SHARING ECONOMY

UBER ON THE BRINK **May 8, 2017**

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After its humiliating defeat in China and it's soon to be challenged worldwide by Chinese ride-sharing juggernaut Didi Chuxing, Uber is now facing the possibility that its very existence may be at stake, at least, in the United States. First, the Ninth and Second Circuits will decide in the near future whether and to what extent Uber's mandatory arbitration clauses and class action waivers and class arbitration waivers in their driver contracts are enforceable. Second, Uber's questionable program known as "greyballing" is now the subject of a "United States Department of Justice inquiry over a program that it used to deceive regulators who were trying to shut down its ride-hailing service"[Isaac, *Uber Faces Federal Inquiry Over Use of Greyball Tool to Evade Authorities*, www.nytimes.com (5/4/2017)]. This could be Uber's Waterloo.

Mandatory Arbitration and Class Action Waivers

In order for consumers [e.g., *Meyer v. Kalanick*, 2016 WL 4073071 (S.D.N.Y. 2016)(price fixing)] and drivers [e.g., *O'Connor v. Uber Technologies, Inc*., 2015 WL 5138097 (N.D. Cal. 2015)(misclassification as independent contractors)] to be able to challenge the nearly unlimited litigation resources available to Uber they must be able to sue as a group in a class action [see Dickerson, *Class Actions: The Law of 50 States*, Law Journal Press (2017)]. Since the U.S. Supreme Court has shown a proclivity for enforcing mandatory arbitration clauses and class action and class arbitration waivers [see *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); Dickerson & Chambers, *Challenging 'Concepcion' in New York State Courts*, New York Law Journal (12/29/2015)]. It is not surprising that Uber would at this time choose to vigorously confront the issue of the enforceability of its cherished contractual clauses on both coasts in its biggest markets.

Second Circuit

In New York State the price fixing class action, *Meyer v. Kalanick*, has been put on hold pending an appeal before the Second Circuit of the enforceability of Uber's mandatory arbitration clause. In *Meyer*, presently before federal Judge Jed Rakoff on the Southern District of New York, plaintiffs allege that Travis Kalanick and Uber are stifling price competition among Uber drivers to the detriment of Uber riders in violation of Section 1 of the Sherman Antitrust Act and New York's antitrust statute, General Business Law 340 (Donnelly Act).

Uber's Arbitration Clause

Uber's efforts to dismiss the *Meyer* class action by, *inter alia*, seeking to enforce its mandatory arbitration clause were rejected by Judge Rakoff. "Applying (California) law, the *Sprect* court found that certain plaintiffs had not assented to a license agreement containing a mandatory arbitration clause because adequate notice and assent were not present on the facts of that case". After carefully reviewing cases analyzing "clickwrap" and "browserwrap" agreement, Judge Rakoff distinguished *Mohamed v. Uber*, 109 F. Supp. 3d 1185 and *Cullinane v. Uber*, 2016 WL 3751652 (D. Mass. 2016) and held that "Plaintiff Meyer did not have '[r]easonably conspicuous notice' of Uber's User Agreement, including its arbitration clause or evince unambiguous manifestation of assent to those terms". This decision as to the enforceability of Uber's mandatory arbitration clause is now before the Second Circuit.

Ninth Circuit

The Ninth Circuit has consolidated eleven interlocutory appeals in four misclassification class actions…As a consequence "Uber on Wednesday calibrated its Ninth Circuit assault on several class actions alleging it misclassified drivers as independent contractors, insisting that its arbitration agreements are valid and enforceable in an effort to dismantle myriad litigation from drivers seeking tips, expense reimbursements, overtime and other benefits typically afforded to employees" [Chiem, *Uber Asks 9th Cir. To Shred Driver Misclassification Suit*s, www.law360.com (5/4/2017)].

Conflicting Decisions

Uber's efforts to enforce its mandatory arbitration clause and class action waivers were initially rejected by federal Judge Edward M. Chen of the Northern District of California. However, after some modifications by Uber, a new driver agreement containing a mandatory arbitration clause was approved by federal Judge James S. Moody of the Middle District of Florida in *Suarez v. Uber*, 2016 WL 2348706 (M.D. Fla. 2016) and by federal Judge Marvin J. Garbis of the District of Maryland in *Varon v. Uber* 2016 WL 1752835 (D. Md. 2016). There can be little question that regardless of the outcome at the Ninth and Second Circuits, the enforceability of Uber's mandatory arbitration clause and class action waiver will make it way to the U.S. Supreme Court.

Greyballing

Uber apparently developed software known as "Greyball" which allowed Uber "to deploy what was essentially a fake version of its app to evade enforcement agencies that were cracking down on its service" "[Isaac, *Uber Faces Federal Inquiry Over Use of Greyball Tool to Evade Authorities*, www.nytimes.com (5/4/2017)]. The federal inquiry is taking place in Portland, Oregon. Greyball was part of a larger program, "VTOS" which was used in the United States and in several foreign countries, allegedly, to evade 'law enforcement personnel'. After using a series of techniques to identify and tag officials, Uber would turn to the Greyball tool to show a false version of its app to officers who tried to hail an Uber car using their smartphones.

Conclusion

At stake is the viability of the class action device in several class actions brought by consumers and drivers challenging the way in which Uber does business. In addition, Uber's use of Greyball to trick regulators is most troubling and may not go well for Uber.