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Nicholas Andrew Passaro
Dechert LLP

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HOW *MEYER V. UBER* COULD DEMONSTRATE THAT UBER AND THE SHARING ECONOMY FIT INTO ANTITRUST LAW

*Nicholas Andrew Passaro**

Recently, Uber driver (and former Uber CEO) Travis Kalanick has been sued under antitrust laws. The plaintiffs argue that Mr. Kalanick and the other Uber drivers have engaged in a price fixing arrangement that violates §1 of the Sherman Act. The case, Meyer v. Uber (originally Meyer v. Kalanick), is still being litigated. This Comment will analyze each side's potential arguments and will ultimately conclude that the court should find Uber drivers not guilty of a Sherman Act violation. This determination will be based on: the merits of the various arguments, how such a holding would fit within the history of antitrust law, and how it would set effective precedent for the future. Additionally, this Comment argues that Uber's place in the sharing economy distinguishes it from previous antitrust violators the plaintiffs will likely analogize it to.

* The author is an Associate in the Antitrust/Competition group at the international law firm Dechert LLP in the New York office. The views expressed in this article are those of the author and not of the firm or any of its clients.

I. Background

A. *Introduction*

Legal practitioners in many different practice areas have and will continue to struggle with the application of current jurisprudence to the sharing economy. Accordingly, this Comment argues that the sharing economy should influence market definition in antitrust litigation. This Comment, however, continues to argue that such an impact will not require a restructuring of market definition analysis; there is room within the hypothetical monopolist test and within the existing antitrust legal framework to accommodate the challenges presented by the sharing economy.

Part I will provide an introduction to the sharing economy and the *Meyer v. Uber* litigation. Part II will analyze the merits of the legal arguments the parties will likely make in antitrust litigation. Part III will discuss the role unique aspects of the sharing economy play in the analysis of the antitrust principles governing market definition. Part IV will analyze how the reasoning of the *Meyer v. Uber* decision could impact future sharing economy platforms in the antitrust realm.

B. *An Introduction to the Sharing Economy*

Many antitrust decisions turn on the definition of the relevant market. The parties in *Meyer v. Uber*[1] have made the typical product and geographic market definition arguments thus far. Namely, these arguments are geographic limitations, suitable substitutes, elasticity of demand, and barriers to entry. The parties, however, have failed to acknowledge Uber's role in the sharing economy, an industry fundamentally different from traditional commerce.

The sharing economy refers to the emergence of peer-to-peer services. These services allow owners to give strangers access to their property during the time(s) when the owner does not wish to use it.[2] 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, generally trustworthy transactions.[3] These services are often provided in app or webpage forms, have surged in popularity, and can offer a much

1. Meyer v. Kalanick, 174 F. Supp. 3d 817 (S.D.N.Y. 2016), *sub nom.* Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).

2. *See* Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, Harv. Bus. Rev. (January 28, 2015), https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all.

3. *See generally* Liran Einav, Chiara Farronato & Jonathan Levin, Peer-to-Peer Markets, Working Paper No. 21496, Nat'l Bureau Econ. Res. (Aug. 2015), http://www.nber.org/papers/w21496.pdf. These markets favor small suppliers because they have much lower overhead and investment costs because they already own their property and time, compared to a company that has to buy the property and hire employees. For example, Airbnb allows owners to rent their homes (or rooms) to others when the owners are not utilizing them in exchange for rental money. Other services include Uber (driving services), DogVacay (dog sitting), and Turo (vehicle rentals).

more cost-effective substitute to traditional models. As a result, traditional businesses are losing consumers to peer-to-peer services. These services allow everyday people with (or without) other full-time careers to earn extra income by renting out the things they own (or their time) when that property would otherwise be sitting idle. In Uber's case, the owner of the vehicle is not only renting out the vehicle, but also providing the service of driving. Therefore, an Uber driver is renting out her vehicle and her time in exchange for income when both would otherwise be unused.

The people who offer property and/or services on these platforms are blurring the line between private owners and business operators. As a result, peer-to-peer services have caused a host of regulatory and tax issues in jurisdictions all over the world. For example, in San Francisco, the average Airbnb host rents their room fifty-eight nights each year;[4] this level of volume makes the choice to treat the owner either as a Best Western or as a typical private homeowner a challenging one. Additionally, New York City completed 828 inspections and issued 2,239 violations for short-term rentals in 2012 alone.[5] These violations further demonstrate the gray zone created by peer-to-peer services between private owners and businesses. New York City allows Airbnb to operate its service, yet it inspects and issues violations for certain types of rentals.[6] Cities all over the world are struggling to fit the unique nature of sharing economy platforms into their existing legal framework, and thus far the effort has been problematic.

This struggle is epitomized by the case of EatWith, a website that connects diners with home chefs who want to host a meal.[7] EatWith was founded in 2012 in Tel Aviv and landed in New York City in 2013.[8] The website allows budding chefs to build a reputation, test their menus, receive feedback from unbiased diners, and earn some extra income. As demonstrated by an individual chef who now owns and operates two of his own restaurants, EatWith can serve as a launching pad for new chefs entering a market.[9] According to New York City Health Department Spokeswoman Veronica Lewin, however, New York City's current legal framework provides that "people who offer meals to the public for money

4. *The Rise of the Sharing Economy*, ECONOMIST, Mar. 9, 2013, at 9.

5. Tomio Geron, *Airbnb and the Unstoppable Rise of the Sharing Economy*, FORBES (Jan 23, 2013, 7:00 AM), https://www.forbes.com/sites/tomiogeron/2013/01/23/aribnb-and-the-unstoppable-rise-of-the-share-economy/#6240e907aae3.

6. *See* Katie Benner, *Airbnb Sues over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), http://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0 (stating that New York State government has been fighting Airbnb by proposing large fines for hosts).

7. *See* John Tozzi, *Legal Issues on Table for Dinner-Party Startup*, S.F. GATE (July 28, 2013, 8:00 PM), http://www.sfgate.com/food/article/Legal-issues-on-table-for-dinner-party-startup-4692430.php.

8. *Id.*

9. *Id.*

are considered food service establishments and need permits."[10] This law creates an enormous problem for EatWith chefs and highlights the new grey zone created by the sharing economy. Traditionally, people often chip in for food and allow a host of a casual dinner party to cook without a permit. The law seemingly allows this because friends and family differ from "the public". Budding chefs, on the other hand, are stonewalled from the wonderful resource of public financing because the law states that they allow the public—rather than friends, family, or acquaintances—to chip in for food. In this manner, the chefs' homes are classified as food service establishments.

The EatWith example illustrates a unique aspect of the sharing economy. It facilitates interaction with the public in ways that were traditionally intimate. In this way, the sharing economy blurs the distinction between the public and the intimate and causes many legal headaches.

