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Drivers Slam Uber's Bid To Duck Pricing Model Class Action

By **Linda Chiem**

Law360, New York (July 5, 2017, 6:31 PM EDT) -- A driver who launched a proposed class action alleging Uber breached its contract with drivers by stiffing them on fares with its so-called upfront pricing model urged a California federal judge Monday to reject the ride-hailing giant's bid to toss the suit, saying the agreement at issue is unambiguous.

Plaintiff Martin Dulberg filed a brief opposing Uber Technologies Inc.'s recent motion to dismiss his suit alleging that drivers have been shortchanged on fares — a percentage of which they're promised in their driver agreements with the company — after Uber switched to a so-called upfront pricing model in the fall of 2016.

Dulberg said he and Uber are currently bound by the company's Dec. 11, 2015, technology services agreement, and he insists the language of that agreement backs up his allegations that Uber took a bigger cut of passenger fares than it said it would in the agreement, according to Dulberg's brief.

"Even if the [technology services agreement] allowed Uber to charge passengers an upfront fare and that upfront fare could be different from and higher than the fare determined by the fare calculation (i.e., the only fare in the TSA, the fare that Dulberg charges and the fare on which Uber's service fee is based), Uber has still breached the TSA because Uber may deduct only its service fee — 20 percent 'of the fare determined by the fare calculation' — before remitting the remainder of the upfront fare to Dulberg," the opposition brief said.

Under the upfront pricing model, the ride-hailing giant charges passengers a fare before their ride even begins, but Uber bases that fare on an aggressive and often inflated projection of the distance and time involved in a particular ride, Dulberg alleged. The driver is entitled to a set percentage of the fare as laid out in the driver agreements, but Uber pays based on a calculation of the distance and time actually driven, which can often be less than what the customer actually paid, allowing Uber to pocket the difference, according to Dulberg's complaint.

Uber **moved for dismissal** in June, telling U.S. District Judge William Alsup that Dulberg has misread the agreement and doesn't even have a valid case.

"Plaintiff's claims rest on a misreading of the agreement," Uber said in its motion to dismiss. "The contract itself is before this court, and its written terms provide no support for plaintiff's contentions. Adopting plaintiff's interpretation would alter the bargain that the parties actually made."

Uber insisted that Dulberg's suit should be dismissed for failure to state a claim because his breach of contract allegations don't even square with the actual provisions in his contract, according to the motion to dismiss.

"Contrary to the mischaracterization of the agreement set forth in the complaint, the agreement itself does not base driver payments on 'whatever money passengers pay' or get 'charged' (whether 'upfront' or at the 'end of the ride')," Uber says. "Plaintiff's contention — that the 'fare' assessed to riders, or paid by riders (whether upfront or otherwise), constitutes the 'fare' owed to drivers — is irreconcilable with the contract's actual terms."

Uber also said its statement about upfront pricing is a promotional statement addressed to riders who use the service, not to drivers. Furthermore, it does not discuss what portion of the upfront price will be paid to drivers, and it describes some components for calculating the upfront price or "fare" that differ from the fare calculation that produces the fare found in the agreement.

Dulberg, a Raleigh, North Carolina, resident who has been an UberX driver since May 2014 and an Uber Select driver since February 2015 launched the proposed class action in February, claiming Uber drivers are promised that they will be able to retain 80 percent of the fare charged to passengers for UberX rides, but in fact, retain a smaller percentage of the fare.

"Defendants, by charging a greater fare to riders than the calculation used to determine payment to drivers, have deprived plaintiff and the class members of the full benefits they are entitled to under the parties' agreements," Dulberg alleged in the complaint.

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

Uber is represented by Jonathan R. Bass, Susan K. Jamison, Clifford E. Yin and Sean P.J. Coyle of Coblenz Patch Duffy & Bass LLP.

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

--Editing by Alyssa Miller.

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