

Honorable Robert S. Lasnik

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, and

RASIER, LLC

Plaintiffs,

v.

CITY OF SEATTLE *et al.*,

Defendants.

Case No. 17-cv-00370-RSL

**PLAINTIFFS’ RESPONSE IN
OPPOSITION TO DEFENDANTS’
MOTION TO PERMIT DISCOVERY**

NOTING DATE: April 26, 2019

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ARGUMENT

Seattle’s motion to permit discovery raises two legal arguments disguised as discovery requests. The arguments are wrong as a matter of law. As a result, the facts on which Seattle seeks discovery are immaterial, and Seattle’s requested discovery is unnecessary.

Seattle’s first legal argument is that the statutory labor exemption from federal antitrust law applies not just to employee unions, but also to independent contractors who are “primarily involved in selling their labor.” Disc. Mot. at 8 (Doc. 103). Based on that legal argument, Seattle requests discovery into whether the drivers covered under the ordinance are “primarily involved in selling their labor,” or are instead primarily operating “entrepreneurial businesses.” *Id.* But the relevant statutes, Supreme Court precedent, and Seattle’s own cited authorities all make clear that the statutory exemption applies only to common law employees, who (Seattle concedes) are not covered by the ordinance. Thus, the exemption would not apply here *even if* discovery showed that the independent-contractor drivers “sell their labor” to driver coordinators.

Seattle’s second legal argument is that the *per se* rule for boycotts and price fixing does not apply to drivers who use the Uber and Lyft apps because coordinated driver activity is essential if for-hire transportation services are to be available at all. *Id.* at 10–11. Based on that legal argument, Seattle requests discovery into the necessity of driver coordination “to the usefulness and appeal of those applications” to passengers. *Id.* at 11. But Seattle’s theory erroneously focuses on a different market (the provision of transportation to passengers) than the one regulated by the ordinance (the contractual relationships between drivers and driver coordinators), and the cases on which Seattle relies are facially inapplicable here.

Importantly, this Court must decide these two disputed legal questions now, before allowing discovery to proceed. A court “shall” grant summary judgment unless there are “material” facts in dispute, and may defer a decision only if discovery is needed to uncover facts “essential” to the non-movant’s opposition. Fed. R. Civ. P. 56(a), (d). If Seattle’s arguments fail as a matter of law even on the facts Seattle hopes to prove—and they do—then those facts are neither material

1 nor essential, and it would be improper (not to mention an enormous waste of time and resources)
2 to permit discovery before resolving those arguments.

3 **I. AS A MATTER OF LAW, THE STATUTORY ANTITRUST EXEMPTION FOR**
4 **EMPLOYEE UNIONS DOES NOT APPLY TO INDEPENDENT**
5 **CONTRACTORS COVERED BY SEATTLE’S ORDINANCE**

6 Seattle first argues that it needs discovery to determine whether the statutory labor
7 exemption from federal antitrust law applies to the ordinance. No discovery is needed on that
8 issue, however, because the statutory exemption does not apply to independent contractors. And,
9 as Seattle concedes (Disc. Mot. at 6), the ordinance *by its terms* covers only drivers who are
10 independent contractors. Seattle’s contention that the labor exemption also applies to a subset of
11 independent contractors who “sell their labor”—a novel and unsupported argument concocted by
12 a law professor in an amicus brief in this case (*see* Disc. Mot. at 7)—is contradicted by the relevant
13 statutes, Supreme Court precedent, and Seattle’s own cited authorities.

14 **A. The statutory exemption does not apply to independent contractors**

15 The statutory labor exemption is based on four provisions: sections 6 and 20 of the Clayton
16 Antitrust Act (1914), 15 U.S.C. § 17; 29 U.S.C. § 52; and sections 1 and 13 of the Norris-
17 LaGuardia Act (1932), 29 U.S.C. §§ 101, 113. The Supreme Court has interpreted these
18 interlacing statutes as a cohesive unit. *See H.A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*,
19 451 U.S. 704, 713–16 (1981). The text of these provisions, along with Supreme Court precedent
20 applying them, draws a simple and consistent line based on the common law distinction between
21 independent contractors and employees.

22 *First*, section 6 of the Clayton Act exempts “labor ... organizations” from the antitrust laws.
23 15 U.S.C. § 17. The term “labor organization” refers to an organization of employees, not an
24 organization of independent contractors. Thus, the Supreme Court has repeatedly held that “a
25 party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an
26 independent contractor or entrepreneur.” *Artists*, 451 U.S. at 717 n.20 (citing cases and
scholarship).

1 *Second*, section 20 of the Clayton Act implements the labor exemption by restricting courts
2 from issuing injunctions in cases “between employers and employees.” 29 U.S.C. § 52. The
3 Supreme Court has explained that where (as here) a statute “use[s] the term ‘employee’ without
4 defining it, ... Congress intend[s] to describe the conventional master-servant relationship as
5 understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318,
6 322–23 (1992). The use of the term “employee” in section 20 also underscores that “labor
7 organizations” in section 6 refers to organizations of employees.