Uber is clearly part of the sharing economy, and, accordingly, it too is blurring lines. Are its drivers employees or independent contractors? Does it compete in the market of public transportation services, like taxis, subways, and buses, or only with app-based ride-share services, or both? What about with traditional black car service providers? There are many questions Uber raises about the values and principles of property and ownership, but those are less relevant to the lawsuit in question. Uber's business model fundamentally involves a transaction that is typically as intimate as food consumption. People normally secure rides either from friends and family, or from established, highly regulated taxi or car services. In contrast, Uber allows people to get rides from complete strangers in the drivers' own vehicles with the touch of a smartphone. Uber's membership in the sharing economy and the innovation of its service ought to play a role in how the courts handle lawsuits against it.

C. *Uber's Business Model*

Uber began in 2008 as an idea to create an app to get a ride when a person had trouble hailing a taxi.[11] Today, the transportation juggernaut allows people in cities around the world to get rides from entrepreneurial, everyday people looking to make some extra money on the side by giving rides in their personal vehicles. This model cements Uber's place in the sharing economy because it takes a privately-owned resource—an individual's vehicle—and allows owners to share it with third-parties who need it when they do not.

From the consumers' perspective, Uber is an app that connects them with available drivers in their vicinity. The app allows the rider to view the estimated arrival time of their ride, car description, and likely fare calcu-

10. *Id.*

11. *Our Story*, Uber, https://www.uber.com/our-story/ (last visited Feb. 26, 2018).

lated by the Uber Fare Estimator.[12] After the ride, the rider's credit card or bank account is charged (in some locations, cash payment is available).[13] From the drivers' perspective, things are not as simple as hitting download in the app store. Drivers must be at least twenty-one years old, have three years of driving experience, and maintain in-state car insurance. They must also possess a valid driver's license, vehicle registration, and a Social Security Number. Additionally, they must drive a vehicle with in-state plates that is model year 2001 or later and passes an Uber car inspection.[14] Drivers are also subject to a background check and can be deactivated if an investigation demonstrates that the driver has violated the deactivation policy.[15] Investigations are typically triggered through multiple customer reviews complaining of conduct that violates the deactivation policy or serious violations, even if isolated.[16]

The key aspect of the service that led to the lawsuit in question in this Comment is Uber's price algorithm. The fare charged to consumers by Uber drivers is calculated by the app's built-in algorithm.[17] The algorithm notes how many consumers in a given geographic location are looking for a ride on the app at a given time; the price of a ride increases along with this demand.[18] Therefore, if a lot of consumers simultaneously request a ride in midtown Manhattan because there's a thunderstorm after a Knicks playoff game, there will be a significant increase in fares. The fact that all Uber drivers use the pricing algorithm is a necessary element of the allegation that the drivers are engaged in a price fixing conspiracy that violates the Sherman Act. Uber has claimed that drivers have the freedom to depart from the algorithm so long as they depart downward.[19] However, it has been noted that there is no practical method that allows the drivers to do so, because this can only be achieved *after* the rider has "hailed" the driver and has therefore already agreed to the higher price.[20] Additionally, the complaint in *Meyer v. Kalanick* alleged that all drivers must use

12. *How Does Uber Work?*, UBER, https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e (last visited Feb. 26, 2018); *Getting a Fare Estimate*, UBER, https://help.uber.com/h/cc1efc16-df15-47f3-8057-61c2b75ea529 (last visited Mar. 4, 2018).

13. *Id.*

14. *Uber Driver Requirements*, ALVIA (July 28, 2015), http://www.alvia.com/uber-driver-requirements/.

15. *Uber Community Guidelines*, UBER, https://www.uber.com/legal/deactivation-policy/us-en/ (last updated Oct. 17, 2017).

16. *Id.*

17. *How are Fares Calculated?*, UBER, https://help.uber.com/h/33ed4293-383c-4d73-a610-d171d3aa5a78 (last visited Mar. 5, 2018). Note that "surge pricing" causes rate fluctuation based on the algorithm's calculated demand, meaning that the fares tend to "surge" at times in an area when many people are likely to need a ride.

18. *See id.*

19. Thomas Dickerson & Silvia Hinds-Radix, *Airbnb and Uber in New York City: From Revolution to Institution*, N.Y. L.J., Apr. 22, 2016, at 4.

20. *Id.*

the algorithm.[21] In fact, the defendant's motion to dismiss arguably admits this fact when it states, "[h]ere, 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."[22] While it is not entirely clear that drivers *must* use the algorithm, it does not appear that the defense will be heavily contesting this portion of the allegations.

D. *Independent Actors*

At first glance, one might ask, "How can there be a price fixing conspiracy among Uber drivers if they all work for the same company?" Surely, individual Ford factory managers do not violate the Sherman Act when they agree with corporate headquarters on a uniform price for the Mustang. Rightfully so, a valid defense to an antitrust allegation is that the agreement in question is among parties of the same firm. Thus, there is no antitrust violation because cooperation is necessary among members of the same firm and the action is truly unilateral.[23] This "single entity" defense often arises when members of a joint venture or a parent corporation and its wholly or partially owned subsidiary are accused of a conspiracy.[24]

That being said, such a defense would be futile in the Uber antitrust case because Uber has not only admitted but also zealously argued that its drivers are *not* employees or part of the Uber company.[25] Uber, instead, has claimed that its drivers are independent contractors.[26] Uber has vigorously argued this point in response to a host of other lawsuits involving workers' rights.[27] In these other lawsuits, Uber drivers sued the company to provide minimum wage, health benefits, mandatory overtime, and other rights that the government requires employers to provide to its employees; nonetheless, Uber has been able to successfully defend itself on the grounds that the drivers are not employees but independent contractors.[28]

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21. First Amended Complaint at 8–10, Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y 2016) (No. 1:15 Civ. 9796), Doc. 1.

22. Memorandum of Law in Support of Defendant Travis Kalanick's Motion to Dismiss at 15, Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y. 2016) (No. 1:15 Civ. 9796).

23. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768-69 (1984) (holding that the Sherman Act "does not reach conduct that is 'wholly unilateral'" (quoting Albrecht v. Herald Co., 390 U.S. 145, 149 (1968)).

24. *See id.*; *see also* Dean Williamson, Organization, Control and the Single Entity Defense in Antitrust (Dep't Justice, 2006), https://www.justice.gov/atr/organization-control-and-single-entity-defense-antitrust.

25. *See* Tracey Lien, *Uber sued again over drivers' employment status*, L.A. Times (May 2, 2016), http://www.latimes.com/business/technology/la-fi-tn-uber-nationwide-class-action-20160502-story.html.

26. *Id.*

27. *See id.*

28. However, there is pending litigation and the Ninth Circuit upheld Uber's arbitration provision in September 2016.

Insisting on this point is what has opened the door to this antitrust lawsuit because Uber has already relinquished a very potent defense.

