UBER HAS AN ANTITRUST LITIGATION PROBLEM, NOT AN ANTITRUST PROBLEM

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I. INTRODUCTION

Uber is roughly a decade old since its humble beginnings as an idea to help people get rides when they struggled to hail taxis. Today Uber has become a staple of transportation globally, aiding both those in need of rides, as well as those in need of a convenient way to earn some extra income. The app connects those that have cars and time with those who need rides, and it has faced many legal challenges since its inception. Perhaps its legal struggles are due in part to this unique business model that operates in what many refer to as the sharing economy.[2] Among those legal challenges are allegations of antitrust violations.

The antitrust claims against Uber have been numerous, but rely on surprisingly few theories of antitrust violation. Some of these cases are still pending, but many have been disposed of early on through motions to dismiss and voluntary dismissals. One common thread among these varying claims is that none has been analyzed and decided on the merits by a judge past the motion to dismiss phase.

This article will canvas the several alleged types of antitrust violations, describe the extent to which the merits of those arguments have been analyzed, and analyze those arguments independently on the merits.

II. ALLEGED UBER VIOLATIONS

A. Price Fixing

1. Facts

The Uber app allows riders to hail a ride for a given price and have a driver fulfill that ride for that price. The price is generated by Uber's price algorithm, which aims to mirror actual demand in real time. Uber has acknowledged (and actively defended in labor disputes) the position that the drivers are not Uber employees, but independent contractors that choose to use the app. Therefore, Uber results in thousands of independent sole proprietorships operating in the same market and seeking the same consumers, and all charging the exact same prices. This has led to price fixing allegations by consumers and competitors. The most thorough discussion of these claims came in *Meyer v. Uber*.[3]

In that case, although it had not been specifically mentioned in the complaint, Judge Rakoff found that plaintiffs had sufficiently pled a hub-and-spoke conspiracy, and denied defendant's motion to dismiss.[4] However, after being appealed to the Second Circuit on arbitration issues, and remanded back to the Southern District of New York, the case was sent to arbitration, barring an appeal by the plaintiffs on the antitrust theory. Therefore, while the claim passed muster under a motion to dismiss, the appeal was decided on an arbitration issue rather than the merits of the antitrust arguments.

2. Legal Analysis

A hub-and-spoke arrangement exists where a firm (the hub) organizes collusion among upstream or downstream market firms (the rim) by interacting with each rim firm individually (spokes) in order to artificially preserve or grow its market share or profits. To succeed, plaintiffs must have direct evidence of, or enough circumstantial evidence to infer a horizontal agreement.

The plaintiffs in *Meyer* alleged that Uber orchestrated this collusion among thousands of drivers. This already represents a sharp deviation from historic hub-and-spoke arrangement cases. For example, *Interstate Circuit, Toys "R" Us*, and *Apple (ebooks)* all involved merely six to ten "rim" firms. However, with technology drastically changing over recent years to facilitate mass communication, the sheer number of alleged conspirators may not be enough to find that such a large conspiracy could not exist.

2 The sharing economy refers to the emergence of peer-to-peer services that allow owners to give access to their property to strangers during the time the owner does not wish to use it. Peer-to-peer markets allow small suppliers to compete with traditional providers of the same good or service, making it easy for buyers to engage in convenient, trustworthy transactions. Einav, Farronato & Levin, National Bureau of Economic Research, NBER Working Paper No. 21496 (2015).

3 See *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016); *Swink v. Uber Technologies, Inc.*, 4:16-cv-01092 (S.D. Texas, April 22, 2016).

4 See *Meyer v. Uber*, No. 1:2015-cv-09796-JSR, Doc. 37 at 22-23 (S.D.N.Y. Mar. 31, 2016).

Other key distinctions between *Meyer* and historic cases relate to the purposes of the vertical "spoke" agreements and with whom they were made. In *Interstate Circuit*, *Toys "R" Us*, and *Apple (ebooks)* it was clear that the "hub" made the agreements to curtail competition. Interstate Circuit did not want to continue losing money to cheaper second-run theaters, so it went to every major studio to get them to stop giving those theaters film. Toys "R" Us did not want to lose sales to cheaper wholesale stores, so it went to every major toy manufacturer to get them to stop selling to those stores. Apple wanted to ensure it would be able to successfully enter the ebooks market by going to every major publisher to get them to make Amazon, which was selling at a lower price than Apple wanted, to adopt the same pricing structure as Apple (the agency model). Uber lacks these nefarious motives and cannot be said to be agreeing with all of the major players in the "rim" market, as was the case in those cases. Uber offers its app to any driver who wants to use it, along with the price algorithm, which is part of the product. There is nothing to stop any potential Uber driver from joining a competitor, going out on their own and pricing however they like, or simply declining the "offer" to become a driver. This is in stark contrast to the historic cases where there was a finite group of major players in the "rim" market that were *all* approached to make the deal.

