Uber drivers, drivers would have competed on price and Uber's fares would have been "substantially lower." See id. ¶ 109. Plaintiff also contends that Mr. Kalanick's design has reduced output and that, as "independent studies have shown," the effect of surge pricing is to lower demand so that prices remain artificially high. Am. Compl. ¶ 110. Based on these allegations, plaintiff claims that Mr. Kalanick has violated the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, New York General Business Law § 340. See id. ¶¶ 120-140.

The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. "[A] plaintiff claiming a § 1 violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities." Capital Imaging Associates, P.C. v. Mohawk Valley Med. Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993). "If a § 1 plaintiff establishes the existence of an illegal contract or

combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either per se or under the rule of reason." Id. at 542.

"Conduct considered illegal per se is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination." Id. (internal citation and quotation marks omitted). By contrast, "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether 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. 3, 10 (1997).

Antitrust law also distinguishes between vertical and horizontal price restraints. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988). "Restraints that are per se unlawful include

horizontal agreements among competitors to fix prices," while, at least in the context of resale price maintenance, "[v]ertical price restraints are to be judged according to the rule of reason." Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 907 (2007). In the instant case, the Court finds that plaintiff has adequately pled both a horizontal and a vertical conspiracy.

As to the horizontal conspiracy, plaintiff alleges that Uber drivers agree to participate in a conspiracy among themselves when they assent to the terms of Uber's written agreement (the "Driver Terms") and accept riders using the Uber App. See Am. Compl. ¶¶ 70-71. In doing so, plaintiff indicates, drivers agree to collect fares through the Uber App, which sets fares for all Uber drivers according to the Uber pricing algorithm. See id.[3] In plaintiff's view, Uber drivers forgo

[3] Defendant Kalanick contends that Uber's Driver Terms "do provide that driver-partners have the discretion to charge less than the suggested price determined by Uber's pricing algorithm." Reply Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss, Dkt. 34 ("Def. Reply Br.") at 2 n.1, citing Declaration of Michael Colman, Dkt. 29, Exhibit 2 ("Driver Terms") § 4.1 ("Customer shall always have the right to: (i) charge a fare that is less than the pre-arranged fare . . ."). "Customer" here refers to "an independent company in the business of providing transportation services," that is, Uber's driver-partners. See Driver Terms; Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br.") at 4. Plaintiff points out, however, that the Driver Terms also require drivers to agree that "the Fare provided under the Fare Calculation is the only payment Customer will receive in connection with the provision of Transportation Services," Driver Terms ¶ 4.1, and that more importantly, "there is no mechanism by which drivers can charge anything but the App-dictated fare." Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br."), Dkt. 33, at 4. For the purposes of evaluating defendant's motion to dismiss, the Court will assume that drivers have no practical mechanism by which to depart from the fares

competition in which they would otherwise have engaged because they "are guaranteed that other Uber drivers will not undercut them on price." See id. ¶ 72; Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. Br."), Dkt. 33, at 11. Without the assurance that all drivers will charge the price set by Uber, plaintiff contends, adopting Uber's pricing algorithm would often not be in an individual driver's best interest, since not competing with other Uber drivers on price may result in lost business opportunities. See Am. Compl. ¶ 72. The capacity to generate "supra-competitive prices" through agreement to the Uber pricing algorithm thus provides, according to plaintiff, a "common motive to conspire" on the part of Uber drivers. See Amended Complaint ¶ 90. Plaintiff also draws on its allegations about meetings among Uber drivers and the "September 2014 conspiracy," in which Uber agreed to reinstitute higher fares after negotiations with drivers, to bolster its claim of a horizontal conspiracy. See Pl. Opp. Br. at 14-15; Am. Compl. ¶¶ 41, 87, 92. In plaintiff's view, defendant Kalanick is liable as the organizer of the price-fixing conspiracy, Am. Compl. ¶¶ 76, 88; Pl. Opp. Br. at 9, and as an Uber driver himself, see id. ¶¶ 80-85.

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set by Uber's algorithm. Defendant acknowledges that any discretion drivers may have to charge a lower fare "is not material to this motion," Def. Reply Br. at 2 n.1, and oral argument proceeded on the assumption that Uber sets mandatory prices for drivers to charge. See Transcript of Oral Argument dated March 9, 2016 at 4:12-16.

Defendant Kalanick argues, however, that the drivers' agreement to Uber's Driver Terms evinces no horizontal agreement among drivers themselves, as distinct from vertical agreements between each driver and Uber. See Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss ("Def. Br."), Dkt. 28, at 9, 12-13; Transcript of Oral Argument dated March 9, 2016 ("Tr.") 3:19-22. According to Mr. Kalanick, drivers' individual decisions to enter into contractual arrangements with Uber constitute mere independent action that is insufficient to support plaintiff's claim of a conspiracy. See Def. Br. at 9. Defendant asserts that the most "natural" explanation for drivers' conduct is that each driver "independently decided it was in his or her best interest to enter a vertical agreement with Uber," and doing so could be in a driver's best interest because, for example, Uber matches riders with drivers and processes payment. See Def. Br. at 12-13. In defendant's view, the fact that "a condition of [the agreement with Uber] was that the driver-partner agree to use Uber's pricing algorithm" does not diminish the independence of drivers' decisions. See id. at 13.

It follows, defendant contends, that such vertical arrangements do not support a horizontal conspiracy claim. See Def. Br. at 13-14, citing, e.g., Leegin, 551 U.S. at 885 (manufacturer's agreements requiring retailers to charge certain

minimum prices, a form of "vertical minimum resale price maintenance," were to be judged by the rule of reason); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (a manufacturer with no purpose to create a monopoly may "exercise his own independent discretion as to parties with whom he will deal" and "announce in advance the circumstances under which he will refuse to sell").

The Court, however, is not persuaded to dismiss plaintiff's horizontal conspiracy claim. In Interstate Circuit v. United States, 306 U.S. 208 (1939), the Supreme Court held that competing movie distributors had unlawfully restrained trade when they each agreed to a theater operator's terms, including price restrictions, as indicated in a letter addressed to all the distributors. For an illegal conspiracy to exist, the Supreme Court stated:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Circuit, 306 U.S. at 226-27. Much more recently, the Second Circuit stated:

> [C]ourts have long recognized the existence of "hub-and-spoke" conspiracies in which an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the

> "spokes." These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub's] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.

United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015), cert. denied, Mar. 7, 2016 (internal citation and quotation marks omitted); see also Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012)("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.").

In this case, plaintiff has alleged that drivers agree with Uber to charge certain fares with the clear understanding that all other Uber drivers are agreeing to charge the same fares. See Amended Complaint ¶¶ 70-71. These agreements are organized and facilitated by defendant Kalanick, who as at least an occasional Uber driver, is also a member of the horizontal conspiracy. See id. ¶¶ 76, 84.

On a motion to dismiss, the Court is required to draw all reasonable inferences in plaintiff's favor. See Town of Babylon, 699 F.3d at 227. Given this standard, the Court finds that plaintiffs have plausibly alleged a conspiracy in which drivers sign up for Uber precisely "on the understanding that the other

[drivers] were agreeing to the same" pricing algorithm, and in which drivers' agreements with Uber would "be against their own interests were they acting independently." Apple, 791 F.3d at 314, 320. Further, drivers' ability to benefit from reduced price competition with other drivers by agreeing to Uber's Driver Terms plausibly constitutes "a common motive to conspire." Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir. 1987). The fact that drivers may also, in signing up for Uber, seek to benefit from other services that Uber provides, such as connecting riders to drivers and processing payment, is not to the contrary. Of course, whether plaintiff's allegations are in fact accurate is a different matter, to be left to the fact-finding process.

The Court's conclusion that plaintiff has alleged a plausible horizontal conspiracy is bolstered by plaintiff's other allegations concerning agreement among drivers. Plaintiff, as noted supra, contends that Uber organizes events for drivers to get together, see Am. Compl. ¶ 41, and, more importantly, that Mr. Kalanick agreed to raise fares following drivers' efforts to negotiate higher rates in September 2014. See id. ¶ 87.[4] While it is true that these allegations about agreements

[4] Though defendant's counsel argued at oral argument that if these events were "an antitrust violation, Mr. Kalanick would be a victim and not a participant in the conspiracy," since he allegedly initially opposed the higher rates, Tr. 37:8-9, the fact remains that, if plaintiff's allegations are taken as

among drivers reaching even beyond acceptance of Uber's Driver Terms are not extensive, see Def. Reply Br. at 7 n.8, nonetheless, they provide additional support for a horizontal conspiracy, and plaintiff need not present a direct, "smoking gun" evidence of a conspiracy, particularly at the pleading stage. Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013).

More basically, it is well to remember that a Sherman Act conspiracy is but one form of conspiracy, a concept that is as ancient as it is broad. It is fundamental to the law of conspiracy that the agreements that form the essence of the misconduct are not to be judged by technical niceties but by practical realities. Sophisticated conspirators often reach their agreements as much by the wink and the nod as by explicit agreement, and the implicit agreement may be far more potent, and sinister, just by virtue of being implicit. Recently, for example, in United States v. Ulbricht, the Government alleged that defendant Ulbricht had organized an online marketplace for illicit goods and services called Silk Road. See United States v. Ulbricht, 31 F. Supp. 3d 540, 546-47 (S.D.N.Y. 2014). In ruling on motions in limine in Ulbricht, Judge Forrest rejected the defense's argument that transactions among Silk Road's users

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true, Mr. Kalanick agreed to a fare raise that set higher fares for all Uber drivers in the relevant groups.

gave rise to "only buy-sell relationships and not conspiratorial behavior" or, at most, to "a multitude of discrete conspiracies." United States v. Ulbricht, 79 F. Supp. 3d 466, 481 (S.D.N.Y. 2015). Instead, Judge Forrest noted that the Government charged the defendant with sitting "atop an overarching single conspiracy, which included all vendors who sold any type of narcotics on Silk Road at any time." Id. at 490. In the instant case, Uber's digitally decentralized nature does not prevent the App from constituting a "marketplace" through which Mr. Kalanick organized a horizontal conspiracy among drivers.

Defendant argues, however, that plaintiff's alleged conspiracy is "wildly implausible" and "physically impossible," since it involves agreement "among hundreds of thousands of independent transportation providers all across the United States." Def. Br. at 1. Yet as plaintiff's counsel pointed out at oral argument, the capacity to orchestrate such an agreement is the "genius" of Mr. Kalanick and his company, which, through the magic of smartphone technology, can invite hundreds of thousands of drivers in far-flung locations to agree to Uber's terms. See Tr. 12:15-16. The advancement of technological means for the orchestration of large-scale price-fixing conspiracies need not leave antitrust law behind. Cf. Ulbricht, 31 F. Supp. 3d at 559 ("if there were an automated telephone line that

offered others the opportunity to gather together to engage in narcotics trafficking by pressing "1," this would surely be powerful evidence of the button-pusher's agreement to enter the conspiracy. Automation is effected through a human design; here, Ulbricht is alleged to have been the designer of Silk Road . . ."). The fact that Uber goes to such lengths to portray itself - one might even say disguise itself - as the mere purveyor of an "app" cannot shield it from the consequences of its operating as much more.

Recent jurisprudence on vertical resale price maintenance agreements does not, as defendant would have it, undermine plaintiff's claim of an illegal horizontal agreement. See Def. Br. at 15. In Leegin, the Supreme Court held that resale price maintenance agreements - e.g., a retailer's agreement with a manufacturer not to discount the manufacturer's goods beneath a certain price - are to be judged by the rule of reason, unlike horizontal agreements to fix prices, which are per se illegal. See Leegin, 551 U.S. at 886, 907. The Court cited various "procompetitive justifications for a manufacturer's use of resale price maintenance," id. at 889, and concluded that although this practice may also have anticompetitive effects, the rule of reason is the best approach to distinguishing resale price maintenance agreements that violate the antitrust laws from those that do not. See id. at 897-900.

Here, unlike in Leegin, Uber is not selling anything to drivers that is then resold to riders.[5] Moreover, the justifications for rule of reason treatment of resale price maintenance agreements offered in Leegin are not directly applicable to the instant case. See Pl. Opp. Br. at 15-16; Tr. 20-21. In particular, the Court's attention has not been drawn to concerns about free-riding Uber drivers, or to efforts that Uber drivers could make to promote the App that will be under-provided if Uber does not set a pricing algorithm. See Leegin, 551 U.S. at 890-91. While Mr. Kalanick asserts that Uber's pricing algorithm facilitates its market entry as a new brand, see Def. Br. at 16-17, this observation – which is fairly conclusory – does not rule out a horizontal conspiracy among Uber drivers, facilitated by Mr. Kalanick both as Uber's CEO and as a driver himself. The Court therefore finds that plaintiff has adequately pleaded a horizontal antitrust conspiracy under Section 1 of the Sherman Act.

