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

SPENCER MEYER, Plaintiff, v. TRAVIS KALANICK, Defendant.	**Case No. 1:15-cv-9796 (JSR)**

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TRAVIS KALANICK'S EXPEDITED MOTION FOR JOINDER OF UBER TECHNOLOGIES, INC. AS A NECESSARY PARTY

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PRELIMINARY STATEMENT

Plaintiff's claim that Uber is not a necessary party to this case might be dismissed as merely myopic or misguided were it not so patently calculated. This is a case against Uber in everything but name. Uber's actions and operations permeate every aspect of Plaintiff's Complaint. Plaintiff seeks a declaration that Uber's very essence—its pricing algorithm and business model—is illegal and an injunction preventing Uber from contracting with driver-partners to use that algorithm. Plaintiff cannot obtain his requested relief without joining Uber. Moreover, absent joinder, Uber cannot adequately protect its interests—interests that are profoundly threatened by the relief Plaintiff seeks. For all of these reasons, Uber should be a party to this case.

But Plaintiff chose not to sue Uber—not because his true dispute is with Uber's CEO, Travis Kalanick, but because he did not want to be confronted with his agreement to arbitrate his disputes with Mr. Kalanick's employer. Rule 19 is a bulwark against this type of very gamesmanship. It allows a necessary party to be joined, at any time, and even where a plaintiff has gone to great lengths to avoid that party. Here, Uber is the very definition of a necessary party. The Court should therefore put an end to Plaintiff's games and join Uber to this case under Rule 19.

I. Uber Is a Necessary Party under Rule 19

A. The Joinder of Necessary Parties May Be Raised At Any Time

Plaintiff mistakenly argues that Mr. Kalanick's Rule 19 motion is not timely. Contrary to Plaintiff's suggestion (DE 75 at 2-3), however, there is no requirement of timeliness under Rule 19. *See Rubler v. Unum Provident Corp.*, No. 04-cv-7102 (DC), 2007 WL 188024, at *2 (S.D.N.Y. Jan. 25, 2007) ("an objection based on the absence of an indispensable party can be raised at any time, even by an appellate court"). Even if timeliness were not expressly

disclaimed as an element under Rule 19, this argument would not pass muster. Only two months have passed since Mr. Kalanick's motion to dismiss was denied, and the time to join parties under the Court-ordered case management plan is more than a month away. S*ee* DE 39 at 1. Plaintiff's suggestion that it is too late to join Uber is wrong on the law and wrong on the facts.

B. The Court Cannot Award Plaintiff's Full Requested Relief Without Joining Uber

Plaintiff does not dispute the general principle that parties cannot obtain "complete relief" under Rule 19 where they seek to enjoin a nonparty's conduct. DE 75 at 8-9. Nor could he. It is well-established that where, as here, a plaintiff seeks equitable relief that can only be undertaken by a nonparty, such "equitable relief demanded by plaintiffs would be unenforceable on its face" unless the nonparty is joined under Rule 19. *Aguinda v. Texaco, Inc.*, 945 F.Supp. 625, 628 (S.D.N.Y. 1996) (Rakoff, J.) *aff'd in part and vacated in part on other grounds, Jota v. Texaco*, 157 F.3d 153 (2d Cir. 1998); *see Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 251 (S.D.N.Y. 2002) (same, for Complaint seeking declaration that nonparty's conduct is unlawful).[1]

Instead, ignoring the plain language of his own Complaint, Plaintiff blithely asserts that he only "seeks a declaration that Defendant violated the law and an injunction that prevents him from continuing to participate in the price-fixing conspiracy." DE 75 at 9. To the extent Plaintiff now seeks to narrow the scope of the relief he seeks, he should amend his Complaint and be bound by that amended demand for relief going forward. Plaintiff's present characterization of his requested relief, however, is utterly irreconcilable with the text of his Complaint, which demands "[a] declaration that *the use of [Uber's] pricing algorithm* for setting

[1] Plaintiff's attempt to distinguish *Weizmann* as limited to disputes over ownership of assets is misplaced. Judge Berman broadly held that where a "Complaint[] explicitly request[s] relief directly implicating" a nonparty, the nonparty must be joined under Rule 19. 229 F.Supp.2d at 251.

fares . . . *is unlawful*" (Compl. at 26 (emphases added)) and insists that Uber's "unlawful contracts" and "ongoing violations [of law]" must be "permanently enjoined" (*id.* ¶ 133).