Lastly, the drivers in Uber lack the interdependence that was central for courts inferring agreements among "rim" firms in those historic cases. Evidence demonstrated that in each of those cases, the same agreement was presented to every major firm in the "rim" market, and that it would only make economic sense for *any* of them to agree if *all* of them agreed. An Uber driver has no stake in whether another person, potentially hundreds of miles away, also becomes an Uber driver. While the app, and therefore each driver, may find greater success when there are more drivers (which could help convince more riders to use the app), drivers do not agree to Uber's terms because they know everyone else will too. They likely do it for numerous, unrelated reasons such as flexible extra income that would be difficult and costly to achieve independently from the app's reputation for safety, fair pricing, and reliability.

B. Avoiding Regulation (Sherman Act § 2)

1. Facts

Uber's insistence in labor law proceedings that its drivers are not employees, but rather independent contractors, not only opened the door for a claim of price fixing among the drivers, but also a monopolization claim by giving Uber the allegedly unfair competitive advantage of avoiding regulations. These claims exist not only because the drivers are not employees, but generally because Uber's unique and novel business structure often puts it outside the definition of many local regulations that govern traditional ride service-providers.

The most thoroughly discussed example of this type of claim against Uber is *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc*.[5] Plaintiffs alleged Uber had an anticompetitive advantage by avoiding costly regulatory compliance, but the Eastern District of Pennsylvania dismissed the first and second amended complaints for failure to demonstrate antitrust injury.[6] The Third Circuit affirmed this decision, finding that plaintiffs failed to properly allege any of the elements of an attempted monopolization claim.[7]

2. Legal Analysis

As the Third Circuit rightly held, Uber's non-compliance with costly regulations to which it believes it is not subject does not constitute grounds for an attempted monopolization claim. For the advantage to be anticompetitive, Uber must at least be subject to the regulation it is allegedly avoiding. Every regulation is not required to apply to every competitor in a market, and while Uber may have competitive advantages over its competitors, that does not make such advantages anticompetitive. For example, a company that is organized in a way that has advantageous tax benefits compared to a competitor cannot be said to violate the Sherman Act in an attempt to monopolize the market based on that conduct alone.

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5 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 218 F. Supp. 3d 389 (E.D. Pa. 2016); compare to *Malden Transportation, Inc. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 213023 (D. Mass. 2017).

6 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 218 F. Supp. 3d 389 (E.D. Pa. 2016); *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 2017 WL 551593 (E.D. Pa. Mar. 20, 2017).

7 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 2018 WL 1474373 (3rd Cir. Mar. 27, 2018).

If a future court were dissuaded by the above argument in a case with different circumstances, the elements of a monopolization claim would be to Uber's avail. An attempted monopolization claim under Section 2 of the Sherman Act requires proof of (1) anticompetitive conduct; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power.

For the first element, plaintiffs would presumably point to Uber's alleged violation of regulations to satisfy the first element. However, in *Philadelphia Taxi Ass'n*, the Third Circuit found that plaintiffs had failed to demonstrate anticompetitive conduct because "the elimination of medallion taxi competition did not constitute anticompetitive conduct," so it is likely plaintiffs would also need to demonstrate reduced options or quality of service in the area.[8]

The second element requires a specific intent to monopolize, not to be confused with a lawful "intent to compete vigorously."[9] Rather, such intent involves "a specific intent to destroy competition or build monopoly."[10] Unless it were demonstrated through evidence that this was Uber's intent, it is unlikely a court would be willing to infer it simply because Uber declined to incur the costs of complying with a regulation that it arguably was not subject to. The Third Circuit in *Philadelphia Taxi Ass'n* reasoned that knowledge of the regulation Uber was allegedly violating was not enough on its own to constitute a specific intent to monopolize.[11]

Lastly, the third element requires a dangerous probability of achieving monopoly power. In considering this element, the Third Circuit looks to factors such as significant market share, barriers to entry, strength of competition, development of the industry, and elasticity of demand, with market share being the most significant factor.[12] The claims using this theory thus far have typically come from taxi services, which harms their arguments as to market power. The only way avoiding regulations gives Uber a competitive advantage that could possibly be anticompetitive is if competitors *are* subject to those regulations, otherwise avoiding them could not be anticompetitive. These taxi plaintiffs therefore need to be part of the same market as Uber to make their claim. However, when the market is extended to taxi services, Uber has a far lower market share compared to the market for app-based ride-share services, which makes it less probable they could monopolize that broader market.

To avoid this low market share problem, a plaintiff would have to find a regulation that applied to them but not Uber so they could state their claim, but not admit that a broad group of transportation services compete in the same market as them and Uber. For example, if the regulation were somehow applied to a competing app-based ride-share service, but not Uber, the market could reasonably be app-based ride-share services where Uber could arguably be said to have market power, *and* avoiding the regulation gives them an anticompetitive advantage within that market over the competitor plaintiff. However, this hypothetical regulation simply does not exist. Even if it did, there would need to be clear evidence avoiding the regulation allowed Uber to dominate the market because the Third Circuit in *Philadelphia Taxi Ass'n* specified that vague claims that Uber's conduct would raise barriers to entry and drive out competition were insufficient to allege the third element.[13] Thus, without more, a Section 2 claim supported by allegations that Uber is avoiding regulations is doomed to fail on the merits.