As to plaintiff's claim of a vertical conspiracy, a threshold question is whether plaintiff has alleged a vertical

[5] Leegin's statement that "[t]o the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason," 551 U.S. at 893, thus does not clearly apply to the instant case, since Uber is setting no minimum resale prices. Moreover, Leegin did not purport to overrule Interstate Circuit, which, for the reasons described supra, permits a finding of a conspiracy among competitors in circumstances such as those of the instant case. See Interstate Circuit, 306 U.S. at 226-27.

conspiracy in the Amended Complaint, which defendant denies. See Def. Reply Br. at 8; Def. Letter at 1. Although plaintiff's allegations of a vertical conspiracy are much more sparse than his contentions about a horizontal conspiracy, the Court finds that the Amended Complaint adequately pleads a vertical conspiracy between each driver and Mr. Kalanick.[6] In particular, plaintiff alleges that "[a]ll of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm," Am. Compl. ¶ 68, and that Mr. Kalanick designed this business model, see id. ¶¶ 76, 78. The Amended Complaint also includes several allegations that would be pertinent to a rule of reason, vertical price-fixing theory. See id. ¶¶ 94-108. Under the Sherman Act count, plaintiff states that the "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 . . ." Am. Compl. ¶ 124. Plaintiff claims that Mr. Kalanick is per se liable as organizer of the conspiracy and as an occasional Uber driver, ¶¶ 128-29, and then states that "[i]n the alternative, Kalanick is also liable under Section 1 of the Sherman Act under a 'quick look'

[6] Indeed, defendant himself referred in the briefing to "a vertical price arrangement like that described in the Amended Complaint." Def. Br. at 17. But see Def. Reply Br. at 8 ("The Amended Complaint . . . does not allege a vertical restraint in violation of the antitrust laws.").

or 'rule of reason' analysis." Id. ¶ 130. In the Court's view, these allegations of legal theory, when coupled with the allegations of pertinent facts, are sufficient to plead a vertical conspiracy theory.

The question, then, is whether this theory is plausible under a "rule of reason" analysis. Under this analysis, "plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market." Capital Imaging, 996 F.2d at 543. "To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must 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 v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) (internal citation and quotation marks omitted).

As to market definition, plaintiff defines the relevant market as the "mobile app-generated ride-share service market." Am. Compl. ¶ 94. Plaintiff alleges that Uber has an approximately 80% market share in the United States in this market; Uber's chief competitor Lyft has nearly a 20% market share; and a third competitor, Sidecar, left the market at the end of 2015. Id. ¶¶ 95-97. Plaintiff then explains that traditional taxi service is not a reasonable substitute for

Uber, since, for example, rides generated by a mobile app can be arranged at the push of a button and tracked on riders' mobile phones; riders need not carry cash or a credit card, or, upon arrival, spend time paying for the ride; and riders can rate drivers and see some information on them before entering the vehicle. Id. ¶ 104. Indeed, plaintiff claims, Uber has itself stated that it does not view taxis as ride-sharing competition. Id. ¶ 105.

Plaintiff also alleges that traditional cars for hire are not reasonable substitutes, since they generally need to be scheduled in advance for prearranged locations. Id. ¶ 106. However, plaintiff nevertheless contends that "Uber has obtained a significant share of business in the combined markets of taxis, cars for hire, and mobile-app generated ride-share services," and that Uber's own experts have suggested that in some U.S. cities, Uber has 50% to 70% of business customers "among all types of rides," which seems to refer to these combined markets. Id. ¶ 107.

Defendant contests plaintiff's proposed market definition, arguing that plaintiff provides inadequate justification for the exclusion not just of taxis and car services, but also of public transit such as subways and buses, personal vehicle use, and walking. See Def. Br. at 18; Def. Reply Br. at 8. In defendant's

view, "[e]ach of these alternatives is a clear substitute for the services provided by driver-partners." Def. Br. at 18.

One could argue this either way (and defendant's attorneys are encouraged to hereinafter walk from their offices to the courthouse to put their theory to the test). But for present purposes, plaintiff has provided plausible explanations for its proposed market definition, and the accuracy of these explanations may be tested through discovery and, if necessary, trial. "Market definition is a deeply fact-intensive inquiry [and] courts [therefore] hesitate to grant motions to dismiss for failure to plead a relevant product market." Chapman v. New York State Div. for Youth, 546 F.3d 230, 238. Plaintiff's allegation that Uber - an industry member - recognizes that it does not compete with taxis, see Am. Compl. ¶ 105, also deserves consideration. See Todd v. Exxon Corp., 275 F.3d 191, 206 (2d Cir. 2001) (declining to exclude evidence of industry recognition from the analysis of market definition). The Court finds that plaintiff has pleaded a plausible relevant product market. See Capital Imaging Associates, 996 F.2d at 546.

The Court further finds that plaintiff has adequately pleaded adverse effects in the relevant market. Specifically, plaintiff pleads that "Kalanick's actions have further restrained competition by decreasing output," Am. Compl. ¶ 110 (citing "independent studies"); "Uber's market position has

already helped force Sidecar out of the marketplace," id. ¶ 102; "Uber's dominant position and considerable name recognition has also made it difficult for potential competitors to enter the marketplace," id. ¶ 103.[7]

Defendant counters that Uber provides many pro-competitive benefits, see Def. Reply Br. at 9, and also disputes the conclusions that plaintiff purports to draw from the cited studies. See Def. Letter. Defendant's counter-assertions, while certainly well worth a fact-finder's consideration, do not persuade the Court to grant a motion to dismiss. The Court hence determines that plaintiff has plausibly pleaded adverse effects in the relevant market. Consequently, the Court finds that plaintiff has presented a plausible claim of a vertical conspiracy under Section 1 of the Sherman Act.

Finally, the Court addresses plaintiff's state law Donnelly Act claim. The Second Circuit has held that this New York 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 n.2 (2d Cir. 2011). Though plaintiff contends that his Donnelly Act claim survives even if his Sherman Act claim fails, see Pl. Opp. Br. at 21, the Court has no occasion to assess this contention, for

[7] In plaintiff's letter submitted after oral argument, plaintiff further described the "independent studies" quoted anonymously in Amended Complaint ¶ 110 that supposedly support these assertions. See Pl. Letter.

it holds that plaintiff's Sherman Act claim withstands defendant's motion to dismiss and, for the same reasons, the Court declines to dismiss plaintiff's Donnelly Act claim.[8]

For these reasons, 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.

Dated: New York, NY
March 31, 2016

JED S. RAKOFF, U.S.D.J.

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[8] Defendant argues that plaintiff is equitably estopped from avoiding the class action waiver in the user agreement that plaintiff made with Uber. See Def. Br. at 21; Colman Declaration, Dkt. 29, Exhibit 1 (User Agreement), at 8-9. The relevant provision of the User Agreement reads:

> Dispute Resolution: You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement . . . will be settled by binding arbitration . . . 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.

User Agreement at 8-9. Although plaintiff has sued Mr. Kalanick personally and not Uber, defendant claims that plaintiff's claims against Mr. Kalanick are "intimately founded in and intertwined with" the underlying agreement with Uber. See Def. Br. at 23, quoting Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013). The Court finds, however, 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.

HSE

Harter Secrest & Emery LLP

ATTORNEYS AND COUNSELORS

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March 11, 2016

BY ELECTRONIC MAIL
Hon. Jed S. Rakoff
United States District Judge
United States Courthouse
500 Pearl Street, Room 1340
New York, New York 10007

Re: Meyer v. Kalanick, 15 Civ. 9796 (JSR)

Dear Judge Rakoff:

We write in response to the Court's request that Plaintiff identify the studies referenced in Paragraph 110 of the First Amended Complaint. That paragraph alleges that Defendant's "actions have further restrained competition by decreasing output," and that "independent studies have shown [that] 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." This letter cites two independent studies supporting these allegations.

The first is a Northeastern University study by researchers Le Chen, Alan Mislove, and Christo Wilson, published in October 2015 (the "Northeastern University Study"). *See* L. Chen, A. Mislove, & C. Wilson, Peeking Beneath the Hood of Uber, October 2015, *available at* http://www.ccs.neu.edu/home/cbw/pdf/chen-imc15.pdf (last visited Mar. 10, 2016). The Northeastern University Study concluded that surge pricing "seem[s] to have a small effect on attracting new cars," but "appears to have a larger, negative effect on demand, which causes cars to either become idle or leave the surge area." *Id.* at 12. Significantly, although the study used the term "demand," it actually measured output, defining "demand" as "fulfilled demand," *i.e.*, the number of rides supplied by Uber driver-partners. *Id.* at 4. That is the equivalent of output. *See, e.g., General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) (Posner, J.) (equating "amount supplied" to "output"). Thus, the study concluded that surge pricing had "a large, negative effect" on "demand," *see* Northeastern University Study at 12, by measuring a large, negative effect on output.

The second study supporting the allegations in paragraph 110 was conducted by Nicholas Diakopoulos of the University of Maryland (the "University of Maryland Study"). *See* N. Diakopoulos, "How Uber surge pricing really works," Washington Post, *available at*

https://www.washingtonpost.com/news/wonk/wp/2015/04/17/how-uber-surge-pricing-really-works/ (last visited Mar. 10, 2016). The University of Maryland Study suggested "that rather than motivating a fresh supply of drivers, surge pricing instead re-distributes drivers already on the road." *Id.* "[I]t appears that rather than getting more drivers on the road in the short-term, Uber's surge pricing instead depletes drivers in adjacent areas. A price hike in one area means drivers move there, but away from another, leaving it underserved.... At the end of the day the Uber systems appears to be more about *re-allocation* of existing supply." *Id.*

These studies support the allegation in paragraph 110 that Defendant's actions, including his implementation of an agreement among all driver-partner competitors to surge prices, have decreased output. In particular, these studies suggest that drivers' commitments to Defendants' surge pricing have artificially lowered output during periods of high demand by decreasing output—either by decreasing output in absolute terms (*i.e.*, decreasing the number of fulfilled sales), *see* Northeastern University Study at 12, or by decreasing output in relative terms (*i.e.*, preventing supply from increasing as expected during periods of heightened demand), *see* University of Maryland Study.

Paragraph 110 of the First Amended Complaint thus alleges that Defendant has orchestrated a surge pricing conspiracy among competing drivers to maintain "prices artificially high and . . . reap[] artificially high profits." First Amended Complaint ¶ 110. That conclusion reflects the economic reality that price-fixing agreements, like the one orchestrated by Defendant, are the equivalent to restrictions on output: "If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus . . . raising price [and] reducing output . . . have the same anticompetitive effects." *General Leaseways, Inc.*, 744 F.2d at 594-95.

Thank you for your consideration of this submission. If Plaintiff can provide any further assistance to the Court, please do not hesitate to contact us.

Respectfully submitted,

Harter Secrest & Emery LLP

/s/ Brian M. Feldman

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VIA E-MAIL

March 15, 2016

Hon. Jed. S. Rakoff
500 Pearl Street, Room 1340
New York, NY 10007

Re: *Meyer v. Kalanick*, 15 Civ. 9796 (JSR)

Dear Judge Rakoff:

We write in response to Plaintiff's letter brief dated March 11, 2016, in which Plaintiff purports to identify the "studies" he relies on for his allegation that surge pricing "restrain[s] competition by decreasing output." Am. Compl. ¶ 110.

As an initial matter, even if Plaintiff is correct about these "studies," he has still failed to state a claim for a vertical restraint in violation of the rule of reason. As we noted at oral argument, the Amended Complaint alleges only a horizontal price-fixing conspiracy *among driver-partners* in which Mr. Kalanick allegedly participated. *Id.* ¶ 126 (alleging a single claim under the Sherman Act based on "a conspiracy, combination, or agreement between all driver-partners to charge the same price"). The Amended Complaint nowhere contains a claim based on a *vertical* restraint in violation of the rule of reason (or the quick look doctrine). Plaintiff's allegations of a horizontal conspiracy, whether examined under per se, quick look or the rule of reason, fail because the Amended Complaint describes an implausible horizontal agreement based exclusively on legal vertical conduct in which individual driver-partners agree with Uber to the Driver Terms. *Id.* ¶ 38. Any allegations that Plaintiff now relies on to argue for a claim of a vertical restraint in violation of the rule of reason are irrelevant because the Complaint does not make such a claim.

Notwithstanding this threshold pleading defect, Plaintiff's self-styled "studies" in fact disprove the very proposition he cites them for: that surge pricing reduces output. The Chen Paper—which has never been accepted for publication in any academic journal (or non-academic journal for that matter)—finds that surge pricing operates only "during times of strained supply" and modestly expands the supply of driver-partners in the short-term by providing an immediate financial incentive to offer rides. Chen Paper at 10-11. The Diakopoulos Blog Post—which was written by a journalism professor and was not subjected to any peer review—concludes that surge pricing, in the short term, reallocates supply from low demand areas to high demand areas—meaning it increases efficiency at no cost to output. More broadly, Diakopoulos observes that surge pricing greatly expands supply in the *long-term*: "The benefit of surge pricing on overall driver supply . . . appears to stem from the long term effects of communicating to drivers when they should in general get on the road for . . . periods of expected high demand." *See* Am. Compl. ¶ 58 (Uber informs drivers of "recent busy periods" and expected periods of high future demand). To expand supply when supply is strained expands output—it does not "decrease" it, as Plaintiff alleges. *See United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1107, 1115 (7th Cir. 1985) (Posner, J.).[1]

The "studies" also squarely refute Plaintiff's allegation in Paragraph 110 that surge pricing is used to maintain "artificially high" prices beyond that necessary to equalize supply and demand. The Chen Paper finds that "the vast majority of surges are short-lived" (less than 10 minutes) and that surge pricing occurs only when supply is constrained. Chen Paper at 10. They further show that, contrary to Plaintiff's allegation, surge pricing is rarely applied and is eliminated as soon as supply and demand equalize. *See id.* at 8 (in New York

[1] The Chen Study finds that surge pricing correlates with low numbers of fulfilled rides, and somehow concludes that surge pricing is *causing* low output. But in acknowledging that surge pricing only arises when supply is constrained, the Chen Study itself proves that low output drives surge pricing rather than the other way around. For example, when a Yankees game concludes, demand may outstrip supply in the Bronx, leading both to fewer fulfilled rides and to surge pricing taking effect. But in no way could surge pricing be deemed the cause of the low output.