8 *Third*, the Norris-LaGuardia Act further implements the statutory exemption by restricting
9 courts from issuing injunctions in cases “involving or growing out of a labor dispute.”
10 29 U.S.C. §§ 101, 113(c). Here as well, the Supreme Court has held that the “critical element” in
11 determining whether a controversy involves a “labor dispute” is whether an “employer-employee
12 relationship [is] the matrix of the controversy.” *Jacksonville Bulk Terminals, Inc. v. Int’l*
13 *Longshoremen’s Ass’n*, 457 U.S. 702, 712 (1982) (quoting *Columbia River Packers Ass’n v.*
14 *Hinton*, 315 U.S. 143, 147 (1942) (alteration in *Jacksonville*)). In *Columbia River Packers*, for
15 example, the Court held that no “labor dispute” existed because the union members at issue were
16 independent contractors (“independent fishermen”), while “the attention of Congress was focussed
17 upon disputes affecting the employer-employee relationship.” 315 U.S. at 144–45.

18 All of these cases rely on the ubiquitous common law distinction between employees and
19 independent contractors as the “critical element” in applying the statutory labor exemption.
20 *Jacksonville Bulk Terminals*, 457 U.S. at 712. None of these cases even hint at rejecting the
21 common law meaning of “employee” and “independent contractor,” nor do they suggest that the
22 statutory exemption applies to some subset of independent contractors who are “primarily involved
23 in selling their labor.” Disc. Mot. at 8. *See also, e.g., Burlington Northern Santa Fe Ry. Co. v.,*
24 *Int’l Broth. of Teamsters Local 174*, 203 F.3d 703, 709–11 & n.11 (9th Cir. 2000) (applying the
25 “matrix” test and discussing common law factors with respect to whether milk vendors in a prior
26 Supreme Court case “were independent contractors”); *Conley Motor Express, Inc. v. Russell*,

1 500 F.2d 124, 125–27 (3d Cir. 1974) (applying “matrix” test and rejecting labor exemption
 2 because the truck drivers “were independent contractors and not employees” under the common
 3 law test applied to those drivers by the National Labor Relations Board).¹

4 **B. Seattle’s attempt to expand the statutory exemption to independent**
 5 **contractors conflicts with binding Supreme Court precedent**

6 In the face of this well-settled authority, Seattle argues that the “common law ... distinction
 7 between independent contractors and employees” is irrelevant. Disc. Mot. at 7. According to
 8 Seattle, even though the drivers are independent contractors, “the relevant question ... is whether
 9 the drivers are primarily involved in selling their labor.” *Id.* at 8. But Seattle has fabricated this
 10 “primarily selling their labor” standard out of thin air. Seattle cites not a single case embracing
 11 this test, and Seattle’s arguments in support of its novel theory go from bad to worse.

12 The City first points to the final clause in the Norris-LaGuardia Act’s definition of “labor
 13 dispute” (Disc. Mot. at 7), which states that a “labor dispute” includes “any controversy concerning
 14 terms or conditions of employment ..., *regardless of whether or not the disputants stand in the*
 15 *proximate relation of employer and employee,”* 29 U.S.C. § 113(c) (emphasis added). This
 16 “proximate relation” clause does not abandon the distinction between employees and independent
 17 contractors; it just broadens the range of *employee-based* disputes that qualify for the labor
 18 exemption. Congress added the clause to override judicial holdings that had restricted the labor
 19 exemption “to trade union activities directed against an employer by *his own* employees.” *United*
 20 *States v. Hutcheson*, 312 U.S. 219, 230 (1941) (emphasis added). Under the expanded definition,
 21 the labor exemption applies to a wider range of employee-based disputes, such as “internecine

22
 23 ¹ The only time the statutory exemption applies to disputes involving independent
 24 contractors is when an employees’ union combines with independent contractors in some way and
 25 there is “job or wage competition or some other economic interrelationship affecting legitimate
 26 union interests between the union members and the independent contractors.” *Artists*, 451 U.S. at
 718; *see also Am. Fed’n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968). Seattle does not contend
 that the contemplated unions for independent-contractor drivers fit within the rule established by
 these cases, nor could it, since there are no *employees’* unions (or *employees*) involved in the
 conduct covered by the ordinance.

1 struggle[s] between two unions seeking the favor of the same employer,” *id.* at 232, and activities
2 directed against an employer by *someone else’s* employees (commonly known as secondary
3 activity), *see Burlington N. R.R. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 438–40 (1987).
4 But the Supreme Court has squarely held that the “proximate relation” clause “does not expand
5 the application of the Act to include controversies upon which the employer-employee relationship
6 has no bearing.” *Columbia River Packers*, 315 U.S. at 147. Some “employer-employee
7 relationship” must still form “the matrix of the controversy.” *Id.*