E. *Meyer v. Uber*

The initial allegation of antitrust violations in the lawsuit—originally entitled *Meyer v. Kalanick*—did not include Uber as a defendant.[29] In the original complaint, plaintiffs alleged only a horizontal price fixing conspiracy among Uber drivers.[30] The Plaintiffs added the named defendant, Travis Kalanick (former CEO of Uber) only after he admitted in an interview that he was also an Uber driver, and thus a member of the conspiracy.[31] The Southern District of New York found that the pleadings were also sufficient to allege a hub-and-spoke arrangement involving vertical agreements between Kalanick in his capacity as CEO and the drivers because Kalanick designed the business model wherein drivers must use the pricing algorithm central to the alleged conspiracy.[32] This finding by Judge Rakoff was made in the course of denying an early motion to dismiss.[33] Building on the newly accepted hub-and-spoke theory, the plaintiffs made a motion to join Uber Technologies, Inc. (Uber), which was granted.[34] The Second Circuit sent the case back down to the District Court to determine if Uber waived its right to arbitrate with Meyer, changing the case name to *Meyer v. Uber*.[35] On remand, the Southern District ruled that Uber did not waive its right to arbitrate the case, although plaintiffs could appeal that decision in the future.[36] Even if the case does not go to trial, however, these arguments will be relevant for the next sharing economy business to get sued under antitrust law.

II. Merits of Potential Antitrust Arguments

A. *Hub-And-Spoke Arrangement*

A hub-and-spoke arrangement refers to a situation in which a firm (the hub) organizes collusion in upstream or downstream firms (the rim) by interacting with each rim firm individually (spokes) in order to prevent its market share from shrinking in some way or to maintain high profits. This form of collusion involves not only the vertical agreements between the hub and the rim firms, but also implied horizontal agreements among the rim firms. The examples below illustrate how courts have been able to

29. *See* First Amended Complaint, *supra* note 21.

30. *Id.* at 1–3.

31. *Id.* at 2.

32. *See* Op. on Mot. to Dismiss at 18–19, *Meyer*, 200 F. Supp. 3d 408 (No. 15 Civ. 9796), Doc. 37.

33. *See id.*

34. *See* Mem. Order at 7, *Meyer*, 200 F. Supp. 3d 408 (No. 15 Civ. 9796), Doc. 90.

35. Meyer v. Uber Techs., Inc., 866 F.3d 66, 94 (2d Cir. 2017).

36. *See* Meyer v. Uber, No. 1:2015-cv-09796-JSR, Doc. 173 at 4; 20–21 (S.D.N.Y. Mar. 5, 2018).

imply horizontal agreement among rim firms without concrete evidence of direct communication.

The first discussion of a hub-and-spoke arrangement (although not using the term explicitly) occurred in the historic antitrust case, *Interstate Circuit, Inc. v. United States*.[37] In *Interstate Circuit*, the industry at issue involved movie production and distribution. This industry, however, looked far different in the 1930s than it does today. At the time of the case, there were eight main movie distributors and a series of first- and second-run theaters nationwide.[38] A first-run theater refers to the major theaters that existed in large cities that were typically higher-end and more expensive. Interstate Circuit had a complete monopoly of first-run theaters in five cities in Texas.[39] Movie distributors would gradually send out their new movie to the first-run theaters to build word-of-mouth popularity and then, some time later, allow second-run theaters to show the movie for a lower cost of admittance. After a while, many people decided to simply wait for the movies to appear in their local second-run theater so they could see it at a lower cost. This caused the first-run theaters to lose business. Interstate Circuit decided to act and sent letters to all eight major movie distributors demanding each distributor require second-run theaters to raise their prices if they wanted to show the distributors' films.[40] Each distributor agreed, but there was no direct evidence of collusion between the distributors or any direct evidence that the distributors knew what the others would do.[41]

The Supreme Court stated that it was permissible to draw the inference of an agreement from the nature of the proposals made to the distributors and from the unanimity among the distributors.[42] The Court noted that each distributor knew the proposal was under consideration by the other distributors and that without unanimous action there was a risk of substantial loss, but with unanimous action there was a prospect of increased profits.[43] This case established that such consciously parallel business conduct could form the basis of an antitrust violation.[44]

A modern example of a hub-and-spoke arrangement can be found in *Toys "R" Us, Inc. v. FTC*.[45] In the 1990s, Toys "R" Us was the largest chain of retail toy stores in the U.S., controlling approximately twenty percent of the market for all toys sold.[46] The industry consisted of ten princi-

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37. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

38. *See id.* at 214–15.

39. *Id.* at 215.

40. *Id.* at 215–17.

41. *See id.* at 221.

42. *Id.* at 224–27.

43. *Id.* at 222.

44. Richard A. Givens, *Parallel Business Conduct Under the Sherman Act*, 5 ANTITRUST BULL. 271, 277 (1960).

45. *See* Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

46. *See In re* Toys "R" Us, Inc., 126 F.T.C. 415, 420 (1998).

pal toy manufacturers. In order of highest profit margin on toys, the major players were retail toy stores (such as Toys "R" Us), specialized discount stores, general discount stores, and warehouse clubs (such as Costco) that sold toys in addition to numerous other goods.[47] When the toy manufacturers sold the same toys to both retail stores and warehouse clubs, consumers could easily compare prices, leading to a loss in business for the more expensive retail stores. Evidence before the Seventh Circuit showed that Toys "R" Us presented each toy manufacturer with a new policy they would be required to adopt if they wanted to continue to do business with them.[48] The Toys "R" Us policy included demands that: the warehouse clubs not be able to purchase one of the manufacturer's new products unless the warehouse carried their entire line; Toys "R" Us would be given the first right to refuse all new products before these products would be shown to the warehouse clubs; and clearance items were only permissible if Toys "R" Us had the first opportunity to buy the product.[49] In presenting these demands, Toys "R" Us also made it clear that they would be going to all ten of the major toy manufacturers. In fact, Mattel and Hasbro executives testified that they went along with "the special warehouse club policy" only because they believed their competitors had agreed to it.[50]

The Seventh Circuit agreed with the FTC's earlier decision that Toys "R" Us had violated the Sherman Act.[51] The court noted that, similar to *Interstate Circuit*, each manufacturer's decision to agree to Toys "R" Us' demands represented an abrupt shift from previous business dealings.[52] This case, however, was arguably more demonstrative of anticompetitive conduct than *Interstate Circuit* due to the evidence regarding the communications.[53] The court specifically stated that if there was no evidence in the record tending to support concerted behavior, it would have ruled in Toys "R" Us' favor.[54]

United States v. Apple, Inc. presents another recent example of a hub-and-spoke arrangement.[55] The case involved the eBook industry, specifically, the six major publishers (the "Big Six"), Apple, and Amazon (Apple's competitor). Amazon sold eBooks for its Kindle at a very competitive price of $9.99.[56] Apple was about to enter the eBook market with the much-anticipated iPad.[57] Both Apple and the Big Six felt that

47. Toys "R" Us*,* 221 F.3d at 931.
48. *Id.* at 931–32.
49. *Id.*
50. *Id.* at 932–33.
51. *Id.* at 940.
52. *Id.* at 935–36.
53. *Id.* at 935.
54. *Id.* at 935–36.
55. *See* United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).
56. *Id.* at 296.
57. *See id.* at 301.