City, surge pricing is in effect only 14% of the time); Diakopoulos Blog Post (surge "prices tend to tick down in bigger steps than they move up" and "change every three or five minutes," which is "great for riders").

Even if surge pricing reduced output, which it does not, Plaintiff's own "studies" expose why he cannot state a rule of reason claim under any antitrust theory. First, both "studies" confirm that Plaintiff's relevant market definition—which Plaintiff defines as the "mobile app-generated ride-share service, with a relevant sub-market of Uber car service"—utterly fails as a matter of law. Am. Compl. ¶ 121. As the "studies" explain, Uber competes in a broad transportation marketplace that includes an array of local transport options, including taxis and public transportation. By its own terms, the Chen Paper's methodology is only valid if one assumes the relevant market includes taxis. Because Uber driver-partners "compete with traditional taxis," the Chen Paper purports to use publicly available taxi data as the control group to "validate[] the accuracy of our Uber measurement methodology." Chen Paper at 2-3. Plaintiff's allegation of a "proposed relevant market that clearly does not encompass all interchangeable substitutes" alone requires granting the motion to dismiss. *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 621 (S.D.N.Y. 2013).

Chen's paper also observes that "[t]axis are much denser than Ubers" in Manhattan—with 43 Uber driver-partners competing in the same space as 172 taxis in midtown—and states that the "dearth of Ubers in Manhattan . . . may be due to greater availability of taxis and better public transport." *Id.* at 3, 7. According to Chen, "Uber accounted for 29% of all rides in NYC during 2014." *Id.* at 3. Even if the relevant market were limited just to car services, therefore, Uber would not have market power in New York City, the only specified place that Plaintiff has used Uber's services. Am. Compl. ¶ 7; *see Bookhouse*, 985 F. Supp. 2d at 622 ("courts have rejected market shares between 30 percent and 40 percent as inadequate to demonstrate market power").

Second, the "studies" confirm that Uber has benefited consumers by lowering prices and improving service. A study relied on by Chen found that the average cost of a ride with an Uber driver-partner—including rides subject to surge pricing—is more than 10% cheaper than the average taxi fare.[2] In addition, both studies observe that surge pricing is an essential component of Uber's goal to provide consumers the ability to "push a button and get a ride within minutes." Am. Compl. ¶ 52. The Chen Paper states that "Uber offers expedient service" with average wait times of approximately 3 minutes in New York City, and concludes that the "complex interplay between supply and demand supports Uber's case for implementing dynamic pricing" to reduce wait times for consumers. Chen Paper at 7-8; *see* Diakopoulos Blog Post ("surge pricing works to maintain or improve service quality" by "reduc[ing] estimated times"). Surge pricing is therefore a classic example of what the Supreme Court concluded was legal in *Leegin*: a new market entrant using resale price maintenance to offer enhanced services. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 891 (2007). Surge pricing must therefore survive the rule of reason as a pro-competitive action.

Finally, Plaintiff's assertion of reduced output attributable to surge pricing assumes that Uber driver-partners do not compete with any other transportation service. Yet Plaintiff's "studies" show the exact opposite: when surge pricing is in effect, riders react by switching to reasonably substitutable services, such as taxis and public transport. Unless one assumes that consumers react to surge pricing by deciding to cancel their social plans or not go to work, options which are not suggested in either "study," the price-sensitivity of riders proves that Uber driver-partners have a positive cross-elasticity of demand with competing services—and therefore that Plaintiff's market definition fails as a matter of law. This not only accords with common sense, but also the facts as presented by Plaintiff's "studies." If a consumer facing surge pricing is in midtown surrounded by 172 taxis, 43 Uber driver-partners, the crosstown 7 subway line, several bus lines, and is wearing comfortable walking shoes, she will naturally, and economically rationally, survey the range of her local transportation options and perhaps choose a competing service—or just walk. Output in the relevant market is not reduced.

Sincerely,

/s/ William A. Isaacson

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[2] Brad Stone, *Uber Is Winning Over Americans' Expense Accounts*, Bloomberg, April 7, 2015, available at http://www.bloomberg.com/news/articles/2015-04-07/uber-is-winning-over-americans-expense-accounts.

SA-67

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 FOR RECONSIDERATION OF THE COURT'S HOLDING REGARDING PLAINTIFF'S CLASS ACTION WAIVER

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April 14, 2016

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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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-v-

TRAVIS KALANICK,

Defendant.

15 Civ. 9796

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

On January 29, 2016, plaintiff Spencer Meyer, on behalf of himself and those similarly situated, filed his First Amended Complaint in this putative class action lawsuit against defendant Travis Kalanick, CEO and co-founder of Uber Technologies Inc. ("Uber"). See First Amended Complaint, Dkt. 26. Plaintiff Meyer alleged that defendant Kalanick, as CEO of Uber and an occasional Uber driver, had conspired with Uber drivers to fix prices through the Uber mobile application (the "Uber app") in violation of federal and state antitrust laws. See id. ¶¶ 1, 3, 120-40. On March 31, 2016, this Court issued an Opinion and Order denying defendant Kalanick's motion to dismiss the First Amended Complaint. See Opinion and Order dated March 31, 2016, Dkt. 37. Among much else, the Court found that, contrary to defendant's contentions, plaintiff Meyer had not, in signing a User Agreement with Uber, waived the right to proceed

via class action, nor was plaintiff equitably estopped from pursuing a class action suit against Mr. Kalanick. See id. at 23 n.8.

On April 14, 2016, defendant Kalanick filed a motion for partial reconsideration of the Court's Opinion and Order denying his motion to dismiss. See Notice of Motion, Dkt. 40.[1] In this motion, defendant Kalanick challenges what he describes as a "narrow and discrete issue," viz., the Court's finding that plaintiff Meyer had not waived the right to proceed via class action. See Memorandum of Law in Support of Defendant Travis Kalanick's Motion for Reconsideration of the Court's Holding Regarding Plaintiff's Class Action Waiver ("Def. Br."), Dkt. 41, at 1. Plaintiff filed his opposition to the motion for partial reconsideration on April 21, 2016. See Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion for Partial Reconsideration of the Court's March 31, 2016 Opinion and Order ("Pl. Opp. Br."), Dkt. 43. Having reviewed the parties' papers, the Court, for the reasons stated below, hereby denies defendant's motion for partial reconsideration and holds that plaintiff may continue to seek to pursue a class action.

[1] Defendant Kalanick, as instructed by the Court during a telephone conference held on April 11, 2016, filed his answer to the First Amended Complaint on the same day as his motion for partial reconsideration. See Answer, Dkt. 42. As the Court further informed defendant on that call (without objection from plaintiff), the Court would not construe the filing of the Answer as, per se, a waiver of any issue that defendant might raise in his motion for reconsideration.

By way of background, plaintiff Meyer, in signing-up to use Uber, agreed to Uber's Terms and Conditions for users (the "User Agreement"),[2] which included the following provision:

> **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.

User Agreement at 7-8 (boldface in the original). Defendant Kalanick, though not himself a signatory to the agreement between plaintiff and Uber, claims that the above-quoted language constitutes plaintiff's waiver of the right to proceed

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[2] It may be noted that the User Agreement, a lengthy and detailed agreement written in highly legalistic language, bears all the earmarks of a classic contract of adhesion. See generally Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173 (1983). It is doubtful that any Uber user other than a lawyer has ever read it, let alone understood it.

via class action, and that he may lawfully enforce this class action waiver even without seeking to compel arbitration. See Def. Br. at 5. Mr. Kalanick asks the Court to reconsider its ruling to the contrary.

The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995). "A motion for reconsideration should be granted only when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks omitted).

Here, defendant has not identified any "controlling decision" that the Court overlooked, "intervening change of controlling law," or "clear error" made by the Court in ruling that plaintiff retained the right to proceed via class action. While defendant's arguments are not frivolous, no controlling precedent or obvious point of law requires the Court to rule in defendant's favor. In fact, defendant's arguments on the motion

for partial reconsideration essentially accord with those made, albeit much more briefly, in defendant's motion to dismiss. This time, however, defendant has expanded its argument and cited several new cases, such as U1it4Less, Inc. v. FedEx Corp., No. 11-cv-1713, 2015 WL 3916247 (S.D.N.Y. June 25, 2015) and DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (Dec. 14, 2015). Defendant's motion thus fails to comply with the direction that a motion for reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012), as amended (July 13, 2012) (internal quotation marks omitted). On this ground alone, the Court declines to grant defendant's motion for partial reconsideration.

Independently, even if defendant's motion did not fall short of the standard required for reconsideration, the motion would not succeed. As an initial matter, the Court hereby clarifies that it will apply California law to interpret the User Agreement. Indeed, the parties do not appear to disagree on this point - or, at least, they did not disagree during the briefing on defendant's motion to dismiss. See Def. Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss ("Def. MTD Br."), Dkt. 28, at 23 ("In this case, the

relevant contract law is the law of California."); Memorandum of Law in Opposition to Defendant Travis Kalanick's Motion to Dismiss ("Pl. Opp. MTD Br."), Dkt. 33, at 23 ("California contract law governs the User Agreement"); Def. Br. at 7 n.3 ("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."). Moreover, under New York's "interest analysis" for choice of law, a court "must consider five factors: (1) the place of contracting; (2) the place of the contract negotiations; (3) the place of the performance of the contract; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, places of incorporation, and places of business of the parties." Philips Credit Corp. v. Regent Health Grp., Inc., 953 F. Supp. 482, 502 (S.D.N.Y. 1997). Here, the interest analysis points to the application of California law, especially since Uber is headquartered in California. See Def. Br. at 7 n.3. Therefore, the Court will apply California law to interpret the User Agreement.

Turning to the merits of the motion for partial reconsideration, three main issues present themselves for the Court's consideration. First, does the User Agreement contain a class action waiver that is effective in the absence of a motion

to compel arbitration?[3] (The Court will refer to such a class action waiver as an "independent class action waiver.") Second, if the User Agreement contains an independent class action waiver, is this waiver enforceable, or is it, as plaintiff urges, unconscionable under valid California law? See Pl. Opp. Br. at 9-14. Third, if the User Agreement contains an independent and enforceable class action waiver, may Mr. Kalanick, as a non-signatory to the User Agreement, enforce such a waiver against plaintiff Meyer? In response, the Court finds that, first, the User Agreement contains no independent class action waiver, and that, second, even assuming arguendo that such waiver existed, it would be unenforceable under California law. The Court therefore has no occasion to reach the third issue, i.e., whether Mr. Kalanick, as a non-signatory to the User Agreement, may enforce this agreement against plaintiff Meyer.

Regarding the presence of an independent class action waiver in the User Agreement, defendant Kalanick argues that the bolded sentence in the "Dispute Resolution" section of the User Agreement is not limited to the arbitration context, but simply

[3] Defendant has not made any motion to compel arbitration. In fact, defendant represented in its briefing on the motion to dismiss that "Mr. Kalanick does not seek to compel arbitration here" and that "Mr. Kalanick does not waive and expressly reserves his right to move to compel arbitration in other cases arising out of the User Agreement." See Def. MTD Br. at 22 n.10 (emphasis added).

states "**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.**" User Agreement at 8; see Def. Br. at 6. In defendant's view, the use of the word "or" in the User Agreement "creates two distinct waivers: the right to a trial by jury and, separately, the right to participate in a class action," Def. Br. at 5, and those waivers can each be independently enforceable, not just in the arbitration context but also in a court.

However, defendant's reading of this language in the User Agreement ignores important context. As noted, the bolded sentence referencing class proceedings appears in a section of the User Agreement titled "Dispute Resolution." User Agreement at 7-8. The first sentence of this section provides that "any dispute, claim, or controversy arising out of or relating to this Agreement . . . will be settled by binding arbitration," with certain narrow exceptions. See User Agreement at 7-8 (emphasis added). The bolded sentence quoted above is the second sentence of this section. The third sentence then states: "Further, . . . the arbitrator may not consolidate more than one person's claims . . ." User Agreement at 8. The provisions directly before and after the bolded sentence, then, concern arbitration. The sentence beginning "Further" elaborates on

certain features of the arbitration proceedings discussed in the preceding part of the paragraph, including the bolded sentence. Additionally, the first sentence of the Dispute Resolution section lays out the path that the user "will" be required to follow in signing up to use Uber ("any dispute . . . will be settled by binding arbitration"), while the bolded sentence referencing class proceedings contains a description of the consequences of following this path ("you and Company are each waiving the right to trial by jury or to participate as a plaintiff or class User . . ."). User Agreement at 8.

Given this context, the bolded sentence is most plausibly read as an explanation of the rights that the parties are giving up in agreeing to arbitrate disputes, and not as an independently effective waiver of the right to pursue a class action outside the arbitration context. Since no motion to compel arbitration has been made (and, as noted, appears to have been effectively relinquished), plaintiff Meyer has not, by agreeing to the Dispute Resolution paragraph, waived any right to proceed via a class action lawsuit outside the arbitration context.

