



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Uber Driver Pushes For Cert. In Suit Over Fares

By **Dorothy Atkins**

Law360, San Francisco (January 26, 2018, 2:44 PM EST) -- An Uber Technologies Inc. driver on Thursday urged a California federal judge to certify his proposed class action alleging that the ride-hailing giant's pricing model charges passengers a fare before their ride begins based on inflated projections but pays drivers based on the actual distance and time they drove.

In a partially redacted Jan. 25 reply brief, lead plaintiff Martin Dulberg proposed to tweak the class definition to include only drivers who made less than they would have made based on Uber's different fare calculations. Also, Dulberg said, all of Uber's asserted defenses can be addressed using common, classwide evidence.

"There is no need to probe all of the drivers in the class individually, to see whether the subjective benefits they may have received from Uber's breach somehow outweigh any monetary loss," the brief said. "If that were so, there could never be a breach of contract class action."

The fight over class certification is the latest happening in a putative class action that Dulberg **launched in February**. The suit claims that Uber charges passengers a fare before their ride begins, based on an aggressive and often inflated projection of the distance and time involved in a particular ride. Then, instead of paying driver's their percentage of the initial fare, Uber allegedly pays drivers based on the distance and time they actually drove and pockets the difference, according to the complaint.

In August, U.S. District Judge William Alsup nixed Uber's **bid to dismiss** the case. Judge Alsup cited some inconsistencies in Dulberg's complaint, but he found that his description of Uber's allegedly misleading charging methods were good enough to proceed.

In December, Dulberg asked the court to certify a class of Uber drivers and appoint Napoli Shkolnik PLLC as lead counsel, which Uber opposed earlier this month. In its opposition brief, Uber argued that the drivers' individual issues defeat the predominance and adequacy class certification requirements and said that some drivers actually benefited from its fare calculations.

But Dulberg argued in his reply brief that most of Uber's opposition hinges on the fact that the class, as defined in his opening brief, contains a significant number of members who did not suffer damages. That can be remedied by tweaking the class definition, Dulberg argued. It's an "easy cure," and the court won't have to make a liability finding to determine who is a member of the class, he said.

Dulberg also said that the court should reject Uber's argument that he may be subject to a waiver or estoppel affirmative defenses, particularly since it is inappropriate to consider affirmative defenses at the class certification stage.

"Courts traditionally have been reluctant to deny certification simply because affirmative defenses may be available against individual class members," the brief said. "Moreover, these defenses all require Uber to establish that Dulberg had, among other things, full knowledge of the circumstances surrounding upfront pricing. The evidence that Uber presents does not come close to satisfying that standard."

As it is, Uber's affirmative defenses are based on "shaky evidence" and can be decided on a

classwide basis, the brief said. Dulberg also noted that he has always agreed with Uber that rider promotions have no effect on the driver payments at issue.

A hearing on the motion is set for Feb. 8.

Counsel for Dulber declined to comment on Friday. Counsel for Uber didn't immediately respond to request for comment.

Dulberg is represented by Paul B. Maslo and Andrew Dressel of Napoli Shkolnik PLLC.

Uber is represented by Randall W. Edwards, Matthew D. Powers, Damali A. Taylor and Adam M. Kaplan of O'Melveny & Myers LLP.

The case is Dulberg v. Uber Technologies Inc. et al., case number 3:17-cv-00850, in the U.S. District Court for the Northern District of California.

--Additional reporting by Cara Bayles, Melissa Daniels and John Kennedy. Editing by Stephen Berg.

All Content © 2003-2018, Portfolio Media, Inc.