Amazon's pricing was too low and that it was destructive to the industry.[58] Apple devised a plan in which it would implement the agency model, allowing the Big Six to set their own eBook prices under a certain ceiling and splitting the profits 70/30 in the publishers' favor.[59] As part of the plan, however, Apple would offer this agency model agreement to each of the Big Six with the condition that they force all of their distributers (namely, Amazon) to also operate under the agency model.[60] Apple made it clear that unless a "sufficient number" of the Big Six agreed to the agency model, it would not bother building a bookstore for the iPad.[61] All six of the publishers agreed.

The Second Circuit found that this agreement had the effect of raising eBook prices.[62] The court noted that parallel conduct with respect to Apple's individual agreements with each publisher was not enough to demonstrate that it had organized a conspiracy to raise prices, but that the presence of additional circumstantial evidence—tending to exclude the possibility each of the Big Six acted independently—was sufficient to find a conspiracy.[63]

The plaintiffs in the Uber case will argue that Uber has engaged in the same conduct as the hubs (Interstate Circuit, Toys "R" Us, and Apple) in the previously discussed cases. They will argue that Uber orchestrates a price fixing scheme among the drivers by making the drivers' use of its app contingent on agreeing to its pricing structure. The theory will attempt to analogize Uber's conduct to that of the previously discussed hubs by characterizing it as Uber reaching out to all potential drivers with a deal involving anticompetitive price fixing, where those drivers have no choice but to accept the deal if they wish to drive for Uber. The theory claims the drivers would not have accepted independently if they did not know the other drivers were accepting as well. The plaintiffs could further argue that drivers would only agree to be Uber drivers if there were many Uber drivers, which would indicate that Uber was successful and attracts many consumers. They could also note that, as in *Apple*, Uber is trying to maintain high prices; if drivers competed on price, prices would likely decrease, leading to a decline in Uber's profits.

Uber will likely argue that unlike many of the previously discussed cases, the invitation—allegedly coercing the drivers to accept—is a nothing more than a necessary feature of its product. Part of the innovation Uber provides is a coherent pricing structure that changes alongside demand. This is far different than the arbitrary invention of specific demands sent out to the major players in the up- or downstream markets.

58. *See id.* at 301–02.

59. *Id.* at 303.

60. *Id.* at 303–04.

61. *Id.* at 318.

62. *See id.* at 311.

63. *See id.* at 316, 339.

Additionally, Uber will likely argue it is different than the previously discussed defendants because of its place in the sharing economy, the secondary nature of the fixed price (compared to the primary purpose of the agreement: linking drivers and riders), and the number of spokes. Additionally, Uber may characterize its conduct as multiple, independent vertical agreements with each of its drivers. The reality is that many potential drivers do not accept Uber's terms and do not become Uber drivers. With so many people not accepting the invitation, Uber's conduct differs from that of the other hubs because when a potential Uber driver makes a decision as whether to accept Uber's terms, their decision has nothing to do with whether other potential drivers are agreeing as well. Also, Uber could note that unlike in *Interstate Circuit*, *Toys "R" Us*, and *Apple*, Uber is not using its price algorithm to drive out competitors. In fact, the agreement between Uber and its drivers has nothing to do with competing firms. Unlike in *Apple*, Uber is also not trying to maintain high prices in response to a competitor looking to lower them, and nothing resembling the threat of Amazon exists here. Finally, Uber will likely note the scale of the alleged implied horizontal agreement. The alleged agreement in the Uber case is vastly larger than any that has been found before. In fact, the largest successfully proven hub-and-spoke arrangement consisted of eight sophisticated business leaders engaging in conduct that later allowed a court to imply an agreement based on circumstantial evidence. The number of Uber drivers dwarfs this eight-company conspiracy. It is a stretch of the imagination to conceive that thousands of individuals shared the same level of interdependence as the previously discussed examples.

B. *Ancillary Agreement*

One defense to a price fixing allegation is: the alleged agreement is part of a broader scheme, the main purpose of which was something other than fixing prices. This can best be seen in joint ventures. A joint venture involves two or more independent firms that agree to work together on something new and separate from the individual firms. This agreement involves sharing resources, profits, and ideas. By their nature, joint ventures often require the firms to agree on a price to sell a product; however, these agreements to fix the price do not violate the Sherman Act because they are ancillary to the formation of the joint venture.

For example, Equilon Enterprises was a joint venture between Texaco, Inc. and Shell Oil Co.[64] The venture was established to refine and sell gasoline from both firms in the western part of the United States under both the Texaco and Shell Oil brand names.[65] Texaco and Shell Oil historically competed with each other in the sale of gasoline, but this competition ended in the western part of the United States when they decided to

64. Texaco Inc. v. Dagher, 547 U.S. 1, 3 (2006).

65. *Id.*

operate through Equilon.[66] The Court held that the joint venture was legitimate, and as such, the pricing decisions of that joint venture were not *per se* unlawful under §1 of the Sherman Act.[67] While the Court chose to use the "single entity" defense as the reasoning behind its decision, the Court clearly stated, "if we were to invoke the [ancillary restraints] doctrine in [this case], Equilon's pricing policy is clearly ancillary to the sale of its own products."[68]

Under the ancillary restraints doctrine, Texaco and Shell Oil would have been allowed to agree on the price of Equilon because that agreement was ancillary to the broader agreement to work together in creating Equilon and to enter the western U.S. market for the sale of gasoline.

Likewise, the agreement between Uber and its drivers to use the company's pricing algorithm could similarly be viewed as ancillary to the broader agreement to work together to break into the transportation services market in each of the cities in which Uber operates. Agreeing to become an Uber driver could be fueled by many forces, the most important of which (when compared to simply starting one's own driving service) is access to a tremendous number of consumers who are willing to pay you to drive them around. Without Uber, these drivers would likely never be able to earn an adequate income as an independent, part-time driver with no marketing budget or access to consumers. Without independently contracted drivers, Uber would have to hire people as employees, which would come with enormous overhead costs. This partnership between Uber and its drivers is primarily designed to allow both "firms" to enter the transportation services market in select cities while sharing each other's resources. Uber could argue that the agreement by which prices are set through an algorithm is merely ancillary to this joint venture.