The conclusion that the User Agreement does not contain an independent class action waiver outside the arbitration context is also supported by Uber's description of the User Agreement's provision on class proceedings in a suit against Uber in the

Northern District of California, Matthew Philliben and Byron McKnight v. Uber Technologies, Inc. and Rasier, LLC, No. 14-cv-5615 (N.D. Cal.). Although Uber is not a party to the instant proceeding between plaintiff Meyer and defendant Kalanick, nevertheless, insofar as Mr. Kalanick seeks to enforce a contract drafted by Uber, Uber's description of the relevant contractual language carries some weight. In Philliben, in the course of arguing that the arbitration clause in Uber's User Agreement is not procedurally unconscionable, Uber stated that "[t]here is literally one bolded sentence in all the Terms: the part of the Arbitration Agreement that waives the right to a jury trial and to participate in a class action." Defendants' Reply in Support of Motion to Stay Proceedings Pending Arbitration, Philliben, No. 14-cv-5615, Dkt. 38[4] (May 26, 2015) ("Def. N.D. Cal. Br.") (emphasis added). Uber then cited the "Cianfrani Declaration," Exhibit A, at 8, which contains the same language as that found in plaintiff Meyer's User Agreement. See Def. N.D. Cal. Br., citing Declaration of R. Michael Cianfrani in Support of Uber's Motion to Stay Proceedings Pending Arbitration, Exhibit A, Philliben, Dkt. 26-1, at 7-8. While defendant Kalanick contends that plaintiff Meyer has

[4] All docket numbers following references to Philliben refer to the docket of that case.

mischaracterized Uber's reply brief in the Philliben matter,[5] the Court reads Uber's statement in this brief to acknowledge that the class action waiver is "part of the Arbitration Agreement," and therefore not an independent provision of the User Agreement. This statement by Uber provides additional, though not essential, support for the Court's holding that the User Agreement does not include an independent class action waiver.

Defendant Kalanick, in arguing to the contrary, cites two cases in which class action waivers were held to be enforceable outside the arbitration context.[6] See Def. Br. at 7-8, citing U1it4Less, 2015 WL 3916247; Palmer v. Convergys Corp., No. 10-cv-145, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012). But in these cases, the relevant contracts contained class action waivers and no arbitration clauses, so that the issue of whether the class action waiver had effect independently of the arbitration clause did not even arise. See U1it4Less, 2015 WL 3916247, at *1, *4; Palmer, 2012 WL 425256, at *1. Defendant also contends that a party does not waive the ability to enforce all contractual rights simply by not enforcing certain contractual provisions. See Def. Br. at 8. But this argument does not apply if, as the

[5] Mr. Kalanick's short letter to this effect, dated April 25, 2016, will be docketed along with this Opinion and Order.

[6] Neither of these cases applied California law, which, as discussed infra, would hold an independent class action waiver in the User Agreement to be unconscionable.

Court now concludes, the arbitration and class action provisions in Uber's User Agreement are not different or separate. For all these reasons, the Court determines that the User Agreement does not contain an independent class action waiver outside the arbitration context.

Moreover, even assuming arguendo that any such independent class action waiver were included in the User Agreement, it would be unconscionable under the applicable law: the law of California. In Discover Bank v. Superior Court, the California Supreme Court held that when a class action waiver

> is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005). The California Supreme Court noted that

> the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.

Id. at 1112. In support of this proposition, the California Supreme Court cited America Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001), as modified (July 10, 2001), in which the California Court of Appeals stated that "[i]n contrast to Virginia consumer law's ostensible hostility to class actions, the right to seek class action relief in consumer cases has been extolled by California courts. . . . The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the [Terms of Service] forum selection clause." America Online, 108 Cal. Rptr. at 712.

In this case, it is readily apparent that the User Agreement is a contract of adhesion; that plaintiff Meyer's dispute "predictably involve[s] small amounts of damages"; and that plaintiff alleges that Mr. Kalanick "has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." Discover Bank, 113 P.3d at 1110.[7] Indeed, defendant Kalanick does not argue to the contrary. See Def. Br. at 14 n.7. Mr. Kalanick argues, however, that because plaintiff Meyer's claims arise only under federal and New York law, and not California law, Discover Bank's holding on

[7] As noted supra, the Court does not reach the issue of whether any independent and enforceable class action waiver in the User Agreement could be enforced by Mr. Kalanick, a non-signatory.

the unconscionability of class action waivers does not apply to plaintiff's suit. See Def. Br. at 14 n.7; Reply Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss ("Def. MTD Reply Br."), Dkt. 34, at 10. This argument is based on Discover Bank's use of the phrase "at least to the extent the obligation at issue is governed by California law." Discover Bank, 113 P.3d at 1110; see also id. at 1109 ("[s]uch one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.").

It is highly problematic, however, to argue that California law on the unconscionability of class action waivers applies only when California law itself provides the source of liability. The use of the phrase "at least" in the above-cited language from Discover Bank indicates the California Supreme Court's view that a contractual provision could be unconscionable at minimum where the source of liability is California law. The California Supreme Court did not thereby restrict such sources of liability only to California law. See Pl. Opp. Br. at 12-13. This conclusion accords with subsequent statements of Discover Bank's holding by the California Supreme Court. For example, the California Supreme Court in 2013 described the holding of Discover Bank using ellipses in lieu of

the phrase "at least to the extent the obligation at issue is governed by California law":

> We held in Discover Bank that when a class arbitration waiver "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

See Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 196 (Cal. 2013). See also Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 757 (Cal. 2015) ("In Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, we announced a rule that class arbitration waivers in consumer contracts are unconscionable when they are found 'in a setting in which disputes between the contracting parties predictably involve small amounts of damages and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'") (quoting Discover Bank, 113 P.3d at 1110)). Moreover, courts have applied California's unconscionability doctrine without limitation to any specific source of liability. See, e.g., Ingle v. Circuit City Stores,

Inc., 328 F.3d 1165, 1170 (9th Cir. 2003); Zaborowski v. MHN Gov't Servs., Inc., 936 F. Supp. 2d 1145, 1149-56 (N.D. Cal. 2013), aff'd, 601 Fed. App'x 461 (9th Cir. 2014); Bynum v. Maplebear Inc., No. 15-cv-6263, 2016 WL 552058, at *9 (E.D.N.Y. Feb. 12, 2016). The Court therefore holds that California's doctrine on the unconscionability of class action waivers applies to claims arising under law other than California law, including federal and New York law, where, as here, the waiver itself is contained in an agreement governed by California law.

Mr. Kalanick also argues that "[p]laintiff has not pled . . . that the [User] agreement is unconscionable." Def. Br. at 14 n.7. In his reply on the motion to dismiss, Mr. Kalanick cited a California Supreme Court case in which that court, in evaluating a motion to compel arbitration, stated that "[t]he party resisting arbitration bears the burden of proving unconscionability." Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC, 282 P.3d 1217, 1232 (Cal. 2012); see Def. MTD Reply Br. at 10. However, the Court finds that plaintiff, in its briefing on the motion to dismiss and the instant motion for partial reconsideration, has adequately argued in favor of unconscionability. For all these reasons, the Court determines that even if the User Agreement were read (contrary to the Court's reading) to contain an independent class action waiver outside the arbitration context, such a waiver would be

unconscionable under California law here applicable to all claims.

Defendant Kalanick, however, argues that California cases holding class action waivers to be unconscionable, notably Discover Bank, "were decided prior to and were expressly abrogated by the Supreme Court." Def. Br. at 14 n.7, citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); DIRECTV, 136 S. Ct. As a threshold matter, however, to the extent that defendant is claiming that California law on the unconscionability of class action waivers has been nullified in its entirety, defendant appears to have waived that argument. In Mr. Kalanick's reply brief on the motion to dismiss, Mr. Kalanick conceded that "it remains possible post-Concepcion to conclude that a given class waiver is unconscionable." Def. MTD Reply Br. at 10; see also id. ("Class action waivers are unconscionable where 'they operate to insulate a party from liability that otherwise would be imposed under California law.'") (quoting Discover Bank, 113 P.3d at 1110)(emphasis added by defendant).

More importantly, it is clear that the Supreme Court has not overridden the California Supreme Court's determination that class action waivers are unconscionable in the circumstances discussed above, except in the case of an arbitration proceeding. Specifically, in 2011, the Supreme Court held that the Federal Arbitration Act preempted the California Supreme

Court's decision in Discover Bank classifying most collective arbitration waivers in consumer contracts as unconscionable. See Concepcion, 563 U.S. at 340, 352. Two years later, the Supreme Court held, citing "the [Federal Arbitration Act's] mandate," that a class arbitration waiver was enforceable even when the plaintiff's cost of individually arbitrating an antitrust claim outweighed the possible individual recovery. See American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2308-2312 (2013). And in December 2015, the Supreme Court held that a class arbitration waiver was enforceable, even though the contract at issue provided that the arbitration provision would be unenforceable if "the law of your state" rendered the class arbitration waiver unenforceable. DIRECTV, 136 S. Ct. at 466. The Supreme Court reasoned that "the law of your state" could not refer to California law on the unconscionability of class arbitration waivers that had been invalidated in Concepcion. See id. at 469-71.

These Supreme Court decisions, notably Concepcion, stand for the proposition that the Federal Arbitration Act ("FAA") preempts California's rule that class waivers in arbitration agreements are, in certain circumstances, unconscionable. See Sonic-Calabasas, 311 P.3d at 201 ("What is new is that Concepcion clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration

agreements."); Smith v. Jem Grp., Inc., 737 F.3d 636, 641 (9th Cir. 2013) ("Concepcion held that a California law forbidding a class-action waiver provision in arbitration agreements was preempted by the FAA."). But these Supreme Court decisions do not invalidate in toto the California rule that class action waivers may be held unconscionable. In particular, the Supreme Court's cases on FAA preemption do not invalidate California's unconscionability rule outside the arbitration context. For as the California Supreme Court has stated, "state-law rules that do not 'interfere[ ] with fundamental attributes of arbitration' . . . do not implicate Concepcion's limits on state unconscionability rules." Sonic-Calabasas, 311 P.3d at 201 (quoting Concepcion, 563 U.S. at 344).

In addition to this doctrinal observation, the logic behind the Supreme Court decisions on FAA preemption of class arbitration waivers is not readily transferable to class actions outside the arbitration setting. Thus, in Concepcion, the Supreme Court's reasoning centered on the point that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration." Concepcion, 563 U.S. at 344. The Supreme Court cited various "changes brought about by the shift from bilateral arbitration to class-action arbitration," which, the Court indicated, were "fundamental." Id. at 347, citing Stolt-Nielsen S.A. v.

AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010). The Court indicated that class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; that "class arbitration requires procedural formality"; and that "[a]rbitration is poorly suited to the higher stakes of class litigation." Concepcion, 563 U.S. at 347-50. These points are clearly directed specifically to the relationship between required class procedures and arbitration. They do not apply to litigation, which mandates procedural formality, even at the cost of more extended proceedings, and which accepts the higher stakes of class action suits. Concepcion thus provides no basis on which to conclude that California law on the unconscionability of class action waivers would be invalid outside the arbitration setting.

To be sure, the Supreme Court in Italian Colors stated that "[t]he antitrust laws do not evinc[e] an intention to preclude a waiver of class-action procedure" and "[n]or does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights." Italian Colors, 133 S. Ct. at 2309 (internal quotation marks omitted); see also U1it4Less, 2015 WL 3916247, at *3-*4. But these statements in Italian Colors simply reject certain possible grounds for holding that "the FAA's mandate" did not require the relevant class action waiver to be enforced. See Italian Colors,

133 S. Ct. at 2309 (noting that courts must enforce arbitration agreements according to their terms, even in the face of claims that "allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command.") (internal quotation marks omitted). These statements in Italian Colors do not remotely support the conclusion that state law on the unconscionability of class action waivers is defunct outside the arbitration context. Indeed, adopting defendant's views on the effect of Concepcion and related cases on California's unconscionability doctrine would be, not a necessary or inevitable result of Supreme Court precedent, but a dramatic extension of case law on the Federal Arbitration Act into the hitherto largely undisturbed waters of independent class action waivers. Into those waters the Court declines to recklessly plunge.

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.

SO ORDERED.

Dated: New York, NY
May 7, 2016

JED S. RAKOFF, U.S.D.J.

SA-109

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

SPENCER MEYER,

Plaintiffs,

v.

TRAVIS KALANICK,

Defendant.

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

NOTICE OF MOTION

Pursuant to the Court's telephonic order on June 7, 2016, and upon the accompanying Memorandum of Law, Defendant Travis Kalanick moves this Court, before the Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York, to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., with answering papers to be served and filed by June 22, 2016, reply papers to be served and filed by June 29, 2016, and oral argument to be held on July 7, 2016 at 4:00 p.m.

Dated: June 7, 2016

Respectfully submitted,

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Counsel for Defendant Travis Kalanick

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPENCER MEYER, individually and on behalf of those similarly situated, Plaintiffs, -against- TRAVIS KALANICK and UBER TECHNOLOGIES, INC. Defendants.	Case No. 1:15-cv-9796 (JSR) **NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION**

PLEASE TAKE NOTICE THAT Defendant Uber Technologies, Inc. ("Uber") will and hereby does move this Court, before the Honorable Jed S. Rakoff, courtroom 14B, 500 Pearl St., New York, NY 10007, for an order dismissing these proceedings in favor of arbitration of the claims brought by Plaintiff Spencer Meyer, with response papers to be filed by June 29, reply papers to be filed by July 7, and oral argument to be held on July 14 at 4:00 P.M. Uber's motion is based upon this Notice of Motion, the Memorandum of Points and Authorities offered in support thereof, the supporting declaration of Vincent Mi and all exhibits thereto, all documents in the Court's file, any matters of which the Court may take judicial notice, and any evidence or argument presented in this matter.

Pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, Uber seeks the following relief: an order dismissing this litigation in favor of arbitration.[1]

[1] If the Court determines that Uber has the right to compel arbitration of Plaintiff's claims but Mr. Kalanick does not, then Uber requests that the Court stay this action pending completion of arbitration proceedings between Uber and Plaintiff. *See* 9 U.S.C. § 3 ("the court … shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"); *Katz v. Cellco P'ship*, 794 F.3d 341,

(Cont'd on next page)

Dated: June 21, 2016

Respectfully submitted,

/s/ Reed Brodsky
Reed Brodsky

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Attorneys for Defendant Uber Technologies, Inc.