8 See id at *4-5.

9 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

10 *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953).

11 *Philadelphia Taxi Association, Inc.*, 2018 WL 1474373 at *5.

12 See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318-19 (3rd Cir. 2007).

13 *Philadelphia Taxi Association, Inc.*, 2018 WL 1474373 at *6.

C. Predatory Pricing

1. Facts

Predatory pricing allegations have been the most popular antitrust claims brought against Uber recently, most of them coming from taxi companies.[14] While there have been an abundance of these sorts of claims, there has been a drought in successes, as none have been able to get past a motion to dismiss. That being said, almost all of the cases are still pending and may eventually be decided on the merits.

The cases vary in jurisdiction, but the claims are fairly similar. The allegation is essentially that Uber is pricing below cost to gain market share and drive the plaintiffs out of their respective markets. Opposing parties' arguments as to potential merits of these cases have been that conclusory statements that Uber is operating below cost, charges less than a taxi, and is losing money as a company were insufficient to defeat a motion to dismiss in *Malden*, and that a failure to properly allege anticompetitive effects warranted granting the motion to dismiss in *Miadeco*.
Legal Analysis

The elements of a predatory pricing claim are (1) defendant's prices are below an appropriate measure of its costs; and (2) a dangerous probability of recoupment.[15] Uber ought to prevail should any of these cases proceed to be decided on the merits because it is unlikely plaintiffs will be able to satisfy the first element, and perhaps even more unlikely they can satisfy the second.

First, no plaintiff thus far has overcome a motion to dismiss, so it is unclear that any have presented sufficient evidence demonstrating Uber is pricing below costs. In *Malden*, even if plaintiffs had evidence to support some of their conclusory allegations, they would still not satisfy the first element. Evidence that Uber is losing money overall and that their prices are below the competing taxi companies would not show that they are pricing below cost. However, even if plaintiffs in one of these cases were to present sufficient evidence that Uber was pricing below cost, they would still fail to satisfy the second element.

In *DeSoto*, the plaintiffs claimed that Uber's large source of venture capital funding would allow it to price below cost until competitors were forced out of the market, at which time it could charge supracompetitive prices. Uber responded to this claim in its pending motion to dismiss, arguing that barriers to entry in the ride-hailing market are so low, that a new entrant would quickly appear to undercut the overcharge, thus defeating the purpose of such a scheme. Uber appears to have it right.

Newer companies such as Lyft, Via, Wingz, Juno, and others have sprung up recently in cities around the world and have been directly competing with Uber.[16] While it is unclear without reliable financial data if these companies are thriving or merely surviving, they are at the very least capable of the latter. This serves as evidence in Uber's favor regarding both elements of predatory pricing.

First, it makes it all the more unlikely that Uber is not pricing below cost. If new companies see the opportunity to profitably enter the market, clearly they believe they can offer at least a similar product at a similar price, which would be impossible to do profitably if Uber were pricing below costs. As for the second prong, these new entrants demonstrate that Uber would not be able to recoup the losses of predatory pricing by charging supracompetitive prices. Uber's argument in its motion to dismiss in *DeSoto* that new entrants would appear on the scene should it try to recoup was perhaps understated. There are new entrants already on the scene perfectly capable of preventing Uber from profitably recouping by maintaining competitive prices.

14 *Malden Transp., Inc. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 213023 (D. Mass. 2017); *Miadeco Corp. v. Uber Technologies, Inc.*, No. 1:15-cv-20356, Doc. 120 (S.D. Fla. Mar. 30, 2017); *Miadeco Corp. v. Uber Technologies, Inc.*, No. 1:15-cv-20356, Doc. 120 (S.D. Fla. Mar. 30, 2017); *A White and Yellow Cab, Inc.*, No. 4:15-cv-05163, Doc. 114 at 14 (N.D. Cal. Mar. 5, 2018); *Ariekat v. Uber Technologies, Inc.*, CGC-17-557728 (Cal. Sup. Ct. Mar. 24, 2017); *Friendly Cab Company, Inc. v. Uber Technologies, Inc.*, RG-17-858247 (Cal. Sup. Ct. April 27, 2017).

15 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

16 Arata, "9 New Rideshare Apps to Try," *Nerdwallet*, available at: https://www.nerdwallet.com/blog/loans/9-new-ride-share-apps/.

III. CONCLUSION

Uber has defended allegations of anticompetitive conduct spanning several theories and across jurisdictions across the country. That being said, the theories thus far have not passed muster for the most part. Uber has strong arguments on the merits for each of these claims, and it is likely plaintiffs would have a tough time arguing the merits should they survive a 12(b)(6) motion. Thus, Uber does not have an antitrust problem, despite having a clear antitrust litigation problem.