C. *Vertical Restraints*

Vertical restraints are agreements between a firm and another firm located in either the up- or downstream market. In other words, these are agreements that are *not* between competitors, yet may still come under antitrust scrutiny. Due to the fact that such agreements are far less likely to produce anticompetitive results, all vertical restraints are now analyzed under the rule of reason, rather than *per se* analysis.[69] One main concern motivating the application of the rule of reason to these agreements is that the use of a *per se* rule would infringe upon business' rights to make independent business decisions involving which firms they choose to deal. This concern was addressed in *United States v. Colgate*, in which the Supreme

66. *Id.* at 3–5.

67. *Id.* at 8.

68. *Id.* at 7–8.

69. Under the rule of reason, if a practice is found to be restrictive based on the totality of the circumstances, it must be prohibited as imposing an unreasonable restraint on competition. *See* Leegin Creative Leather Prods v. PSKS, Inc., 551 U.S. 877, 907 (2007) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

Court noted that a business has the power to determine with whom to do business.[70] Specifically, the Court held,

> [T]he [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[71]

Colgate involved a company that refused to sell its product to businesses that resold its products below a certain price.[72] The Court's decision allows businesses to enforce a policy whereby they will not deal with resellers that charge less than a certain price.[73]

The Uber case involves the agreement between Uber and its drivers to use the pricing algorithm, which arguably represents a vertical restraint on pricing. The plaintiffs may argue that under the rule of reason, the agreement between Uber and its drivers to use the pricing algorithm is anticompetitive. They would argue that unlike resale price maintenance ("RPM") agreements, the pricing algorithm does nothing to protect the integrity or reputation of the product—factors which tend to convince the enforcement agencies that RPM arrangements are not anticompetitive.[74] First, the pricing algorithm represents a far more restrictive policy than a typical RPM agreement in that it does not merely set the floor or ceiling for pricing, but instead determines the exact price at which the drivers' services must be sold. Next, mandatory use of the pricing algorithm is arguably unnecessary for the success of the product and the business. If Uber allowed drivers to set their own price, drivers would be able to open the app, see the prices of nearby drivers, and set an appropriate price based on market forces. Additionally, users could still open the app, see all the prices different drivers were offering, and select a driver accordingly. Under this theory, forcing drivers to use the pricing algorithm is anticompetitive and presents no procompetitive justifications. Moreover, the vertical agreements violate the Sherman Act, and Uber should be forced to stop making a potential Uber driver's successful application contingent on an agreement to use of the Uber algorithm.

On the other hand, Uber could argue that—much like RPM agreements where companies have a policy to deal only with resellers who will sell above a certain price—Uber may, as a policy, choose to deal only with contractors who are willing to use the algorithm. The drivers—performing services under the Uber brand—are a reflection on the company, just as a reseller selling a manufacturer's product reflects the manufacturer. Uber

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70. *See* United States v. Colgate & Co., 250 U.S. 300 (1919).

71. *Id.* at 307.

72. *See id.* at 302–03.

73. *See id.* at 307.

74. *See generally Manufacturer-imposed Requirements*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/manufacturer-im posed (last visited Mar. 14, 2018).

can decide it wants its fares at prices that properly reflect demand because prices too high or low would reflect poorly on their brand. Additionally, Uber may decide that the best way to mitigate this risk is to require the use of the price algorithm. Uber could also argue that it wants to maintain a sense of consistency for its users, which would explain why simply setting a price floor would be insufficient. If all drivers could set different prices, Uber users might become so flustered or dissatisfied that they would stop using the service.

The plaintiffs, nonetheless, could argue that this case is similar to *United States v. Topco Assocs.* in that Uber is placing a facially anticompetitive restriction on its drivers to compete in a larger market.[75] In *Topco*, the defendant was a cooperative association of about twenty-five regional supermarkets that operated independently, but that joined together for the purpose of creating a line of store brand products that could compete more effectively with the large national chains.[76] Topco restricted the sale of Topco-brand products by granting to its constituent firms the exclusive right to sell the products in assigned geographic territories in order to simulate the type of exclusivity enjoyed by the national chains with their privately owned product lines.[77] The Court rejected Topco's justifications and found the conduct to be *per se* unlawful horizontal territorial restraint under the Section 1 of the Sherman Act.[78]

Accordingly, the plaintiffs in the *Uber* case could argue that Uber is engaging in outright price fixing and that *Topco* disavowed the goal of strengthening competitiveness in the larger transportation industry as a justification for restricting competition among the individual drivers. To differentiate its agreement from that at issue in *Topco*, Uber may argue that Topco's conduct was analyzed as a horizontal agreement because the regional supermarkets *were* Topco and as such Topco's restrictions were in fact an agreement amongst competitors. In this case, Uber could assert that it is not an association of drivers, but rather a tech company setting the rules for its suppliers (contracting drivers) using its app, thereby making the restraint vertical. Additionally, Uber could argue that it is not justifying its conduct by saying it increases competition in a larger market; instead, it will argue that the drivers are part of the same market as taxis and car services. In *Topco*, regional and national supermarket markets were clearly distinct from each other, while a ride in a city is a far more fungible product.

Plaintiffs could also argue that Uber's conduct does not really resemble RPM at all. Unlike a manufacturer, Uber is not concerned about the resale of its product. The drivers are independent contractors. As such, Uber's product is not the ride itself, but rather the app that connects driv-

75. *See* United States v. Topco Assocs., 405 U.S. 596, 604–05 (1972).

76. *Id.* at 599–601.

77. *Id.* at 605–06.

78. *See id.* at 607–12.

ers to riders. Riders ought to know that these independent contractors are not Uber employees and that they do not represent Uber in any way; they are merely independent service providers that have signed up to use the app to connect with riders. Therefore, Uber should not be concerned with the price because it is based on the app's functionality and not the driver or the services provided by the driver.

Uber would likely argue in response that, following this logic, the company theoretically would then not care to have a say in the quality of the rides, safety of the riders, or other aspects of the ride that it clearly works to improve. This argument would hold that whatever the deal is between Uber and its drivers, consumers will undoubtedly associate the service they receive with the Uber app, and as such, it is imperative that Uber maintain the integrity of the ride itself (including price) because it directly implicates its brand.

The defense's arguments outlined above probably also serve as their best theory of the case, assuming narratives that characterize Uber's conduct as *per se* unlawful are rejected by the court. To avoid the possibility of an inference of unlawful horizontal agreement, Uber's narrative ought to be that it has made numerous, albeit identical, vertical agreements with individual drivers without regard to concerns about competitors. Describing the facts in this manner offers a clear way to avoid antitrust liability, as well as precedential benefits that will be discussed in Section IV. Under the rule of reason, the crux of the analysis engaged in by a judge or jury that will decide the case is whether or not the conduct is anticompetitive. Uber's potential argument about preserving its business by setting a reasonable price standard for the goal of uniformity is persuasive. However, the same could be said for the plaintiffs' potential argument that Uber would lose no consumers by allowing drivers to set different prices. The outcome of this theory will come down to the evidence presented, specifically expert testimony regarding how consumers might respond if drivers set their own prices. The court would have to decide whether any harm would come from removing the restriction requiring use of the algorithm, because without some showing that Uber needs the algorithm to operate, there is arguably no reason it should escape antitrust liability.