(Cont'd from previous page)

345-47 (2d Cir. 2015) ("the FAA mandate[s] a stay of proceedings when … a stay [is] requested").

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 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/ Reed Brodsky
Reed Brodsky

G739MEY1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
SPENCER MEYER ,

Plaintiff,

v. 15 CV 9796 (JSR)

TRAVIS KALANICK, ET AL.,

Defendants.
----------x

New York, N.Y.
July 14, 2016
3:45 p.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

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Attorneys for Defendant Uber Technologies, Inc.
BY: REED MICHAEL BRODSKY
JOSHUA S. LIPSHUTZ

(In open court; case called)

MR. FELDMAN: Good afternoon, your Honor. Brian Feldman from Harter, Secrest & Emery on behalf of plaintiff.

THE COURT: Good afternoon.

MR. WADSWORTH: Good afternoon, your Honor. Jeff Wadsworth on behalf of plaintiff from Harter, Secrest & Emery.

THE COURT: Good afternoon.

MS. MERIWETHER: Good afternoon, your Honor. Ellen Meriwether, Cafferty Clobes Meriwether & Sprengel on behalf of plaintiff.

THE COURT: Good afternoon.

MR. BRIODY: Good afternoon, your Honor. John Briody, McKool Smith, on behalf of plaintiff.

THE COURT: Good afternoon.

MR. SMITH: Good afternoon, your Honor. James Smith, McKool Smith, on behalf of plaintiff.

THE COURT: Good afternoon.

MR. SKINNER: Good afternoon, your Honor. Peter Skinner and Joanna Wright from Boies, Schiller & Flexner on behalf of defendant Travis Kalanick.

THE COURT: Good afternoon.

MR. BOWKER: Good afternoon, your Honor. David Bowker with WilmerHale on behalf of nonparty Ergo.

THE COURT: Good afternoon.

MR. BRODSKY: Finally, your Honor. Good afternoon.

Reed Brodsky and Joshua Lipshutz from Gibson, Dunn & Crutcher on behalf of Uber.

THE COURT: Good afternoon.

All right. We have a lot to cover here. The first motion I want to take up is plaintiff's motion for relief related to the Ergo investigation. I think the following facts are undisputed but let me state them and if there is disagreement as to these facts let me know before we get into legal argument.

So this lawsuit was filed by Mr. Meyer through his counsel, Mr. Schmidt, on December 16, 2015. It was filed against Mr. Kalanick, the CEO of Uber.

On that same day Uber's general counsel, Salle Yoo, wrote to Uber's chief security officer, Joe Sullivan, saying could we find out a little bit more about this plaintiff.

Sullivan in turn forwarded that e-mail to Uber's director of security, Mat Henley, stating, "Please do a careful check on this plaintiff."

We will get into later the controversy as to what prompted that request.

Mr. Henley, the next day, December 17, reached out to Ergo and asked them to conduct an investigation stating, "I have a sensitive, very under-the-radar investigation that I need on an individual here in the U.S."

A week later, on December 24, Mr. Henley wrote to

Mr. Egeland at Ergo attaching the complaint and stating that -- or asking really whether in Ergo's work "Can you make sure to keep it general enough so that the research remains discrete from a discovery perspective?"

On January 4, 2016 Mr. Henley approved a proposal for Ergo's Mr. Egeland that included an investigation not only of Mr. Meyer but also of his counsel Mr. Schmidt. The proposal stated that Ergo would prepare a written report that, "Highlights all derogatories." Mr. Egeland then turned over the investigation to one of their investigators, Mr. Santos-Neves.

Mr. Santos-Neves eventually reached out to various acquaintances and other persons who he believed had knowledge of Mr. Meyer or Mr. Schmidt in the course of which Mr. Santos-Neves gave false statements about why he was seeking the information and why he was contacting these people. For example, he stated that he was "Profiling top, up and coming labor lawyers in the United States." He also said that, "As part of the real estate market research project for a client I am interviewing property owners in New Haven. We are looking to find out what due diligence steps property owners take to vet a potential tenant."

At least eight of these telephone conversations were recorded without the knowledge or consent of the persons to whom Mr. Santos-Neves was talking.

An initial draft report was then prepared. That was circulated between Mr. Santos-Neves, Mr. Egeland who was the Ergo managing partner, and another Ergo partner, Mr. Moneyhon.

Mr. Egeland, for example, on January 19, as part of that process, asked Mr. Santos-Neves whether there were, "Enough negative things said about Meyer to write a text box."

As part of that process, Mr. Santos-Neves also informed Mr. Egeland and Mr. Moneyhon that he was using false pretenses in connection with the investigation. For example, on January 16, 2016 Mr. Santos-Neves e-mailed Mr. Egeland saying, "All the sources believe that I am profiling Meyer for a report on leading figures in conservation. I think this cover could still protect us from any suspicion in the event that I ask such a question," referring to asking a question about derogatory information.

On January 19, 2016 Ergo delivered his report to Mr. -- to Mr. Henley and Mr. Clark both at Uber. Most of the information provided was positive in nature, although the report noted that "Mr. Meyer may be particularly sensitive to any publicity that tarnishes his professional reputation."

Around the same time plaintiff's counsel got initial wind of these inquiries being made and on January 19 he had a conversation with Mr. Skinner at the Boies firm. And Mr. Skinner represented that "It is not us," making the calls. However, after plaintiff's counsel indicated that he would seek

a subpoena relating to Ergo's inquiries, on February 19, Mr. Skinner phoned one of plaintiff's counsel to say that Uber had, in fact, retained Ergo to conduct an investigation.

The only other fact that I think is uncontested is that Ergo, though located in New York, had never obtained, as the law of New York requires, a private investigator's license, or at least not one for Mr. Santos-Neves.

So, let me just pause there. Are there any of those facts that I've just stated that any party disputes? Okay.

So now I'm ready to hear argument starting with plaintiff's counsel.

MR. BRIODY: Thank you, your Honor. John Briody on behalf of the plaintiff Spencer Meyer.

I'd like to begin with plaintiff requests for relief by pointing out another matter that is not contested as we sit here today. And that is no one in this courtroom is going to say that the investigation that was undertaken of Mr. Meyer was an okay thing to do; not Uber, not Ergo, not Mr. Kalanick. No one will say that this was an okay thing to do, when a litigation is pending, to hire an investigator to reach out to personal contacts, professional sources of a plaintiff, to dig out details that highlight all interrogatories about the -- relating to the personal background of a plaintiff.

THE COURT: Well let me just push you a little on that. I assume -- I'll wait to hear from counsel for the

sense that the plaintiffs have suggested that Uber was looking for derogatory information about Mr. Meyer. And I know there's some -- that statement was used by an Ergo investigator, by Mr. Egeland. And on page 84 and 83 of Mr. Henley's testimony he says he doesn't even think he noticed that detail about derogatory information.

And there is no other suggestion in the record, other than internal Ergo communications about derogatory information, there is no other suggestion in the record that Uber was looking for derogatory information which I think, to circle back to where we started, is further evidence that this was not motivated for a litigation purpose. They were not motivated to go after, find out negative information about Mr. Meyer.

THE COURT: All right. Thank you very much.

MR. BRODSKY: Thank you, your Honor.

THE COURT: Let me hear, before we hear finally from plaintiff's counsel, from counsel for Mr. Kalanick.

MR. SKINNER: Your Honor, Peter Skinner on behalf of Travis Kalanick.

THE COURT: I am troubled, Mr. Skinner -- I have the highest respect for you and your firm -- but I am troubled that you are a fact witness in this particular situation and yet you're also acting as counsel which is not usually a permissible situation.

MR. SKINNER: Your Honor, I wanted to address that

head off. The first thing I was going to say is I don't plan to say much right now because I think most of this is with respect to Ergo's actions and what happened internally at Uber and, of course, I represent Mr. Kalanick.

As the Court notes and noted initially, my name comes up in all of this because I made certain communications to Mr. Feldman, the plaintiff's counsel. They haven't asked to depose me. They haven't asked to gather any facts from me. We have the record that we have. If they were to seek to reopen it and turn me into a witness, then I think we can cross that bridge if and when we got there, if there's anything on privilege.

THE COURT: Well it seems to me the argument that Uber's counsel has just made was in part that there were no red flags flying and therefore, while Uber may not have been as focused and while its inquiries may not have been as broadly based as with hindsight might have been ideal, there was nothing that warranted an inference of sanctionable misconduct. And this naturally led to the Court's saying well wasn't one of the red flags flying your denial that Uber and Mr. Kalanick had anything to do with this investigation which was not corrected for a period of some weeks.

I think I need to ask -- if you feel that today you can't answer this without consulting with counsel, I will accept that -- but I think I need to ask exactly what steps you

took when you got the original inquiry.

MR. SKINNER: Placed a phonecall to Uber general counsel's office to ask whether there was anything to --

THE COURT: So, it was you?

MR. SKINNER: Me, yes, your Honor.

THE COURT: The call was from you to whom?

MR. SKINNER: It was from me to Martin White, who is an attorney within the general counsel's office.

I honestly don't remember the scope of the conversation. I don't want to reveal privileged information. I'm trying to walk a line where I'm an officer of the court answering a question from the court.

THE COURT: That's why I say if you don't want to answer at this point you don't have to. If you feel comfortable in sharing whatever you feel comfortable in sharing, that's fine too.

MR. SKINNER: Look, and that's what was done.

THE COURT: Just so I have it clear. And I'm going to state that this part of the inquiry will not of itself be taken to waive any privilege known to mankind.

What you did initially was to put in a call to Mr. White and ask him to find out. Is that a fair statement?

MR. SKINNER: Yes, your Honor.

THE COURT: And he came back and said it's not us?

MR. SKINNER: Yes.

THE COURT: All right. And what prompted your correcting that a few weeks later?

MR. SKINNER: Mr. Feldman called me again and he said we want to serve subpoenas on Ergo but we have a discovery stay in place and we want your consent to, with the discovery stay, so that we can serve these subpoenas. We want to know why Ergo was involved in the investigation they were involved in.

As we all know, Ergo identified themselves as the party who was conducting the investigation. And they were able to figure out who they were. I think we may have even sent them a link to the website. I honestly don't remember.

But, in any event, I said I don't know if that's right. And this is the conversation between me and Mr. Feldman. I said we've already told you it's not us. I don't know if the discovery mechanism in this case is the right way to gather the information you're trying to gather. Maybe you should just pick up the phone and call Ergo and see what they say, something to that effect.

Mr. Feldman can correct me if he has a different recollection. But I think I said something to the effect, I don't know if we're going to be able to consent to lift the discovery stay to serve these subpoenas that you want to serve. To my mind, you've asked. The question has been answered. And this doesn't have anything to do with the litigation.

And he said okay. I may be going to the judge in

order to ask for the relief anyway. If it's over your objection, it's over your objection.

So of course at that point I got back in touch with general counsel's office.

THE COURT: Again Mr. White?

MR. SKINNER: I believe it was Mr. White, yes.

To say plaintiff may be seeking relief from the court. I don't know what our position is ultimately going to be but they may be seeking relief from the court. And we need to figure out what our position is going to be if they make that application.

And I also said -- and you better check again, you know, because if these subpoenas are served and it comes out that you were wrong, that's not going to be good. So let's check again now and let's, you know, triple check this thing. I know you checked before. Check again.

And that's when -- and I think ten days then elapsed actually. I could be wrong. But there was a period of time that elapsed. Until I received a phonecall late on a Friday from another lawyer.

THE COURT: Who was that?

MR. SKINNER: Lindsey Haswell telling me we made a mistake.

That's when I called Mr. Feldman that same night.

THE COURT: Let me interrupt one other thing. By any

unlikely chance is Mr. White or who is the other person?

MR. SKINNER: Ms. Haswell.

THE COURT: Are either of them here in the courtroom?

MR. SKINNER: Mr. White is here.

THE COURT: So Mr. White why don't you come on up. I'll just interrupt Mr. Skinner to talk to Mr. White and then come right back to you.

Mr. White, I know you weren't going to come here believing the court would ask you questions so feel free to say you'd rather wait until you've consulted with counsel or whatever, but if you are comfortable in answering the questions, what it would be useful to the court to know is what you did at the time of the first inquiry from Mr. Skinner and what you did at the time of the second inquiry.

MR. WHITE: Sure, again, with the proviso I assume that anything --

THE COURT: Is not waiver of anything, right.

MR. WHITE: So I can give you a little bit of context. When I got the call from Mr. Skinner I had been at Uber approximately two months. So I certainly knew that I hadn't initiated the investigation. And so I inquired to Ms. Haswell whether we had done so. And she said she will look into it, but she knew that she had not ordered the investigation. And so she looked into it. And came back to me and told me that she had found no evidence that it was us. We checked both

within the litigation department and the employment department, because I understand Mr. Schmidt is an employment attorney, and found no evidence that we had ordered the investigation.

To give you a little bit of context, you had asked earlier what -- how Uber is organized. It's a very, very big office building. I know that may not mean all that much to you but security doesn't sit particularly close to litigation. In our practice, if anybody was going to order an investigation in an ongoing case we would have thought it would be the litigation department. So we had no knowledge or reason to believe that it would be anybody other than us.

THE COURT: So are you saying you were not aware that security had ordered other investigations?

MR. WHITE: I believe the testimony in the depositions is that they have never done so in any kind of litigation situation. Now there may be other investigations ordered --

THE COURT: So this was the only situation where they thought that there was a threat that warranted an investigation?

