UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN SUPPORT OF UBER TECHNOLOGIES, INC.'S MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF COMPELLING ARBITRATION

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PRELIMINARY STATEMENT

Plaintiff's fundamental point in opposition to intervention by Uber Technologies, Inc. ("Uber") cannot be reconciled with his own Complaint. Plaintiff's argument rests to a significant degree on the premise that Uber has not identified a sufficient "interest relating to the property or transaction that is the subject of the action." Plaintiff's Opposition Brief ("Opp. Br.") at 24. Yet, Plaintiff's lawsuit, *against Uber's CEO*, alleges that *Uber's contracts with its driver-partners* facilitated an illegal conspiracy, and seeks a judgment declaring Uber's algorithm illegal. Indeed, if Uber's overwhelming interests in this case—which, even by Plaintiff's own description challenges the core of Uber's business model—are insufficient to support Uber's intervention, it is hard to imagine when intervention would ever be appropriate. Plaintiff's claim, that Uber's intervention is untimely and would prejudice the parties, fares no better. Uber's motion was filed well in advance of the deadline to join parties in this action and Plaintiff's claim of prejudice is unsupported by the record. Likewise, Plaintiff's effort to conflate the question of Uber's intervention with the wholly unrelated Ergo discovery dispute is unavailing. None of Plaintiff's arguments alter the conclusion that, pursuant to Rule 24, Uber is entitled to intervention by right or, in the alternative, permissive intervention, for the limited purpose of moving to compel arbitration.

Put simply, while Plaintiff chose not to name Uber as a defendant, Uber, its contracts, and its pricing algorithm permeate the Complaint. Uber respectfully seeks the Court's permission to defend itself against a Complaint that indisputably attacks it.

ARGUMENT

I. UBER IS ENTITLED AS A MATTER OF RIGHT TO LIMITED INTERVENTION TO COMPEL ARBITRATION

A. This Action Directly Implicates Uber's Protected Contractual Interests

Plaintiff's argument that Uber's interest in this litigation is minimal because he "is not seeking to enjoin Uber's driver-partner agreements," Opp. Br. at 27, is meritless. Plaintiff does not, and cannot, deny that the equitable relief he seeks would "decimate" the driver-partner contracts. *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005), abrogated on other grounds by *Levin v. Com. Energy, Inc.*, 560 U.S. 413 (2010). After all, the gravamen of Plaintiff's entire claim is that Uber's agreements with driver-partners are unlawful. The First Amended Complaint is replete with allegations that the driver-partner agreement, including the pricing algorithm, are at the center of the alleged price fixing conspiracy. It alleges that "[d]river-partners agree to participate in a combination, conspiracy, or contract to fix prices when they swipe 'accept' to accept the terms of Uber's written agreement." FAC at ¶ 70, DE 26. It further alleges that "[f]ares are calculated based on an Uber-generated algorithm." *Id*. ¶ 47. On that basis, Plaintiff seeks a declaration that Uber's "use of the pricing algorithm for setting fares . . . is unlawful." *Id*. ¶ 141C. Such a declaration would, as a practical matter, substantially affect—indeed, potentially "decimate"—Uber's driver-partner agreements.

Much of Plaintiff's argument to the contrary rests on the false premise that the only issue that is "(arguably) pertinent" to the analysis is "whether Uber would be bound by an injunction against Defendant in this case." Opp. Br. at 11. This argument runs directly counter to Supreme Court precedent recognizing that "a judgment [that] is not res judicata as to, or legally enforceable against, a nonparty" may nonetheless affect that non-party's interests even if "they are not 'bound' in the technical sense." *Provident Tradesmens Bank & Trust Co. v. Patterson*,

390 U.S. 102, 110 (1968). "Rule 19(a) does not require that this Court's finding on the meaning of the contract literally bind all other courts that might give attention to the matter." *Global Disc. Travel Servs., LLC v. Trans World Airlines*, Inc., 960 F. Supp. 701, 708 (S.D.N.Y. 1997) (Sotomayor, J.). "Rather, Rule 19(a)(2) 'recognizes the importance of protecting the person whose joinder is in question against the *practical* prejudice to him which may arise through a disposition of the action in his absence.'" *Id*. (quoting Fed. R. Civ. P. 19(a) advisory committee's note).[1]

The proper inquiry is therefore not only whether Uber may be bound, but whether, as a practical matter, the equitable relief Plaintiff seeks would affect Uber's substantial interests, including its contractual interests. *See, e.g.*, *Crouse-Hinds Co. v. InterNorth Inc.*, 634 F.2d 690, 701 (2d Cir. 1980); *Wilbur*, 423 F.3d at 1113; *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 848 (11th Cir. 1999). There can be no serious dispute that the relief Plaintiff seeks, including a declaration that Uber's pricing algorithm is illegal, would affect Uber's substantial interests. That algorithm is an integral aspect of Uber's business model, as Plaintiff acknowledges. *See* FAC ¶ 52.