As this Court has already concluded, the "contracts" that Plaintiff alleges are unlawful and seeks to "permanently enjoin" are Uber's agreements with its independent driver-partners. DE 37 at 8; *see also* Compl. ¶ 70. The Complaint further states:

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

Compl. ¶ 133; *id.* ¶140 (same).[2] Not finished, Plaintiff also demands: "A declaration that the use of the pricing algorithm for setting fares as described above is unlawful," and "[a]ll other relief to which Plaintiff and members of the Class and Subclass may be entitled at law or in equity." *Id.* at 26. Plaintiff cannot credibly dispute that the relief at the center of his Complaint is his effort to enjoin Uber's conduct. This is precisely the circumstance Rule 19 was enacted to address. Indeed, "Rule 19(a) *requires* the Court to join any person to effect 'complete relief,' where such joinder is feasible." *Jota*, 157 F.3d at 162 (emphasis added).[3]

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[2] The fact that this language appears in the body of the Complaint rather than the Complaint's Demand for Judgment "is immaterial, as it is well-settled that final judgment shall grant all the relief to which a plaintiff is entitled, whether or not demanded in [its] pleadings." *Medisim Ltd. v. BestMed LLC*, 910 F. Supp. 2d 591, 620 (S.D.N.Y. 2012) (internal quotations omitted); *see also In re Methyl Tertiary Butyl Ether Products Liab. Litig.*, 568 F. Supp. 2d 376, 383-84 (S.D.N.Y. 2008) ("Under the plain language of the Federal Rules, a party does not need to demand a particular form of relief in the complaint (*i.e.*, the pleadings). It is sufficient for the plaintiff to give notice of her claims and state that she is seeking relief as may be deemed necessary, just and proper by the Court."); Fed. R. Civ. P. 54(c).

[3] Plaintiff mistakenly suggests that *Jota* held that a nonparty is not necessary under Rule 19(a) if the requested injunctive relief can be modified to "only require the named party to act." DE 75 at 9. *Jota* in fact addressed the distinct Rule 19(b) inquiry that arises when a necessary party feasibly "cannot be joined." 157 F.3d at 162. The analysis in *Jota* pursuant to Rule 19(b) does not bear on its affirmance of this Court's holding that joinder of a nonparty is necessary under Rule 19(a) where a plaintiff demands equitable relief against it. 157 F.3d at 161-62. Here, Rule

Because the Complaint seeks declaratory and injunctive relief that, if granted, could restrict Uber's ability to continue using its pricing algorithm, Uber is a necessary party that must be joined to this action under Rule 19(a).

C. Uber's Interests Would Be Harmed Absent Joinder

Where an alleged co-conspirator has protectable interests in a litigation, it is a necessary party separate and apart from its status as a co-conspirator.[4] Plaintiff relies on *Ward v. Apple* for the principle that a co-conspirator can never be a necessary party. 791 F.3d 1041, 1048 (9th Cir. 2015). But *Ward* itself explicitly rejected this contention, reasoning that "there may be circumstances in which an alleged joint tortfeasor has particular interests that cannot be protected in a legal action unless it is joined under Rule 19(a)(1)(B)." *Id.* As *Ward* explained, the purpose of Rule 19(a)(1)(B) is to "protect the interests of absent parties." *Id.* Thus, "an absent party's role as a joint tortfeasor does not preclude it from having an interest in the action that warrants protection." *Id.* In fact, "in some cases the equitable relief sought in an action may make an absent party required under Rule 19(a)(1)(B)(i)." *Id.* at 1049. Accordingly, the fact that a nonparty is an alleged co-conspirator—the point Plaintiff principally relies on here—is "not

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19(b)'s analysis does not apply because Uber's joinder is not only feasible, Uber is independently seeking to intervene in the case. The other cases Plaintiffs cite on this point either involve this same question (*Salt River Project Agric, Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1178 (9th Cir. 2012) (necessary nonparty Navajo tribe cannot be joined because it enjoyed sovereign immunity)) or involve a situation in which no party argued that a nonparty was necessary under Rule 19 (*Gibbs Wire & Steel Co. v. Johnson*, 255 F.R.D. 326, 329 n.1 (D. Conn. 2009)).