D. *BMI*

Finally, Uber would be remiss not to mention the "BMI Defense." In *Broadcast Music, Inc. v. CBS*, CBS alleged that the blanket licenses for copyrighted music Broadcast Music, Inc. ("BMI") was selling violated the Sherman Act as illegal price-fixing.[79] CBS argued that BMI fixed the prices of individual performers' copyrighted music instead of allowing bidding on each song under normal market conditions.[80] In its opinion upholding the validity of the licenses, the Supreme Court noted all of the

79. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 6 (1979).

80. *See id.* at 8–9.

procompetitive justifications for blanket licensing agreements, including allowing owners of copyrighted material to have a reliable method of collecting earnings, avoiding expensive and complicated individual transactions, and allowing users to get the "unplanned, rapid, and indemnified access" that they wanted.[81] More importantly, the Court held that blanket licenses are unique and that they are truly a different product than the individual licenses of which they are made up.[82] Specifically, the Court noted, "[H]ere, the whole is truly greater than the sum of its parts; it is, to some extent, a different product . . . in short, [BMI] made a market in which individual composers are inherently unable to compete."[83] While succeeding cases in which parties have attempted to use this argument have failed—the Supreme Court relegated *BMI* to one-hit wonder status, so to speak—the case remains good law.[84]

While neither overturned nor reaffirmed by the Supreme Court, the BMI defense was subsequently deployed in *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*[85] *NaBanco* involved the complex market of credit card transactions, which consists of cardholders, merchants, card-issuing banks, and merchant-signing banks.[86] In the typical transaction for this market, the merchant-signing bank must "interchange" the receipt of a credit card transaction to the card-issuing bank so that it may charge the cardholder.[87] In the Visa system, a fee is charged to the merchant-signing bank for the interchange called an "Issuer's Reimbursement Fee" ("IRF"), which is calculated as a fixed percentage of each charge.[88] However, when the card-issuing bank and the merchant-signing bank are the same bank—a so-called "on-us transaction"—the fee is waived because there is no interchange.[89] NaBanco argued that the banks that controlled Visa's board of directors were fixing the price of the interchange sale by setting the IRF.[90] NaBanco argued both that this agreement was *per se* unlawful and that it was anticompetitive under the rule of reason because it reduced competition by giving those banks that both issue cards and sign merchants a price advantage over those that did not.[91] The Eleventh Circuit ruled in Visa's favor, citing *BMI*. The court reasoned that "[f]or a payment system like VISA to function, rules must govern the in-

81. *See id.* at 20–21.

82. *See id.* at 21–22.

83. *See id.*

84. *See, e.g.*, Arizona v. Maricopa County Med. Soc., 457 U.S. 332 (1982); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

85. *See* Nat'l Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986) (National Bancard Corp. is commonly referred to as "NaBanco").

86. *Id.* at 594.

87. *Id*.

88. *Id*.

89. *Id.* at 596.

90. *Id.* at 601.

91. *Id.* at 596, 604.

terchange. . .[t]he IRF represents one such rule establishing a 'necessary' term, without which the system would not function."[92]

BMI and *NaBanco* stand for the assertion that a product created to streamline what would otherwise be an unreasonably massive number of individually negotiated contracts, and that may require (in their nature) a fixed price, should be analyzed under the rule of reason. While the means employed to create that product technically involves the fixing of a price, channels of commerce may be opened up that would otherwise be closed off, and thus, the conduct on the whole increases competition. Uber fits this mold; without an easily accessible purchasing platform, drivers would be left to individually negotiate rides with each rider. This need would inevitably lead to far fewer rides and, therefore, fewer transactions because consumers would have go out and haggle each time they needed a ride. The real question is whether fixing the price of the rides via the algorithm is necessary for Uber's product to exist. One could argue that the licensing agreements in *BMI* and the IRFs in *NaBanco* were far more complex than ride purchase transactions. The calculation of the price of a ride essentially comes down to time and distance. Licensing entails a much larger set of variables such as the size of the audience, the format of the music, accessibility, and many additional factors. The IRFs represented a small part of an intricate market involving three to four parties per transaction. Additionally, in both *BMI* and *NaBanco*, it could be argued that the technology to post all sellers' individually determined prices at once for the consumer to conveniently choose did not exist. In Uber's case, it seems it could be possible to let drivers create their own formula and have individually calculated prices for each driver appear in the app, so that drivers could compete against each other on price. That being said, an argument could be made that individual drivers and riders are in a far worse position to effectively negotiate than credit card merchants, banks, artists, and licensees.

Ultimately, Uber's algorithm has been a part of its product from the beginning and the product has opened up a new channel of commerce by avoiding a massive number of individual negotiations, much like both BMI and Visa. Therefore, this argument is a persuasive one, and *Meyer v. Uber* could be the case that reinvigorates the BMI defense, should it go to trial. Similar to the vertical restraints narrative, this defense only prevails if Uber can prove that the pricing algorithm is a necessary feature of the Uber product.

III. Defining A Market In The Sharing Economy

A. *Hypothetical Monopolist Test*

Now that the relevant antitrust arguments have been discussed, it is important to examine one of the most critical pieces of evidence in many antitrust cases—market definition. The hypothetical monopolist test (also

92. *Id.* at 602.

referred to as the "SSNIP" test)[93] is the standard method for defining markets in antitrust cases.[94] The test attempts to define the relevant market by hypothesizing that the defendant is a monopoly that initiates a price increase of a significant amount (usually five to ten percent); following such an increase, the test asks whether consumers switch to substitute products or services in order to avoid the price increase and within what geographic area would they be willing to find such substitutes. If consumers would switch to a given product or go to a competitor in a given location to avoid the small but significant price increase, then that product or geographic area is determined to be a satisfactory substitute and can be considered part of the product or geographic market in which the defendant competes when determining the defendant's market share and, ultimately, market power.[95]

B. *Product Market*

Using the hypothetical monopolist test, each party will make arguments and offer expert opinions to defend their definition of the relevant market. This will be a vital determination for the fact finder because it could determine whether the defendant has market power, which plays a key role in rule of reason analysis. At this stage in the *Uber* case, both parties have made arguments relating to the relevant product market. The defense would like to include taxis, driving services, and even public transportation in the list of sufficient substitutes that would prevent Uber from successfully raising prices in the hypothetical monopolist test. The plaintiffs, on the other hand, allege in the Complaint that Uber's experts have suggested Uber has fifty to seventy percent of a market in some cities (this estimate includes taxis, cars for hire, and mobile-app generated ride-share services).[96] The plaintiffs would like to limit the list of sufficient substitutes only to other "mobile app-generated ride-share services" such as Lyft.[97] The plaintiffs have alleged that in this more limited market, Uber has an eighty percent market share, which would indicate market power and tend to make Uber's procompetitive justifications less likely to prevail in a rule of reason analysis.[98] In making these arguments, the parties have not yet addressed how Uber's membership in the sharing economy makes this analysis different—possibly indicating that neither party believes it does.