MR. WHITE: I don't believe -- Mr. Kalanick may have been sued along with the company in a number of other cases but never in an individual capacity is my understanding. So that's my best understanding of it. I don't know to a positive certainty but that is my best understanding.

THE COURT: Did you understand that -- did you have an

understanding one way or the other as to whether security had undertaken investigations in a nonlitigation context?

MR. WHITE: Honestly I mean at that point two months into my work at Uber, no, I had no knowledge that we even had a security department.

THE COURT: And just out of curiosity so where is -- where are your offices located?

MR. WHITE: In San Francisco near the civic center.

THE COURT: And how many employees are we talking about in security?

MR. WHITE: I couldn't even venture to guess.

THE COURT: Are they on the same floor as you?

MR. WHITE: No, in fact, they're in a different building actually than us.

THE COURT: So go ahead.

MR. WHITE: So at that point I had asked Ms. Haswell. Ms. Haswell conducted her own investigation, got back to me and said whoever it was, this wasn't us. Then I advised Mr. Skinner of that. And my understanding is Mr. Skinner advised plaintiff's counsel of that.

Then the next inquiry came I believe sometime in January. I was about to get on a plane. I got a call from Mr. Skinner. I immediately -- I mean honestly, your Honor, you have many of these communications in your possession so you can confirm this. I then texted Ms. Haswell basically what

Mr. Skinner had asked. And maybe this was in February, not January. I'll correct myself. And that night I learned for the first time it was -- it, in fact, had been ordered by the security group and I was astonished.

THE COURT: Just so I'm clear what is Ms. Haswell's position?

MR. WHITE: She is the director of litigation at Uber.

MR. BRODSKY: Your Honor, Ms. Haswell would normally probably be attending this. She has just given birth recently so she is not here for that reason.

THE COURT: Sounds like a weak excuse to me.

Okay. One last question. Did you or to your knowledge Ms. Haswell consult with Ms. Yoo?

MR. WHITE: I know I did not. I don't know whether Lindsey did or not at the time.

THE COURT: All right. Thank you very much. Let's go back to Mr. Skinner.

Now in your capacity as the lawyer anything you wanted to add to the legal argument we've had earlier today.

MR. SKINNER: Sure, your Honor. Look, I think that I will try to toe the line and keep it in my capacity as a lawyer in responding to the court's questions, obviously an officer of the court, to tell you what I know.

We really do not have much to add. We represent Travis Kalanick. I think that the evidence is undisputed in

this case that Mr. Kalanick was not aware of this investigation in any way. And there is no evidence that suggests that he participated in any of this in any way or even saw the report or has ever had any communication relating to Ergo or the report that was derived from the depositions. The Uber witnesses consistently testified that they had no knowledge Mr. Kalanick knew anything about this. They haven't identified any documents indicating that Mr. Kalanick knew anything about this. And I think that my client, the CEO of Uber, is divorced and removed from this whole process. And I think that there is simply no evidence in the record that would support any indication of willful blindness on behalf of my client or that my client was acting in any way in bad faith.

THE COURT: Let me hear finally from plaintiff's counsel.

Thank you.

MR. SKINNER: Thank you, Judge.

MR. BRIODY: Thank you, your Honor.

I'm going to start by responding to certain of the comments made by Uber's counsel. And one of the last things he said that I thought was interesting is he talked about how, I think for the second time, Mr. Henley, the individual who was tasked albeit indirectly by Uber's general counsel with conducting this investigation, he didn't notice the detail about the derogatories; therefore, Uber had no interest in

SA-130

7/25/16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-v-

TRAVIS KALANICK and UBER TECHNOLOGIES, INC.,

Defendants.

15 Civ. 9796

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

It is a sad day when, in response to the filing of a commercial lawsuit, a corporate defendant feels compelled to hire unlicensed private investigators to conduct secret personal background investigations of both the plaintiff and his counsel. It is sadder yet when these investigators flagrantly lie to friends and acquaintances of the plaintiff and his counsel in an (ultimately unsuccessful) attempt to obtain derogatory information about them. The questions here presented, however, are whether such dubious practices result in waiver of attorney-client privilege and work-product protection, and whether disciplinary action is warranted.

The lawsuit in question is the putative antitrust class action commenced on December 16, 2015 by plaintiff Spencer Meyer against defendant Travis Kalanick, co-founder and CEO of Uber

Technologies, Inc. ("Uber"), to which Uber was later added as a co-defendant.[1]

FACTS

The following facts are undisputed. Immediately after the filing of the lawsuit on December 16, 2015, see Dkt. 1, Uber's General Counsel, Salle Yoo, Esq., wrote to Uber's Chief Security Officer, Joe Sullivan, Esq., saying: "Could we find out a little more about this plaintiff?" See Declaration of James H. Smith in Support of Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Smith Decl."), Exhibit A, Dkt. 104-1, at UBER-0000001. Mr. Sullivan then forwarded Ms. Yoo's email to Uber's Director of Investigations, Mat Henley, saying "Please do a careful check on this plaintiff." Id. Mr. Henley asked Mr. Sullivan: "Want me to outsource or keep in house / open source?" to which Mr. Sullivan responded "Whoever can do it well and under the radar is fine." UBER-0000041.[2]

Mr. Henley thereupon retained Global Precision Research LLC d/b/a Ergo ("Ergo") to conduct the investigation. See Smith Decl., Exhibit C (Henley Dep.), Dkt. 104-3, at 9:18-20.

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[1] Uber was joined as a co-defendant on June 20, 2016. See Memorandum Order dated June 19, 2016, Dkt. 90.

[2] This document, an email chain including messages from Mr. Henley, Mr. Sullivan, and Ms. Yoo, was inadvertently omitted from the documents that the Court intended to release to plaintiff's counsel following in camera review (see infra). It has now been released.

Specifically, on December 17, 2015, Mr. Henley emailed Ergo Managing Partners Todd Egeland (a former Chief Strategy Officer at the CIA) and Matthew Moneyhon (a former State Department employee), saying "I have a sensitive, very under the radar investigation that I need on an individual here in the U.S." See Smith Decl., Exhibit E, Dkt. 104-5, at ERGO-0001170. On December 18, 2015, Messrs. Egeland and Moneyhon of Ergo indicated that they were "happy to undertake the requested research; we do quite a bit of this work for law firms." Id. at ERGO-0001174. On December 24, 2015, Mr. Henley emailed Messrs. Egeland and Moneyhon attaching the Complaint in the instant case and asking whether, in Ergo's statement of work, Ergo could be "general enough so that the research remains discreet from a discovery perspective." Id. at ERGO-0001176.

At all times relevant, Ergo's investigators were not licensed to conduct private investigations in New York. See N.Y. General Business Law § 70; Smith Decl., Exhibit F (Egeland Dep.), Dkt. 104-6, 17:24-18:6. Nevertheless, on December 28, 2015, Ergo's Mr. Egeland sent to Uber's Mr. Henley a proposal for Ergo's investigation that included plans for

> [a]n initial "light-touch" reputational due diligence, engaging in 7 primary source interviews that . . . should highlight any issues for further digging, such as participating in any past lawsuits (particularly with Andrew Schmidt [plaintiff's counsel]), and his relationship with Andrew Schmidt. As part of this effort on Meyer, we will also look to determine the likelihood

> that the attorney, Mr. Schmidt, is actually the driving force behind the complaint.

Smith Decl., Exhibit E, Dkt. 104-5, at ERGO-0001178. The proposal further stated that, following the investigation, Ergo would prepare a report that "highlights all derogatories." Id. On January 4, 2016, Mr. Henley accepted the proposal, stating "[a]ll looks good guys, thanks." Id. at ERGO-0001185; Smith Decl., Exhibit G, Dkt. 104-7, at UBER-0000055.

Ergo's Managing Partner Mr. Egeland then forwarded the proposal to an Ergo investigator, Miguel Santos-Neves. See Smith Decl., Exhibit H, Dkt. 104-8. Mr. Santos-Neves embarked on the investigation, reaching out to 28 acquaintances or professional colleagues of plaintiff Meyer and plaintiff's counsel Schmidt. See Smith Decl., Exhibit L, Dkt. 104-12. In approaching these sources, Mr. Santos-Neves made materially false statements about why he was contacting them. For instance, having learned that plaintiff Meyer was a conservationist associated with Yale University, Mr. Santos-Neves told sources that "[a]s part of a research project, [he was] attempting to verify the professional record and/or previous employment of various up-and-coming researchers in environmental conservation," Smith Decl., Exhibit I, Dkt. 104-9, at ERGO-0000467. Likewise, having learned that Mr. Schmidt's law practice focused on labor law matters, Mr. Santos-Neves told a source that he was engaged in a "project

profiling top up-and-coming labor lawyers in the US," Smith Decl., Exhibit J, Dkt. 104-10, at ERGO-0000626. In still another instance, in an outreach to plaintiff's landlord, Mr. Santos-Neves represented that "[a]s part of the real estate market research project for a client, [he was] interviewing property owners in New Haven" in order "to find out what due diligence steps property owners take to vet a potential tenant." Smith Decl., Exhibit K, Dkt. 104-11 at 223:6-11.[3]

Following up on these initial contacts, Mr. Santos-Neves conducted phone interviews with eight individuals, which he recorded without the knowledge or consent of the individuals with whom he was speaking. See Smith Decl., Exhibit L; Transcript dated July 14, 2016 ("Tr."), at 4:23-25. Mr. Santos-Neves then synthesized his research and corresponded with Ergo Managing Partners Egeland and Moneyhon regarding a draft of the report. See, e.g., Smith Decl., Exhibit N, Dkt. 104-14; Smith Decl., Exhibit Q, Dkt. 104-17. As part of this correspondence, Mr. Santos-Neves wrote to Mr. Egeland on January 15, 2016 that "[a]ll the sources believe that I am profiling Meyer for a report on leading figures in conservation; I think this cover could still protect us from any suspicion in the event that I

[3] Ergo also acknowledges that "Mr. Santos-Neves evidently told Mr. Moneyhon and Mr. Egeland (sometime before the project was completed) that he had used false pretenses." See Ergo's Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Ergo Opp. Br."), Dkt. 114, at 5.

ask such a question [regarding plaintiff's involvement in a lawsuit against Uber]." Smith Decl., Exhibit O, Dkt. 104-15, at ERGO-0000665. Mr. Santos-Neves further noted that "[a]sking such a question could have all sorts of consequences for Meyer himself, as it would get the academic rumor mill going." Id. Mr. Egeland responded: "Miguel, yes, please go back to one or two sources that you believe may have some background on the out of character issue [i.e., whether it was out of character for plaintiff Meyer to be involved in the instant lawsuit]." Id. Additionally, on January 19, 2016, Mr. Egeland asked Mr. Santos-Neves whether there were "enough negative things said about Meyer to write a text box." Smith Decl., Exhibit N, at ERGO-0000697.

On January 19, 2016, Ergo delivered its report to Uber's Mr. Henley. See Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Pl. Br."), Dkt. 103, at 7; Defendants Uber Technologies, Inc. and Travis Kalanick's Joint Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Defs. Opp. Br."), Dkt. 108, at 6. The report speaks about plaintiff almost entirely in positive or neutral terms, but it states that "Meyer may be particularly sensitive to any publicity that tarnishes his professional reputation." Smith Decl., Exhibit R, Dkt. 104-18, at ERGO-0000823; Declaration of Nicola T. Hanna in Support of

Defendants Uber Technologies, Inc. and Travis Kalanick's Joint Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Hanna Decl."), Exhibit H, Dkt. 109-9, at UBER-0000059. Mr. Henley sent the report to Mr. Sullivan, Uber's Chief Security Officer, and to Craig Clark, Esq., Uber's Legal Director of Security and Enforcement. See id.; see also Letter dated May 20, 2016, Dkt. 79. Mr. Sullivan, in turn, passed on the report to Uber's General Counsel Salle Yoo. See Hanna Decl., Exhibit H, at UBER-0000059.

Meanwhile, in early to mid-January 2016, plaintiff's co-counsel Brian Feldman, Esq., was alerted to the fact that Mr. Santos-Neves had contacted acquaintances of plaintiff and plaintiff's counsel Mr. Schmidt. See Declaration of Brian M. Feldman in Support of Plaintiff's Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Feldman Decl."), Dkt. 98, at ¶¶ 2-5. Mr. Feldman reached out to defendant Kalanick's outside counsel, Peter Skinner, Esq., who, on January 20, 2016, wrote Mr. Feldman saying "I followed up. Whoever is behind these calls, it is not us." See Feldman Decl. at ¶ 7; Plaintiff's Letter dated June 3, 2016, Exhibit C, Dkt. 78. Plaintiff's counsel, however, continued to make inquiries of Mr. Kalanick's counsel, and eventually indicated to Mr. Skinner that he was prepared to bring the matter to the attention of the Court in order to seek a subpoena directed to

Ergo. See Feldman Decl. at ¶¶ 8-9; Tr. 45:3-46:2. At that point, Mr. Skinner initiated further inquiries of Uber's in-house counsel, who ultimately confirmed that Uber had initiated the investigation. See Tr. 46:3-23. On February 19, 2016, Mr. Skinner in turn phoned Mr. Feldman and stated that Uber had, in fact, hired Ergo. See Feldman Decl. at ¶ 10; Uber Opp. Br. at 8.