[4] The cases Plaintiff cites for the proposition that co-conspirators are not always necessary parties are inapposite. DE 75 at 12-13. These cases consider whether a party is indispensable under Rule 19(b), which sets forth a distinct—and higher—standard that applies where a necessary party cannot feasibly be joined. *See supra* n.3. Thus, the cases cited by Plaintiff which consider whether a party is indispensable and, as a result, the lawsuit must be dismissed absent joinder, do not address the situation here where joinder is plainly feasible. *See, e.g.*, *Georgia v. Pa. R.R.*, 324 U.S. 439, 463 (1945) (addressing whether complaint must be dismissed under Rule 19(b)); *Temple v. Synthes Corp.*, 498 U.S. 5 (1990) (same).

dispositive of whether it has interests that warrant protection under Rule 19(a)(1)(B)(i)." *Id.* This case is a prototypical example of a situation in which a nonparty's specific, concrete interests that may be impaired absent joinder make it a necessary party under Rule 19(a).

1. Uber Risks Being Bound By an Injunction

As described *supra*, Plaintiff's Complaint seeks injunctive and declaratory relief that Uber's business model is an illegal price-fixing conspiracy. Such relief, if granted, would plainly impair Uber's interests. Most obviously, there is a risk that Uber could be bound by the terms of the injunction entered against Mr. Kalanick without having been afforded the opportunity to defend itself. *See* Fed. R. Civ. P. 65(d)(2) (an injunction "binds . . . (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with" the parties or their agents").[5] While Plaintiff and Mr. Kalanick agree that faithful application of Rule 65(d) means "Uber will not be bound by the terms of an injunction entered against Defendant" (DE 75 at 11), the risk that Uber could be bound by the terms of an injunction entered against Mr. Kalanick is sufficient under Rule 19 to render Uber a necessary party to this case. *See Takeda v. Northwestern Nat'l life Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985) (joinder required under Rule 19 where "a significant possibility" that a nonparty's interests would be impaired absent joinder); *see also People v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996) (Under Rule 65(d), injunctions apply to "the party named in the order" as well as non-parties "legally identified with him"); *Spectacular*

[5] *See Reliance Ins. Co. v. Mast Const. Co*., 84 F.3d 372, 377 (10th Cir. 1996). Plaintiff's attempt to distinguish *Reliance* on the ground that "no Rule 19 joinder issue [was] before the court" (DE 75 at 11 n.5) misses the point. *Reliance* demonstrates that nonparties that are closely associated with a party may be subject to an injunction issued against the party. 84 F.3d at 377. It therefore demonstrates that Uber faces the real risk that an injunction naming its CEO could ultimately bind Uber. *See also LifeScan Scotland, Ltd. v. Shasta Techs., LLC*, No. 11 Civ. 04494 (WHO), 2013 WL 4604746, at *4-5 (N.D. Cal. Aug. 28, 2013) (contempt sanctions against nonparty for aiding and abetting party's violation of injunction.

Venture, L.P. v. World Star Int'l, Inc., 927 F.Supp. 683, 684-85 (S.D.N.Y. 1996) (finding defendant corporation's president and principal to be "one and the same" as the corporation for purposes of Rule 65(d)).

2. Uber Risks Being Collaterally Estopped in Later Lawsuits

Uber also faces the real risk of being collaterally estopped in later litigation, indeed in pending litigation in the Southern District of Texas, based on a judgment issued against Mr. Kalanick in this case. "Collateral estoppel is intended to save judicial and adversarial resources" and the "doctrine has been applied offensively in antitrust cases to preclude relitigation of issues conclusively determined in prior litigation." *Westwood Lumber Co. v. Weyerhaeuser Co*., No. 03-cv-551 (PA), 2003 WL 24892052, at *1 (D. Or. Dec. 29, 2003).