Plaintiff's attempt to analogize this case to *MasterCard*—by asserting that Uber's driver-partner agreements, and the related pricing algorithm, are not "the basis of the claim"—is not only unpersuasive, it is refuted by Plaintiff's own Complaint. Opp. Br. at 27. Plaintiff's First Amended Complaint, as the Court recognized, alleges explicitly that these agreements *are* the

[1] Additionally, Plaintiff's arguments about the collateral estoppel effect of an adverse ruling miss the mark. The mere risk of collateral estoppel is a sufficient showing that Uber's interests are implicated. *Felix Cinematografica S.r.l. v. Penthouse Int'l, Ltd.*, 99 F.R.D. 167 (S.D.N.Y. 1983) ("While the issue is not before this Court, the risk exists that an argument may be urged of the preclusive impact of a judgment in favor of the plaintiffs in this case."). Moreover, Plaintiff's assurance that Uber would not face collateral estoppel is no guarantee; that is a decision reserved for a future court, not the Plaintiff.

very foundation of Plaintiff's claim.[2] *See* FAC ¶ 70; Order re Mot. to Dismiss (March 31, 2016) at 12-13, DE 37. The Court should reject Plaintiff's suggestion that this action does not implicate Uber's contracts with its driver-partners.

1. Uber's Interests Will Not Be Adequately Represented Absent Limited Intervention

Uber's contractual interests are the bullseye of Plaintiff's claims, which fall squarely within the scope of Uber's arbitration provision. *See* Mem. in Support of Mot. to Intervene ("Mot.") at 10-13. Uber therefore has a clear, protectable interest in asserting its contractual right to compel Plaintiff to resolve this dispute in arbitration, rather than in the courts. That right is protected by the Federal Arbitration Act ("FAA"). *See, e.g.*, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). That Plaintiff has chosen to name Uber's CEO and not Uber should not preclude Uber from asserting its right to compel arbitration where, as here, the relief Plaintiff seeks directly and indisputably affects Uber's interests. *Cf. Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 76 (2d Cir. 1984) (cautioning against "manipulat[ing] jurisdiction" by dropping parties "with a substantial interest in the claim solely for the purpose of retaining jurisdiction in the federal court"); *see also Scurtu v. Int'l Student Exch*. 523 F.Supp.2d 1313, 1327 (S.D. Ala. 2007) (rejecting "a gaping loophole" that would permit a plaintiff to evade an arbitration provision). Denying intervention to compel arbitration under these circumstances would impermissibly circumscribe the FAA's protections by permitting plaintiffs to avoid their obligation to arbitrate simply by suing a corporation's officers, rather than the corporation itself. Because there is some doubt about whether Mr. Kalanick can compel arbitration as a non-

[2] Plaintiff seeks to distinguish *Crouse-Hinds* on the ground that it was an action to set aside a contract, rather than an action for declaratory relief. Opp. Br. at 27. This effort fails. It is irrelevant whether Plaintiff seeks an injunction setting aside Uber's contracts or instead seeks a declaration that they are unlawful; the practical impact on Uber's contractual interests is the same.

signatory to the user agreement, he is not able to fully represent Uber's substantial interest in defending the legality of its contracts and pricing algorithm *in arbitration*. Therefore, Uber's absence from this litigation would cause it significant harm by interfering with its ability to have Plaintiff's claims decided in arbitration. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (noting that the burden of showing inadequacy of representation is "minimal").

2. Plaintiff's Authority Is Readily Distinguishable

Uber's compelling, direct interest in the legality of its pricing algorithm and its contracts with driver-partners distinguishes this case from the handful of unpublished or out-of-circuit district court decisions Plaintiff cites in his Opposition.

Plaintiff's reliance on *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, 1996 WL 346352 (S.D.N.Y. 1996), is misplaced. In that case, the district court found that a union could not intervene in an intellectual property dispute to compel arbitration because its "interest in arbitration" did not "pertain to 'the property or transaction' that comprises the 'subject of the action.'" *Id*. at *3. The court found that "the action between [the plaintiff] and [the defendant] implicates this interest only indirectly." *Id*. *Liz Claibourne* thus stands for the unremarkable proposition that a party is not necessarily entitled to intervene in a bilateral contract dispute if it is not a party to the contract.

Here, Uber is a party to the very contracts Plaintiff challenges as price fixing agreements. The impact of the equitable relief Plaintiff seeks—including a declaration that would bear directly on the legality of terms of Uber's contracts and the use of Uber's pricing algorithm—is neither "too indirect" nor "too contingent to justify intervention under Rule 24." Opp. Br. 4.