Over the course of the next two months, plaintiff and defendants engaged in further communications. For example, on April 25, 2016, Mr. Kalanick's counsel Mr. Skinner offered to provide plaintiff's counsel with information about the individuals contacted by Ergo and how these individuals were contacted, but only if plaintiff would agree "not to use the information in this litigation for any purpose whatsoever." Smith Decl., Exhibit T, Dkt. 104-20. Plaintiff declined the offer. See Smith Decl., Exhibit Z, Dkt. 104-26. On May 18, 2016, Mr. Kalanick's co-counsel, Alanna Rutherford, Esq., also provided plaintiff's counsel with a "List of People Who Communicated with Ergo," containing 11 of the 28 individuals to whom Ergo's investigator reached out. See Smith Decl., Exhibit U, Dkt. 104-21.

INITIATION OF JUDICIAL INVOLVEMENT

On May 19, 2016, plaintiff brought the Ergo matter to the Court's attention via a joint telephone call by the parties to the Court. Because it appeared likely that the Ergo

investigation was intended, at least in part, to affect (directly or indirectly) the case pending before the Court, the Court thereupon convened two in-court conferences on the Ergo matter, on May 20, 2016 and May 27, 2016, respectively. As a result of these hearings and associated telephone conferences, the Court authorized plaintiff to depose Uber's Joe Sullivan, Craig Clark, and Mat Henley, and Ergo's Todd Egeland and Miguel Santos-Neves. See Memorandum Order dated June 7, 2016, Dkt. 76, at 4. The Court also authorized plaintiff to serve document subpoenas on Uber and Ergo, albeit after narrowing the subpoenas' parameters. See id. at 4-5. In response to the subpoenas, Uber and Ergo claimed attorney-client privilege and/or work-product protection over numerous documents and voice recordings, and the Court indicated that it would need to review these materials in camera to determine whether privilege was correctly asserted and/or whether the "crime-fraud" exception to the privilege applied. See id. at 5. The Court further stated that in camera review would also be needed to determine whether plaintiff would be authorized to depose Uber's General Counsel Salle Yoo. See id. at 4-5.

On June 2, 2016, Uber moved for reconsideration of the Court's decision to conduct such in camera review, and the Court denied this motion on June 3, 2016, explaining the reasons for this denial in a Memorandum Order dated June 7, 2016. See id. at

1. Specifically, the Court noted that courts commonly review in camera subpoenaed documents as to which an assertion of privilege has been raised in order to see whether the privilege has been properly asserted. See Memorandum Order dated June 7, 2016, at 6-7. Moreover, the Court stated, plaintiff had provided a sufficient basis to suspect that Ergo had committed a fraud in investigating plaintiff through the use of false pretenses, and to suspect that communications from Uber - which had hired Ergo to conduct an investigation of the plaintiff and given Ergo, in Uber's words, "instructions or assignments" - had furthered such a fraud. See id. at 7-8. The Court also indicated that another relevant area of inquiry was whether Uber or defendant Kalanick, or their counsel, had made misrepresentations to plaintiff's counsel in response to plaintiff's initial inquiries about the investigation. See id. at 9. The Court noted that it had no way to know, prior to reviewing the relevant materials, whether or not the crime-fraud exception did in fact apply to some or all of the materials, but that plaintiff had made the threshold showing sufficient to justify in camera review. See id. at 10.

DISCOVERY RULINGS (INCLUDING CRIME-FRAUD EXCEPTION)

The Court then proceeded to conduct the in camera review, and on June 9, 2016, issued an Order indicating the results of this review. See Order dated June 8, 2016, Dkt. 82, at 1-2. In that Order, the Court denied all claims of privilege and work-

product protection as to materials submitted by Ergo; upheld Uber's claims of privilege and work-product protection as to certain materials but not as to others; and denied plaintiff's application to take the deposition of Ms. Yoo. See id. The Court also indicated that an explanation for the Court's rulings would issue in due course. See id. The Court now provides the promised explanation.

Regarding the materials that Ergo submitted, Ergo asserted work-product protection, but not attorney-client privilege, over all these materials. See Ergo Privilege Log. As Ergo subsequently clarified, the decision to assert work-product protection "was based on direction from Uber and Ergo's understanding that the protection belonged to Uber and therefore only Uber could waive it." See Ergo's Opposition to Plaintiff's Motion for Relief Related to the Ergo Investigation ("Ergo Opp. Br."), Dkt. 114, at 8. But whether asserted by Ergo or Uber, the claim of work-product protection for Ergo's materials fails, for several reasons:

To begin with, Uber is, by its own statements, estopped from asserting that these materials were "prepared in anticipation of litigation." Fed. R. Civ. P. 26(b)(3)(A). Both Uber and Mr. Kalanick have repeatedly represented - accurately or not - that Uber commissioned the investigation of plaintiff in order to determine whether plaintiff constituted a safety

threat to Mr. Kalanick or other Uber employees. See Smith Decl., Exhibit S, Dkt. 104-19; Uber Opp. Br. at 2-4; Tr. 30:23-32:12. Although the Court is profoundly skeptical that this explanation - which is nowhere reflected in the underlying documents - was the real reason for the investigation, defendants, having so represented, cannot then claim that the materials relating to the investigation were prepared "in anticipation of litigation," since this contradicts their own assertion of why the investigation was done.

Of course, it is more likely, the Court finds (based on the facts detailed above), that the purpose of the investigation was to try to unearth derogatory personal information about Mr. Meyer and his counsel that could then be used to try to intimidate them or to prejudice the Court against them. But even then, while Ergo's communications might have been in some sense prepared "in anticipation of litigation," any possible such protection would be overcome in light of plaintiff's substantial need for, and inability to obtain by other means, the Ergo materials or their substantial equivalent, without undue hardship. See Fed. R. Civ. P. 26(b)(3)(A)(ii). Plaintiff, who had (along with his counsel) become the target of an intrusive and clandestine investigation that included inquiries into plaintiff's family life, career prospects, and living arrangements, sought essential information about the ways in

which the investigation was committed and for what purposes. Ergo's communications contained crucial details about, for example, the nature of the investigator's contacts and Ergo's analysis of the discovered information, as well as Ergo's responses once Ergo was asked to provide details on its investigation in connection with inquiries made by the plaintiff and the Court. Moreover, previous attempts by plaintiff to gain information about the Ergo investigation had resulted, first, in false denials, and then in an effort by defendants to impose conditions on plaintiff's access to this information, see, e.g., Smith Decl., Exhibit T, as well as to limit the documents and individuals to which plaintiff would have access for review and deposition purposes. See Uber Opp. Br. at 9-10. In this situation, any possible work-product protection attaching to Ergo's communications was clearly overcome. See Fed. R. Civ. P. 26(b)(3)(A)(ii).

Furthermore, there is a "crime-fraud" exception to the work-product doctrine, as there is to the attorney-client privilege. See In re Richard Roe, Inc. (Roe I), 68 F.3d 38, 39 (2d Cir. 1995); In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984). The crime-fraud exception applies when there is "(i) a determination that the client communication or attorney work product in question was itself in furtherance of the crime or fraud and (ii)

probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity." In re Richard Roe, Inc. (Roe II), 168 F.3d 69, 71 (2d Cir. 1999) (internal quotation marks omitted). Here, the Court finds that Ergo, in investigating plaintiff, was engaged in fraudulent and arguably criminal conduct, and that many of the documents over which Ergo claimed work-product protection were intended to facilitate this fraudulent and arguably criminal activity. These documents included emails to Uber representatives concerning the scope of the project, the Ergo investigator's emails to sources and his recordings of phone calls with sources, and emails between Ergo employees preparing the report for transmittal to Uber.

As previously noted, it is undisputed that Ergo's investigator, Mr. Santos-Neves, made blatant misrepresentations to individuals that he contacted in order to gain information about plaintiff and plaintiff's counsel. As Ergo's counsel acknowledged at oral argument, Mr. Santos-Neves "dissembled" and "used false pretenses" in the context of reaching out to the individuals that he interviewed. See Tr. 12:4-6. For example, Mr. Santos-Neves was not, in fact, "attempting to verify the professional record and/or previous employment of various up-and-coming researchers in environmental conservation," "profiling top up-and-coming labor lawyers," or conducting a

"real estate market research project for a client." Smith Decl., Exhibits I, J, and K.

Ergo contended at oral argument that Mr. Santos-Neves made these misrepresentations "in the written communications . . . to initiate the conversation . . . and then to have a forthright conversation." Tr. 19:17-25. However, the use of an initial pretext clearly influenced the nature and tenor of the resulting conversation. Moreover, Mr. Santos-Neves engaged in misrepresentations during his phone calls, not merely in his initial outreach emails. For example, Mr. Santos-Neves told one of his "sources" over the phone: "Let me tell you a little bit about the research project. It's actually pretty straightforward, pretty simple. A client hired us to profile up and coming people in environmental conservation, and so there's a number of people we've been researching and profiling." ERGO 073, 00:25-00:44. In response to the source's statement "the whole thing is very mysterious to me," Mr. Santos-Neves stated "Yeah pretty much I think you got a sense . . . it pretty much works like a head hunting thought process." Id. at 1:58-2:10. Mr. Santos-Neves went on to ask the source several questions about the plaintiff, including whether the source knew "of any personal issues that might affect [plaintiff's] professional reputation," id. at 8:35-8:45, and whether the plaintiff had "butted heads with the law in any way." Id. at 9:32-9:42. The

Ergo investigator's fraudulent misrepresentations, therefore, broadly influenced his interactions with the sources to whom he spoke.

Moreover, Mr. Santos-Neves was not acting as any kind of rogue investigator; his misrepresentations were condoned by the highest levels of Ergo leadership. Mr. Santos-Neves directly and unabashedly referred to his claims to sources as a "cover" in an email to Ergo Managing Partner Egeland. See Smith Decl., Exhibit O, at ERGO-0000665. Mr. Egeland responded by approving a proposal for Mr. Santos-Neves to return to one or two sources. See id. Further, Mr. Egeland testified at his deposition that at the time he received the email containing the "cover" language from Mr. Santos-Neves, he did not see it as a problem that the sources believed (falsely) that Mr. Santos-Neves was creating a report on leading figures in conservation. See Declaration of James H. Smith in Support of Plaintiff's Reply Memorandum of Law in Support of His Motion for Relief Related to the Ergo Investigation ("Smith Reply Decl."), Exhibit D (Egeland Dep.), Dkt. 118-4, 97:17-98:9. Indeed, at his deposition, Mr. Egeland testified that Ergo analysts, as a more general matter, mislead sources about the reason why they are reaching out to them to collect information. See id. at 32:21-33:3. Additionally, Ergo has acknowledged that before the project was completed, Mr. Santos-Neves told another Ergo Managing Partner, Mr. Moneyhon,

that he had used false pretenses. See Ergo Opp. Br. at 5. Ergo cannot, therefore, disavow responsibility for the fraudulent misrepresentations made by Mr. Santos-Neves.

Furthermore, Ergo's fraudulent misrepresentations were both intentional and material. The fact that Ergo describes its conduct as an effort to "help solicit information while also protecting the identity of his client," Ergo Letter dated June 16, 2016[4] at 2, is not inconsistent with the existence of fraudulent intent. Likewise, Ergo's false statements to sources were intended to, and did, induce the investigator's interlocutors to provide information that they would not otherwise have provided. Indeed, Ergo acknowledged that Mr. Santos-Neves used false pretenses "to initiate a conversation, to get over that hump." Tr. 19:17-24; see also, e.g., Smith Reply Decl., Exhibit D (Egeland Dep.), 36:12-20.

Ergo argues, however, that its actions did not constitute fraud because they did not cause actual damages, a requirement of New York's civil fraud statute. See Ergo Letter dated June 16, 2016 at 2-3, citing Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 170 (2d Cir. 2015) ("Under New York law, fraud requires proof of (1) a material misrepresentation or omission of a fact, (2) knowledge of that

[4] This letter was sent by Ergo to the Court. Plaintiff responded in a letter dated June 21, 2016, and Ergo replied in a letter dated June 23, 2016. All three of these letters will be docketed along with this Opinion and Order.

fact's falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages."); see also Lama Holding Co. v. Smith Barney Inc., 668 N.E.2d 1370, 1373 (N.Y. 1996) ("The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the 'out-of-pocket' rule") (internal quotation marks omitted).

But Ergo's argument fundamentally misapprehends the nature of the crime-fraud exception. The purpose of this exception is "to assure that the seal of secrecy . . . between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563 (1989) (internal quotation marks omitted).[5] As the Second Circuit has stated:

> The rationale for the [crime-fraud] exclusion is closely tied to the policies underlying these privileges. Whereas confidentiality of communications and work product facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered "sound." Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection.

In re Grand Jury Subpoena, 731 F.2d at 1038. If actual damages had to be shown in order for "fraud" within the meaning of the

[5] While this formulation of the crime-fraud exception is based on the attorney-client privilege, the crime-fraud exception also applies to the work-product doctrine, as noted supra. See In re Richard Roe, 68 F.3d at 39; In re Grand Jury Subpoena, 731 F.2d at 1038.

crime-fraud exception to occur, then the attorney-client privilege and/or work-product doctrine could cover, for example, a communication from a client to a lawyer asking for help in cheating an unsuspecting adversary out of money, as well as the lawyer's response to the client "let's do it, and here's how!" Such a result would be clearly incompatible with the policies underlying the privilege doctrines and exceptions thereto. Moreover, it is worth noting that criminal fraud statutes, such as the federal criminal mail and wire fraud statutes, do not require a showing of damages. See 18 U.S.C. §§ 1341, 1343; Neder v. United States, 527 U.S. 1, 24-25 (1999). In sum, Uber and Ergo may not escape the application of the crime-fraud exception when many of the Ergo materials they seek to protect so manifestly fall within the categories of communications not to be covered by the cloak of privilege.