Plaintiff asserts that "[a]bsent joinder, there is no reasonable risk that Uber will be subject to non-mutual offensive collateral estoppel based on rulings adverse to Mr. Kalanick in this action," yet fails to offer any justification or cite any authority for this assertion. DE 75 at 13. In fact, the law is contrary. "[O]ffensive non-mutual collateral estoppel" applies when

> (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom [collateral estoppel] is asserted was a party or in privity with a party in the prior action.

Collins v. D.R. Horton, Inc., 505 F.3d 874, 882 n.8 (9th Cir. 2007). Plaintiff does not dispute that the first three elements of this test may be met if this lawsuit results in a finding of liability against Mr. Kalanick.

As for the final element, Uber and Mr. Kalanick risk being found in privity. Corporate executives may be in privity with the corporation that employs them. *In re Teltronics Servs., Inc*., 762 F.2d 185, 190-91 (2d Cir. 1985). Moreover, courts in this Circuit have found alleged co-conspirators to be in privity for purposes of collateral estoppel. *E.g., 7 W. 57th St. Realty Co.,*

LLC v. Citigroup, Inc., No. 13-cv-981 (PGG), 2015 WL 1514539, at *26-27 (S.D.N.Y. March 31, 2015).[6]

Plaintiff's summary conclusion that there is "no reasonable" risk that Mr. Kalanick and Uber will be found in privity is therefore misguided. While Mr. Kalanick or Uber may oppose any future arguments that they are in privity, they nonetheless face a real risk of a court applying the doctrine of collateral estoppel. Under Rule 19, that is more than sufficient to warrant joinder *See Takeda*, 765 F.2d at 821 (joinder is required where there is a "significant possibility" that the relationship between the party and nonparty was "sufficiently close" such that collateral estoppel *could apply* to the nonparty in a subsequent proceeding) (emphasis added).[7]

3. Uber Has Protectable Contract Interests

Uber risks not only collateral estoppel and being bound by an injunction, but also a judgment holding its innumerable contracts with driver-partners illegal. In resisting this obvious conclusion, Plaintiff again ignores his own Complaint, now taking the position that he "does not seek to enjoin Uber's contracts with its driver-partners." DE 75 at 14. This assertion is not only in tension with Plaintiff's Complaint, it directly contradicts it. Uber driver-partner contracts are at the heart of Plaintiff's conspiracy theory, and the Uber App is the alleged means of effectuating the purported conspiracy. *See* DE 8, 10-11.

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[6] Plaintiff's suggestion that the privity analysis differs in the offensive and defensive collateral estoppel contexts is without merit. *See* DE 75 at 13. Courts uniformly apply the same privity standard in both offensive and defensive estoppel cases. *See, e.g., Levin v. Tiber Holding Corp.*, 277 F.3d 243, 252-53 (2d Cir. 2002) (citing privity standard from defensive collateral estoppel case, in case where claimant sought offensive collateral estoppel); *Mario Valente Collezioni, Ltd. v. AAK Ltd.*, 2004 WL 724690, at *7-8 (S.D.N.Y. Mar. 26, 2004) (same).

[7] Contrary to Plaintiff's position, the fact the Ninth Circuit applied state law to the collateral estoppel analysis in *Takeda* does not bear on its holding that, under federal law, where a nonparty risks collateral estoppel, joinder is necessary because "Rule 19 speaks to possible harm, not only to certain harm." *Id.*

There can be no dispute that a request to "permanently enjoin[]" performance of a nonparty's contracts threatens to impair that nonparty's protectable interests. *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-01 (2d Cir. 1980). For this additional reason, Uber is a necessary party under Rule 19. *See id.* ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.").