DSMC, Inc. v. Convera Corp., which Plaintiff also relies upon, is likewise inapt. 273 F. Supp. 2d 14 (D.D.C. 2002). There, the plaintiff, DSMC, filed a formal arbitration demand on NGTL, and then filed suit against Convera, without naming NGTL as a party. *Id*. at 17. NGTL

sought to intervene to stay the action pending the outcome of its arbitration with DSMC. *Id*. at 17-18. The court held that NGTL could not intervene as of right merely to seek a stay of DSMC's action against Convera, but permitted NGTL to intervene for the purpose of "join[ing] in Convera's request to compel arbitration among all three parties." *Id*. at 25. *DSMC, Inc.* has little, if any, relevance here. Uber seeks to intervene for the purpose of compelling arbitration, not solely for a stay and, unlike the non-party in that case, Uber has cited substantial interests that could be directly affected by disposition of this action in its absence.[3]

B. Uber's Motion is Timely

Uber's motion to intervene is timely. It was filed before the Court's deadline to join parties. Case Management Order, DE 39. That should be at least constructive if not controlling as to timeliness, as Rule 24(a)(2) is a "counterpart" to Rule 19 joinder. Fed. R. Civ. P. 24, advisory committee's note to 1966 amendment; *MasterCard Int'l Inc.,* 471 F.3d at 390 ("These rules are intended to mirror each other."). Moreover, timeliness is a *flexible* determination that considers all the circumstances, including prejudice to the moving and existing parties, as well as the length of time a party knew of its interest. *Floyd v. City of N.Y.*, 770 F.3d 1051, 1058 (2d Cir. 2014).

1. Denying Intervention Will Strongly Prejudice Uber

Plaintiff's assertion that "Uber will not suffer prejudice" if it is not permitted to intervene, Opp. Br. 23, is contradicted by Uber's strong protected interest in this litigation. Stripping away the gamesmanship, Plaintiff's Complaint targets Uber and in particular, Uber's

[3] The Southern District of Indiana's unpublished decision in *Twist v. Arbusto* is also distinguishable. 2007 WL 30556 (S.D. Ind. 2007). The only issues at stake in the litigation were the *Twist* plaintiffs' right to compel arbitration and recover attorney's fees. *Id*. at *2. Because the court concluded that the moving party's interest in compelling arbitration was "not at stake in, or affected by" the litigation, his "right to arbitration presents entirely separate legal issues than those determining Twist's right to arbitration." *Id*. at *4.

business model, including the pricing algorithm and driver-partner agreements that are the heart of Uber's operation.[4] The prejudice to Uber is underscored by the uncertainty surrounding whether Mr. Kalanick can compel arbitration absent Uber's intervention. *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 183 (2d Cir. 2001); *see also Chen-Oster v. Goldman, Sachs & Co.*, No. 10 CIV. 6950 AT JCF, 2015 WL 4619663, at *6 (S.D.N.Y. Aug. 3, 2015) (granting motion to intervene where, despite the passage of time, it had only recently become "apparent that the representative no longer protect[ed] the intervenor's interest"). As the true target of the litigation *and* the signatory of the arbitration clause, Uber can only protect its interests if it is permitted to intervene.

Plaintiff avers that Uber will be "capable of defending itself in subsequent litigation," including by moving to compel; this misses the point. Opp. Br. at 23. Uber has a specific interest in compelling arbitration in *this* case, against *this* putative class. Moreover, Uber's right to arbitrate at all is at stake if any plaintiff can avoid arbitration by only naming an executive.[5]

2. Plaintiff Will Not Be Prejudiced By Allowing Uber to Intervene

Plaintiff argues prejudice because he has spent "significant resources" on the "issue of [the] class-action waiver," and Uber's intervention is merely a "third bite at the apple." Opp Br. at 22. This contention, however, runs directly contrary to Plaintiff's earlier briefing which went to great lengths to distinguish class waivers in the context of arbitration from class waivers independent of arbitration. Plaintiff's Mem. in Opp. to Defendant's Mot. to Dismiss at 23-25, DE 33; Order re Mot. to Dismiss at 13, DE 37. Uber seeks to intervene for the limited purpose

[4] Plaintiff's gamesmanship extends to its discovery strategy which ignores Uber's non-party status. As described in Mr. Kalanick's letter brief related to the "possession, custody, or control" discovery dispute, much of the artificiality injected into this proceeding by Plaintiff's litigation choices would be swiftly eliminated by granting Uber's motion to intervene.

[5] Furthermore, if not allowed to intervene, Uber is prejudiced where it is subjected to costly litigation, including substantial discovery, without any ability to defend its interests.

of compelling arbitration; and Plaintiff acknowledges that no party had previously moved for arbitration.[6] Opp. Br. 7.