The innovation of businesses operating in the sharing economy is not embodied in a new device you can buy at the store and take home. It is

93. SSNIP is a commonly used acronym for the phrase "Small but Significant and Non-Transitory Increase in Price."

94. *See* Serge Moresi et al., Antitrust Econ. for Law. 1 (2017 ed.) (Market Definition).

95. *See id.* at 5–6.

96. First Amended Complaint, *supra* note 21, ¶ 107.

97. *Id.* ¶¶ 94–97.

98. *See id.*

usually found in a simple, user-friendly platform that allows people to cheaply replace things they would normally solicit from traditional businesses (e.g., rides from a taxi service, rooms from a hotel, etc.) with things already privately owned by individuals who do not need to use those things at the time the consumer wants to use them. This allows users to access incredibly cheap goods and services that traditionally could have been quite expensive. These savings come from the fact that the people operating on sharing economy platforms own the goods and do not need to use them all the time. There is essentially no overhead cost, and any profits the goods could provide would go unrealized without those platforms because they would be sitting idle, so these operators can afford to price fairly low while remaining profitable. Uber has argued in their motion to dismiss that only mobile app-based ride-share services should be considered part of the relevant market, excluding traditional taxi services and public transportation.[99] This ignores the reality of the sharing economy, which is that it exists to compete against and to potentially replace the traditional, more costly method by which the services were previously consumed. This is not only intuitive, but it is supported by significant data. For example, medallion prices for cabs in New York City went down forty percent in 2015, a drastic change after increasing fifty percent over the five prior years.[100] Also, in 2015 the New York City taxis created the Arro app, where people can hail taxis similarly to how they would get a ride from Uber.[101] The direct effect Uber's presence and popularity has on the value and on the progression of the taxi service as a product clearly demonstrates that the two compete against each other for the same consumers.

As Airbnb is to the traditional hotel industry, Uber is an innovative alternative to traditional transportation services. Both are able to compete at a high level in industries that, due to the need for scaling, traditionally have been difficult to break into because they rely on individuals and their privately-owned property, rather than trying to acquire that property and provide those services on their own. While the method of attracting consumers and providing the service may differ from the methods employed by taxis and traditional car services, the consumer is still buying a ride, and all three types of services compete against each other to provide that ride.

C. *Geographic Market*

The definition of geographic market will likely be less contentious in this case than the product market. Uber operates in select major cities and regions just outside of those major cities.[102] The geographic location may

99. *Id.*

100. Chris Isidore, *New York City's Yellow Cab Crisis*, CNN Money (July 22, 2015), http://money.cnn.com/2015/07/21/news/companies/nyc-yellow-taxi-uber.

101. Davey Alba, *NYC's Taxis Finally Launch An App To Compete With Uber*, Wired (Aug. 28, 2015), https://www.wired.com/2015/08/arrow-ny-taxis-app.

102. *See Cities,* Uber, https://www.uber.com/cities/ (last visited July 5, 2018).

revert to the product market dispute if either side argues that substitutes are different in different cities. For example, New York City has an intricate subway system, whereas many other cities have a much less diverse option of subway lines. One could argue that the subway is a viable substitute in New York City, but not in the other cities where Uber operates. For a company that provides transportation, Uber's product is not one that a consumer could travel elsewhere to get. A person who needs a ride in San Francisco would not be willing to go to a different city to get a ride from a competing service in the way they might be willing to do so for a more tangible product like a car. The nature of Uber's product and the clearly defined cities in which they operate will likely leave the geographic market largely undisputed.

IV. Precedent For The Sharing Economy

The ultimate resolution of the *Uber* case may set important precedent for future antitrust cases against companies in the relatively new sharing economy. Many of these sharing economy platforms involve everyday people that have become quasi-businesses, and it is not too farfetched to imagine how the agreements necessary to operate on these platforms could be subject to antitrust laws in the future—especially if the plaintiffs in the *Uber* case win. This section will look at the two potential theories related to the sharing economy the plaintiffs could raise in *Uber* that a court might entertain and will examine what the reasoning the court provides with its ruling might mean for future sharing economy cases.

A. *Hub-and-Spoke Reasoning*

If the court subscribes to the plaintiffs' theory that Uber is engaged in an implied horizontal price-fixing agreement, it would have to do so by characterizing the case as a hub-and-spoke arrangement. While distinctions surely exist between Uber's conduct and that of other hubs in hub-and-spoke arrangements, noting the court's decision was also based off Uber's presence in the sharing economy would send a different message to the major firms in other sharing economy platforms. However, to send the clearest message, the court would have to draft its opinion very carefully so as not to describe such a small window that Uber fits through, but through which other sharing economy platform firms may not.

For example, if a decision in Uber's favor is based on Uber drivers' lack of knowledge that the other drivers would agree to Uber's invitation, difficulties could arise for future sharing economy defendants. It is easy to imagine a procompetitive service that antitrust laws theoretically should protect that would nonetheless fall victim to this reasoning. For example, consider a bike-share app that utilizes a price algorithm that shows users the other users in the area that have also agreed to the app's terms. This might be helpful because it would encourage potential new users to join, as the service would only be beneficial if there were other nearby users. If the court allows Uber to exist based on the reasoning that they could not infer an agreement because the drivers did not know about each other, such bike service would not find a valid defense from the precedent set by the Uber case.

The more interesting and important analysis lies in the central question of antitrust law, namely, whether the conduct is anticompetitive. Characterizing Uber's case as a hub-and-spoke arrangement would leave the court in a difficult situation because if they find an implied agreement among the drivers, the agreement would be *per se* unlawful, and no further analysis would be warranted. This result occurs unless the court accepts a BMI defense. Utilizing this line of reasoning, the court would hold that this agreement constituted price fixing, but that the situation nonetheless warrants rule of reason analysis, ultimately deciding the product on the whole is procompetitive.