Facing an analogous situation, the Fourth Circuit held that a nonparty with a "direct pecuniary interest" in a dispute, by virtue of its contract with an existing party, is a necessary party under Rule 19. *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 434 (4th Cir. 2014) ("fairness requires" the nonparties "be joined as necessary parties to protect their own interests in the determination of the legal significance of their actions"). Similarly here, Uber has a "direct pecuniary interest" in this lawsuit not only to protect its business model but also because Uber, as an alleged co-conspirator, will potentially be liable to Plaintiff for any monetary judgment Mr. Kalanick cannot satisfy. Uber also has an interest in protecting the "determination" of the "legal significance" of its algorithm and business model. *Id.*

Joinder is also necessary because the equitable relief sought here "would prevent a defendant from fulfilling substantial contractual obligations to the absent party." *Ward*, 791 F.3d at 1053. The relief requested by Plaintiff would prevent Mr. Kalanick, Uber's CEO, from performing the duties set forth in his employment contract. Moreover, Mr. Kalanick is not an ordinary employee. As "the co-founder and CEO of Uber," Mr. Kalanick is "the public face of Uber," "the manager of its operations" and "the proud architect of [its] business plan." Compl. ¶¶ 1, 9. Given Mr. Kalanick's position within Uber, an injunction against Mr. Kalanick would effectively enjoin Uber from operating as a business—as its chosen CEO could no longer direct

its business activities. If this Court were to enter an injunction against Mr. Kalanick, Uber would face the choice of severing its relationship with its CEO, co-founder, and "public face" (potentially in breach of any employment agreement between Mr. Kalanick and Uber) or fundamentally restructuring its business model. Uber should not and cannot be placed in such a position without the right to defend itself.

4. Uber's Interests Are Not Adequately Protected By Mr. Kalanick

Plaintiff's suggestion that joinder of Uber is unnecessary because Plaintiff claims that Uber has had some involvement in Mr. Kalanick's defense of the claims asserted against him personally is without merit. First, it should come as no surprise that Uber's general counsel's office would take an interest in litigation against the company's CEO where, as here, the claims relate solely to Uber's business operations and the allegations specifically concern Mr. Kalanick's actions in his capacity as Uber's CEO. *See* Compl. ¶¶ 1-3. Indeed, this fact only underscores the strategic nature of Plaintiff's suit—to sue Uber without naming it as a party. While Mr. Kalanick is plainly associated with Uber, he does not own Uber outright, nor does he exercise control over Uber's 400-plus operations in countries around the world. Indeed, Uber has retained its own outside counsel to represent its interests in this action. These interests include Uber's contractual right to resolve all disputes with riders related to their use of the Uber App in individual arbitration. Moreover, Plaintiff's contention that Uber's "interests are adequately represented by" Mr. Kalanick "is precisely" what may "cause[] the likelihood of collateral estoppel in future litigation and thus determines" that Uber "is a necessary party" here. *Takeda*, 765 F.3d at 821 n.7.

5. Mr. Kalanick Risks Inconsistent Judgments Absent Uber's Joinder

Mr. Kalanick faces the very real possibility of being subject to inconsistent judgments if Uber is not joined as a party to this case. A copycat lawsuit filed in the Southern District of Texas based on allegations substantively identical to those in issue here names *both* Uber and Mr. Kalanick. *See Swink v. Uber Technologies, Inc. and Travis Kalanick*, No. 16-cv-1092, DE 2 (S.D. Tex. April 22, 2016). The possibility that Uber and Mr. Kalanick could successfully move to compel arbitration in one jurisdiction while Mr. Kalanick could be forced to litigate the same causes of action in this jurisdiction creates the risk of inconsistent judgments for Mr. Kalanick. *Home Buyers Warranty Corp.*, 750 F.3d at 434-45 (finding risk of inconsistent obligations meriting joinder where "one court could enforce the arbitration clause while another finds it unenforceable"); *see also PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 201 (6th Cir. 2001) (joinder required under Rule 19 where necessary to "avoid[] the possibility of a federal court and a state court reaching opposite conclusions regarding the question of whether the contracts require Cohen to process his claims through arbitration").

CONCLUSION

For the reasons described in this Memorandum, Defendant Travis Kalanick respectfully requests that Uber Technologies, Inc. be joined as a party to this action.

Dated: June 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 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