Plaintiff further asserts prejudice if Uber seeks to compel arbitration. *See* Opp. Br. at 31. But being held to the terms of his agreement with Uber by resolving this dispute through arbitration does not amount to cognizable prejudice. Plaintiff has no right to have his antitrust claims heard by a court if those claims are subject to arbitration, or to have those claims resolved on a class-wide basis. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("The antitrust laws do not evinc[e] an intention to preclude a waiver of class-action procedure.") (citation and internal quotation marks omitted).

3. The Early Phase of This Litigation Weighs in Favor of Granting Uber's Motion to Intervene

"[T]he effect that the length of time the litigation or proceeding has been pending is to be determined on a case by case basis." *Mortgage Lenders Network, Inc. v. Rosenblum*, 218 F.R.D. 381, 384 (E.D.N.Y. 2003). The number of months that have passed, without consideration of the broader posture of the litigation, cannot serve as a litmus test. *See Republic of the Philippines v. Abaya*, 312 F.R.D. 119, 123 (S.D.N.Y. 2015) (intervention timely "nearly a year" after commencement of litigation).

The relevant measurement of timeliness includes "the point to which the suit has progressed." *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). Plaintiff points primarily to *MasterCard* for the proposition that a four to five month delay is too long; yet, Plaintiff overlooks that Visa filed its motion on "the eve of the preliminary injunction hearing." *MasterCard Int'l v. Visa Int'l Serv. Ass'n , Inc.*, 471 F.3d 377, 390 (2d Cir. 2006). Similarly, the

[6] Mr. Kalanick filed a Motion to Compel on June 6, 2016. DE 80. Uber previously submitted that Mr. Kalanick has not waived his right to compel arbitration. Uber's Proposed Mot. to Compel Arbitration at 20 n.11, DE 59-2.

district court denied the petition in *Doe v. Duncanville Indep. Sch. Dist.*, as it was filed *two days before* a preliminary injunction hearing. 994 F.2d 160, 167 (5th Cir. 1993) (per curiam). Upon review, the Fifth Circuit declared this timeline "not dispositive," and the court instead focused on the equities and the prejudice to the proposed intervenors. *Id.* at 168. By contrast, it is undisputed that discovery in this case is still in the early stages.

Plaintiff mistakenly asserts that Uber's intervention is delinquent because it "has known of the case . . . since the very day it was filed." Opp. Br. 20. Plaintiff cites no case—and Uber is aware of none—that a motion to intervene *must* be filed *immediately* upon learning of litigation. Plaintiff's reliance on *MasterCard* for this proposition neglects the context that was significant to the timeliness analysis. The court's decision, upholding the denial of Visa's intervention, turned on the fact that Visa would not be prejudiced if denied intervention, because Visa was "a stranger to the contractual dispute between MasterCard and FIFA." 471 F.3d at 390. By contrast, Uber is no "stranger" to the contracts and algorithm at issue here. Indeed, Uber is party to the very contracts and agreements targeted by Plaintiff's suit, and its algorithm is at the center of Plaintiff's alleged price fixing conspiracy. Finally, the time elapsed since the filing of the complaint is both modest and not necessarily dispositive as to timeliness. *See Floyd*, 770 F.3d at 1058 (acknowledging that the timeliness requirement "is not confined strictly to chronology"); *see also Abaya*, 312 F.R.D. at 123.

4. There Are No "Unusual Circumstances" Arising From the Ergo Investigation That Warrant Denial of Uber's Motion to Intervene

Plaintiff's effort to inject the Ergo dispute into consideration of Uber's motion to intervene should be seen for what it is: a red herring. Plaintiff cites no case law for the proposition that hiring an investigator is an "unusual circumstance" that warrants the denial of intervention. To the contrary, a moving party's involvement with a party to the litigation does

not foreclose it from later intervening. *See Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870, 874 (S.D.N.Y. 1991) (finding a motion timely where the moving party waited two years to intervene and had been involved with the defendant during the litigation).

II. IN THE ALTERNATIVE, UBER SHOULD BE GRANTED PERMISSIVE INTERVENTION

Plaintiff wrongly asserts that permissive intervention would cause "undu[e] delay or prejudice." Fed. R. Civ. P. 24(b)(3). The possibility of arbitration cannot be a basis for Plaintiff's claims of delay or inefficiency. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-25 (1983) (recognizing that federal policy favors "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). Furthermore, considering the facts alleged in his Complaint, Plaintiff cites no grounds (nor can he) that Uber would not "significantly contribute to full development of the underlying factual issues." Opp. Br. 31.

CONCLUSION

For the reasons set forth above, and in its Memorandum of Law in Support of Motion to Intervene, this Court should grant Uber's motion to intervene for the limited purpose of compelling arbitration.

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/ Reed Brodsky
Reed Brodsky