If the court finds Uber is not engaged in an implied agreement, it could still find that the drivers knew about each other but did not agree. It is not hard to imagine Uber's arrangement as one similar to the hub-and-spoke arrangements previously discussed. Uber could reach out to every potential driver through advertising, and these drivers could all agree—with the knowledge that anyone who signs up to be an Uber driver will also be agreeing on prices—to use the Uber algorithm. However, that is not *why* an Uber driver elects to enlist with the company. The other previously discussed hub-and-spoke arrangements are unlawful because those business decisions make no economic sense in the absence of implicit collusion. Assuming Uber does not allow drivers to deviate from the algorithm, it would still make sense for an individual driver to agree to the terms because it grants them access to thousands of consumers he or she would otherwise have no way of reaching. The risk of other drivers forgoing Uber to charge lower prices on their own is unrealistic because each of those drivers lacks the network of consumers required to adequately compete with an Uber driver. Therefore, it makes economic sense for drivers to independently agree to use Uber's price algorithm regardless of what other drivers may do.

Since the conduct does not demonstrate collusion, organizing a decision using this reasoning would allow Uber to continue its operations without pigeonholing future sharing economy companies into a position where they must prevent users from learning that other users have accepted the company's pricing structure. Because the drivers' act of agreeing to utilize the Uber app can be distinguished from outright price-fixing, and such a defense could even be presented in the face of a *per se* analysis of the hub-and-spoke arrangement, the above reasoning could properly result in a dismissal without changing existing law.

B. *Vertical Restraints Reasoning*

If the court opts to ignore the hub-and-spoke theory altogether because the thought of thousands of drivers globally engaging in an implicit agreement to fix prices is so implausible, then it will likely turn to the vertical restraints characterization of the case. This result could realistically occur because, as mentioned earlier, other notable hub-and-spoke arrangements involve a very small number of spokes, making implicit collusion easier to prove. However, the situation in this case deviates so greatly from those cases that a court may reject the comparison outright. By treating the case as a challenge of thousands of vertical agreements between Uber and each individual driver, the court would allow a more in-depth analysis because it would be operating under the rule of reason.

The court could truly dive into why Uber is procompetitive for the transportation industry, and that analysis would likely start with Uber's market definition. By including taxis and other driving services in Uber's relevant market, the court would be better able to demonstrate the procompetitive value Uber offers. Specifically, these other transportation options are not only substitutes for Uber in the hypothetical monopolist test, but they are exactly the competitors Uber was designed to compete with. Uber offers a great new product that is forcing traditional transportation services to become more readily available to consumers. For example, in 2015, New York City taxis created the Arro app that allowed people to hail taxis similarly to how they would get a ride from Uber.[103] This innovation was in direct response to Uber's popularity and resulted in a better product from a competitor, a true sign of healthy competition in a common market. The court could identify Uber as a sharing economy platform and could demonstrate that these platforms are procompetitive; they challenge existing traditional services to improve and adapt to consumers' craving for convenience.

The above procompetitive justifications defend Uber's existence, but the pricing algorithm is what needs proper justification as the primary mechanism restraining trade at issue. The court should accept Uber's potential argument that the pricing algorithm is procompetitive because it maintains uniformity within its service and confidence among its users that they will be offered reasonable prices when they open the app. Forcing drivers to constantly update their pricing to compete with other drivers, moreover, is extremely dangerous. Uber's current price changes are instantaneous, and a ruling that the pricing algorithm is anticompetitive would force individual drivers—who often work part-time—to somehow calculate the appropriate fare for each ride they provide. With such a difficult task forced upon the drivers—one that would likely result in widely varying fares for consumers—Uber's entire business model could be upended and all of the above procompetitive justifications for its existence would disappear, along with the business. Competing on price is a fundamental principle of antitrust law, but Uber's business model is successful, at least in part, because it provides a pricing algorithm along with its ability to connect drivers and riders. Therefore, the pricing algorithm is procompetitive in that it is a fundamental part of Uber. Of course, if the court finds through expert testimony that no harm would come by having

103. Alba, *supra* note 101.

drivers set their own prices and that natural market forces would guide the price of rides to a reasonable fare, the court would have to rule in the plaintiffs' favor, as forcing use of the algorithm is clearly a pricing restraint.

By holding that the agreements between sharing economy platforms and the independent contractors who operate on them are procompetitive if they are necessary for or enhance the success of the platform itself, the *Uber* case could pave the way for more confidence in investment and research in new platforms to transform other industries into more convenient versions of themselves in the future.

Conclusion

As to the merits of this case, it is unlikely that the plaintiffs will succeed. The most convincing narratives that the plaintiffs could offer would be that (1) Uber is engaged in a hub-and-spoke arrangement in which an agreement between the drivers is implied and (2) numerous vertical restraints between Uber and each driver are anticompetitive under the rule of reason. As previously discussed, the hub-and-spoke narrative is likely to fail because Uber should be able to demonstrate the key factual differences between its conduct and that of traditional hubs in traditional hub-and-spoke cases. Also, there is the potential for a persuasive use of the BMI defense, arguing that even if there were an agreement, the case should nonetheless be analyzed under the rule of reason. As for the vertical restraints narrative, there are several procompetitive justifications for the pricing algorithm that should serve as successful defenses against the claim that the agreement is anticompetitive under the rule of reason.

A decision in favor of the plaintiffs could result in the complete disbanding of Uber; the result of forcing Uber to hire drivers as part-time employees; or the requirement of allowing drivers to set their own prices. Any of these measures, combined with the enormous treble damages payouts of antitrust cases, could be catastrophic to Uber's business. Any form of sanctions could also be seen as the court preventing a tech company's innovation from offering a great new form of transportation beloved in cities worldwide, thus discouraging new innovation, growth, and investment in existing and developing sharing economy platforms.

The sharing economy has been met with much criticism and concern. Governments often fight the firms operating on these platforms for fear of safety, workers' rights, tax avoidance, discrimination, and lost revenue issues. While each of these issues has been fiercely debated and widely discussed, they play no role in an antitrust analysis. Social welfare is not a valid defense against allegations of antitrust violations, so neither should it be a consideration tending toward a finding of an antitrust violation (outside of the social welfare associated with consumer protection and the goals of antitrust law). The sharing economy has demonstrated its ability to offer innovative platforms that are indisputably procompetitive. When looking at Uber empirically, it is clear that the service increases competition in the broad market of transportation. As enhancing or diminishing competition is the ultimate issue antitrust laws look to analyze, the lawsuit against Uber ought to be dismissed under the rule of reason. In doing so, however, the court must explain *why* Uber and its conduct are procompetitive. Doing so need not include an attempt to thread the needle of Uber's conduct through decades of precedent. However, it must include facing the reality of how the development of the sharing economy makes Uber, its market, and its conduct fundamentally different from other hub-and-spoke arrangements. It is these differences that will allow other innovative platforms to be developed and invested in without fear of harsh antitrust ramifications.

As mentioned earlier, these potential impacts will only come to fruition if the case ends up going to trial, rather than being sent to arbitration. Regardless, these potential arguments ought to serve as a guide for the next sharing economy platform business to be challenged under antitrust law.