Ergo next seeks to defend itself by citing, in particular, two district court cases in which courts concluded that it was not a violation of attorney disciplinary rules for investigators to pose as customers of the opposing party in order to investigate compliance with a cease-and-desist letter in a trademark case, see Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122-23 (S.D.N.Y. 1999), or to determine whether the opposing party was complying with the terms of a consent order, see Apple Corps Ltd. v. Int'l

Collectors Soc., 15 F. Supp. 2d 456, 461-62, 475-76 (D.N.J. 1998). See Ergo Letter dated June 16, 2016 at 2; see also Ergo Opp. Br. at 3. The instant case, however, is sharply distinguishable from the cases that Ergo cites. Ergo has not claimed that it was seeking to investigate misconduct that plaintiff had perpetrated vis-à-vis Uber (as was the situation in Gidatex), let alone discover whether plaintiff and his counsel were disobeying an existing court order (as was the situation in Apple).

Furthermore, even if (contrary to the Court's interpretation) Gidatex and Apple could be read to support the proposition that investigators working on behalf of a party to litigation may properly make misrepresentations in order to advance their own interests vis-à-vis their legal adversaries, this Court would reject such a proposition. The New York Rules of Professional Conduct require lawyers to adequately supervise non-lawyers retained to do work for lawyers in order to ensure that the non-lawyers do not engage in actions that would be a violation of the Rules if a lawyer performed them. See N.Y. Rules of Professional Conduct § 5.3; see also Upjohn Co. v. Aetna Cas. & Sur. Co., 768 F. Supp. 1186, 1214-15 (W.D. Mich. 1990). Actions that a lawyer may not ethically take include knowingly making a false statement of fact, see N.Y. Rules of Professional Conduct at § 4.1, and engaging in "conduct

involving dishonesty, fraud, deceit or misrepresentation," id. at § 8.4(c).

Even beyond the rules of professional conduct, moreover, litigation is a truth-seeking exercise in which counsel, although acting as zealous advocates for their clients, are required to play by the rules. See Nix v. Whiteside, 475 U.S. 157, 166 (1986). It would plainly contravene this truth-seeking function if non-lawyers working for counsel, such as Ergo, could make fraudulent representations in order to surreptitiously gain information about litigation adversaries through intrusive inquiries of their personal acquaintances and business associates.

Remarkably, Ergo seeks to distance itself from rules governing attorneys' conduct by contending that Ergo was not "involved . . . in the litigation process at all," Ergo Opp. Br. at 8, "had no intent to affect this litigation in any way," id., and was unaware of any "special duties incumbent on lawyers or others at Uber who were involved in the litigation," id. Ergo's protestations of innocent ignorance are at odds with the joint representation of Ergo's Managing Partners, in writing to Uber's Mr. Henley to accept Uber's assignment to investigate plaintiff, that "we do quite a bit of this work for law firms." Smith Decl., Exhibit E, at ERGO-0001174. Furthermore, Ergo's work proposal, sent in response to an request from Uber for "some

discreet research on the individual that's filed" a lawsuit, included "highlight[ing] all derogatories," a proposition that Uber immediately approved. See Smith Decl., Exhibit E, at ERGO-0001172, 0001178, 0001185. It bears asking what Ergo's employees could possibly have thought its research would be used for, if not to affect in some way the litigation against plaintiff Meyer. The Court therefore finds unconvincing Ergo's effort to disclaim any responsibility for conduct that risked perverting the processes of justice.

For all of these reasons, the Court rejects Ergo's efforts to disavow participation in fraudulent and arguably criminal conduct. Moreover, if Ergo's misrepresentations to sources were not sufficient evidence of the applicability of the crime-fraud exception, two additional features of Ergo's conduct highlight their conduct's impropriety. First, although Ergo was located in New York, Ergo, as previously noted, did not possess a private investigator's license to engage in its investigative activities, as required by New York law. See N.Y. General Business Law § 70. Violation of this licensing provision may itself be prosecuted as a criminal misdemeanor. See id.

Ergo seeks to explain this violation as, variously, an "oversight[] of a small company with limited resources," see Ergo Opp. Br. at 6, or as a product of Ergo's understanding that its work did not "fit the traditional plain meaning of private

investigation work in New York," see Tr. 15:11-18. But if concocting fictitious stories to induce acquaintances of a client's litigation adversary to shed light on the adversary's employment, finances, family life, and motivation for bringing a lawsuit does not constitute private investigation work, then the Court does not know what would. Ergo's failure to obey New York's licensing laws, which carry the threat of criminal penalties, raises serious concerns about Ergo's commitment to legal compliance.

Second, it is undisputed that Ergo's investigator Mr. Santos-Neves recorded his phone calls with sources without their knowledge or consent. See Tr. 4:23-25.[6] Some of these individuals, however, had phone numbers traceable to Connecticut and New Hampshire, where it is illegal to record telephone calls without the consent of both parties to the call. See N.H. Rev. Stat. Ann. § 570-A:2; Conn. Gen. Stat. Ann. § 52-570d. Neither Ergo nor defendants has cited a case or other legal provision restricting these laws to scenarios in which both parties, or the party recording the phone call, are physically located in Connecticut or New Hampshire. Cf. Kearney

[6] While Ergo asserts that no one else at Ergo knew that Mr. Santos-Neves was recording phone calls, see Tr. 16:5-10, Ergo has not suggested that Mr. Santos-Neves was violating Ergo policy in so doing.

v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006).[7] The Ergo investigator's recording of phone calls without the consent of his interlocutors was at worst illegal and, at best, evidence of reckless disregard of the risk of failing to comply with the law.

For all of the reasons stated above, the Court denied Ergo and/or Uber's claim of work-product protection for Ergo communications that were responsive to plaintiff's subpoena (as narrowed by the Court).

As to Uber-generated materials, Uber asserted attorney-client privilege and work-product protection over numerous documents. The Court denied these assertions with respect to several documents, which were listed in the Court's Order dated June 8, 2016. The primary reason for this denial was that the Court found that, in light of defendants' representations (however doubtful) about the supposed safety-related purpose of the investigation (see supra), they were estopped from claiming

[7] Ergo contends that in New Hampshire, an individual cannot be held to have violated the law forbidding the recording of a telephone call without consent if that person acted "with "a good faith belief that [his] conduct was lawful." See Ergo Letter dated June 23, 2016, citing Fischer v. Hooper, 732 A.2d 396, 400 (N.H. 1999) (internal quotation marks omitted); see also Tr. 17:5-9. However, the Fischer court distinguished such a "good faith belief" from "intentional or reckless disregard for the lawfulness of [a person's] conduct." See Fischer, 732 A.2d at 400. Here, the Court finds that that Mr. Santos-Neves displayed reckless disregard for the lawfulness of his conduct. Moreover, Ergo's citation of Fischer does not speak to Connecticut law. Further, even if by chance one of the individuals contacted by Ergo was located somewhere different from the location suggested by the area code of his or her phone number, see Tr. 18:7-15, Ergo would have recklessly disregarded the likely possibility that the individual in question was, in fact, located in Connecticut or New Hampshire.

that these documents were either "made for the purpose of obtaining or providing legal assistance," In re Cty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007) or were prepared "in anticipation of litigation," Fed. R. Civ. P. 26(b)(3)(A). Moreover, to the extent that Uber claimed work-product protection over the documents that the Court ordered to be released to plaintiff's counsel, the Court found this protection to be overcome, for reasons substantially similar to those discussed supra in connection with claims of work-product protection for Ergo's materials. See Fed. R. Civ. P. 26(b)(3)(A)(ii).

However, as to certain other communications over which Uber claimed privilege, the Court found that they either were covered by attorney-client privilege and/or were covered by a work-product protection that was not overcome by substantial need. These communications included, for instance, emails between Mr. Kalanick's counsel and Uber in-house counsel addressing potential responses to plaintiff's counsel's inquiries and letters about the Ergo investigation. As to the crime-fraud exception, the Court did not find that this exception applied to the documents over which the Court upheld Uber's claims of privilege. For example, the Court did not find that Mr. Kalanick's counsel, in making inaccurate representations to plaintiff's counsel about whether Uber had commissioned the Ergo

investigation, acted with fraudulent intent. Rather, he was the victim of inaccurate representations made to him by Uber's in-house counsel that, while negligent (maybe even grossly negligent), did not evidence intentional falsity. Finally, the Court denied plaintiff's application to take the deposition of Uber's General Counsel Salle Yoo on the basis that the relevant facts concerning her involvement were clearly a matter of record, and the risk that her deposition would involve potential invasion of the remaining attorney-client privilege was high.

PLAINTIFF'S PRAYER FOR RELIEF

Following the foregoing discovery, plaintiff, on June 29, 2016, moved for the following relief:

> (1) an order prohibiting Defendants from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same; (2) an order enjoining 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 means; (3) an order for monetary sanctions, including Plaintiff's attorneys' fees and costs related to the investigation of Plaintiff by Ergo; and (4) any other relief the Court deems just and proper, including against Ergo.

Notice of Motion and Motion for Relief Related to the Ergo Investigation, Dkt. 96. On July 6, 2016, defendants Uber and Kalanick jointly opposed plaintiff's motion in part, directing their opposition primarily against plaintiff's request for

monetary sanctions. See Defs. Opp. Br.[8] On July 7, 2016, third party Ergo also submitted a response to plaintiff's motion. See Ergo Opp. Br. Ergo consented to plaintiff's request for an order enjoining Ergo from undertaking further background investigations in connection with this litigation, but opposed further relief against Ergo. See id. at 10. Plaintiff submitted reply papers on July 8, 2016, and the Court heard oral argument on July 14, 2016. See Tr. Plaintiff and Ergo, as noted supra, had also previously sent letters to the Court regarding the legality and ethical status of Ergo's investigation. See Ergo Letter dated June 16, 2016; Plaintiff Letter dated June 21, 2016; Ergo Letter dated June 23, 2016.

Largely through the commendable subsequent efforts of the parties' outside counsel, however, plaintiff's requests for relief have now been resolved, as follows:

Plaintiff first requests "an order prohibiting Defendants from using any of the information obtained through Ergo's investigation in any manner, including by presenting arguments or seeking discovery concerning the same." See Notice of Motion. Defendants Uber and Kalanick confirmed at oral argument that they did not object to such an order, provided that it did not

[8] Pursuant to the Court's direction at a joint telephone conference held on June 28, 2016, the parties were permitted to initially file redacted copies of their briefs and exhibits and then re-file copies that were unredacted, with the exception of very limited redactions permitted by the Court.

involve a concession of wrongdoing on defendants' part. See Tr. 55:9-56:4, 57:7-10. In addition to the fact that defendants do not oppose plaintiff's first request for relief, the Court finds perfectly appropriate an order enjoining defendants from making use of the fruits of their own troubling conduct. See Fayemi v. Hambrecht & Quist, Inc., 174 F.R.D. 319, 324 (S.D.N.Y. 1997). For these reasons, the Court hereby enjoins defendants Uber and Kalanick from using in any manner in connection with this case any of the information obtained through Ergo's investigation, including by presenting arguments or seeking discovery concerning the same.

Plaintiff next seeks "an order enjoining 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 means." See Notice of Motion. Ergo, for its part, immediately consented to an order enjoining "any further background investigation of any individuals involved in this litigation." See Ergo Opp. Br. at 1; see also Tr. 26:20-25. Uber and Mr. Kalanick also consented to plaintiff's second request for relief, subject to the limitation that defendants would be able to seek information about plaintiff for purposes genuinely relevant to the litigation, such as information that would bear on whether

plaintiff Meyer is an appropriate class representative. See Tr. 56:9-57:2; see also Uber Opp. Br. at 20. The Court is of the view that such a limitation is appropriate, and that the clearest way to enforce such a limitation is to enter the following injunction. Specifically, the Court hereby 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.

Plaintiff's third request, which was made against defendants Uber and Kalanick, was for monetary sanctions including reimbursement of plaintiff's attorneys' fees and expenses incurred in connection with the aforementioned conduct. See Tr. 27:6-11. A federal district court is authorized to sanction "improper conduct" through its "inherent power," including by assessing attorneys' fees and costs against a party when that party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991) (internal quotation marks omitted).

If the Court were to reach the issue of whether such sanctions were warranted here, it would have to address whether

Uber acted with, at least, wanton disregard for its ethical and legal obligations. Ergo, as noted supra, carried out its investigation in a blatantly fraudulent and arguably criminal manner. Furthermore, Uber lawyers were required by New York's Rules of Professional Conduct to adequately supervise the Ergo non-lawyers that Uber hired to do work. See N.Y. Rules of Professional Conduct § 5.3. As it happens, however, the Court need not determine whether Uber failed in these duties, because the defendants have reached agreement to pay plaintiff a reasonable (though publicly undisclosed) sum in reimbursement of plaintiff's attorneys' fees and expenses incurred in conjunction with these matters.

While pleased that the parties have resolved the last prong of plaintiff's requested relief, the Court cannot help but be troubled by this whole dismal incident. Potential plaintiffs and their counsel need to know that they can sue companies they perceive to be violating the law without having lies told to their friends and colleagues so that their litigation adversaries can identify "derogatories." Further, the processes of justice before the Court require parties to conduct themselves in an ethical and responsible manner, and the conduct here fell far short of that standard. As the Supreme Court long ago stated, "courts of law" have inherent "equitable powers . . . over their own process, to prevent abuses, oppression, and

injustice," Gumbel v. Pitkin, 124 U.S. 131, 144 (1888). This Court will not hesitate to invoke that power if any further misconduct occurs.

In sum, for the foregoing reasons, 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.

SO ORDERED.

Dated: New York, NY
July 25, 2016

JED S. RAKOFF, U.S.D.J.