8 Seattle next relies heavily on a case that Congress abrogated by statute and the Supreme
9 Court then overruled: *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). Disc. Mot. at 7–8. Just
10 as Seattle seeks to do here with the Clayton Act, *Hearst* rejected the common law meaning of the
11 term “employee” under the National Labor Relations Act (NLRA), and adopted a broader test that
12 included “newsboys”—independent contractors who primarily sold their labor. *Id.* at 124–25. But
13 Congress emphatically rejected *Hearst* with the Taft-Hartley Act, which amended the NLRA to
14 exclude from the definition of “employee” “any individual having the status of an independent
15 contractor.” Pub. L. No. 80-101, § 101 (1947), 29 U.S.C. § 152(3). And, contrary to Seattle’s
16 unsupported assertion (Disc. Mot. at 8 n.4), Congress made clear that Taft-Hartley was not a
17 change to the original NLRA, but was instead a clarifying amendment. As the House Report
18 emphasized: “In the law, there has always been a difference, and a big difference, between
19 ‘employees’ and ‘independent contractors.’” H.R. Rep. No. 80-245, at 18 (1947). The amendment
20 therefore restored the common law meaning of employee in the NLRA that Congress intended
21 “when it passed the act.” *Id.*; *see also NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968)
22 (expressly applying the “common law agency test” after Taft-Hartley).

23 Not only did Congress abrogate *Hearst’s* holding, but the Supreme Court then overruled
24 *Hearst’s* reasoning. *Darden*, 503 U.S. at 322–23. *Darden* interpreted the term “employee” in
25 ERISA as bearing its common law meaning. Like Seattle here, the court of appeals in *Darden* had
26 relied on *Hearst* to reject the common law meaning of “employee” and interpret the term “in the

1 light of the mischief to be corrected and the end to be obtained.” *Id.* at 324 (quoting *Hearst*,
2 322 U.S. at 124). The Supreme Court reversed. It explained that Congress had twice amended
3 statutes to restore the common law meaning of “employee” in response to judicial decisions,
4 including *Hearst*, that incorrectly gave the term a broader meaning. *Id.* at 324–25. The Court thus
5 overruled *Hearst*’s reasoning and confirmed its “abandonment” of construing the term “employee”
6 “in light of the mischief to be corrected.” *Id.* at 325. It held that “when Congress has used the
7 term ‘employee’ without defining it, ... Congress intended to describe the conventional master-
8 servant relationship as understood by common-law agency doctrine.” *Id.* at 322–23. Thus, under
9 *Darden*, when Congress used the terms “employee” and “employer” in the Clayton Act and the
10 Norris-LaGuardia Act, 29 U.S.C. §§ 52, 113(a)–(c), it “intended to describe the conventional
11 master-servant relationship as understood by common-law agency doctrine.” *Id.* *Darden* leaves
12 no room for Seattle’s reliance on *Hearst* to abandon the common law distinction between
13 independent contractors and employees in the Clayton and Norris-LaGuardia Acts. Yet Seattle
14 does not even cite *Darden*.

15 Seattle next turns to *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), a case interpreting
16 the phrase “contracts of employment” in the Federal Arbitration Act (1925). Far from supporting
17 Seattle, *New Prime* confirms that “employee” in the Clayton Act and Norris-LaGuardia Act carries
18 the common law distinction between independent contractors and employees. *New Prime* relied
19 on historical evidence to hold that “contracts of employment” encompassed “not only agreements
20 between employers and employees but also agreements that require independent contractors to
21 perform work.” *Id.* at 539. But the Court carefully distinguished the term “contracts of
22 employment” from the term “employee,” emphasizing that “employees” or “servants” would have
23 been the “natural choices” if Congress meant to “address[] them alone” without including
24 independent contractors. *Id.* at 541. More to the point here, the Court explained that Congress
25 used “employee” as a synonym for “servant” “when drafting legislation to regulate burgeoning
26 industries and their labor forces in the early 20th century.” *Id.* This early 20th century labor

1 legislation, of course, refers to statutes such as the Clayton Act, the Norris-LaGuardia Act, and the
2 NLRA, all of which—unlike the Federal Arbitration Act—do use the word “employee.”

3 Lacking any affirmative support, Seattle attempts to distinguish six cases that denied the
4 statutory exemption to independent contractors, claiming these cases involved independent
5 contractors who were “operating independent, entrepreneurial businesses,” rather than “primarily
6 selling their labor.” Disc. Mot. at 8–9 & n.6. But, as described in the bullet list below, each of
7 these cases used words like “employee,” “independent,” “contractor,” or “independent contractor,”
8 and the analysis in each case shows that the court based its decision on the common law meaning
9 of these terms. Indeed, the independent contractors in several of these cases were primarily
10 engaged in selling their labor, including truck drivers, pilots, clothing stitchers, and physicians:

- 11 ● *United States v. Women’s Sportswear Mfrs. Ass’n*, 336 U.S. 460, 463–64 (1949)
12 (independent “stitching contractors” who “furnishe[d] chiefly labor”);
- 13 ● *American Med. Ass’n v. United States*, 317 U.S. 519, 536 (1943) (association of
14 “independent physicians” “were not an association of employees in any proper sense of the
15 term,” but were instead “individual practitioners” providing medical services);
- 16 ● *Columbia River Packers*, 315 U.S. at 144–47; (exemption does not apply to “controversies
17 upon which the employer-employee relationship has no bearing,” such as to a group of
18 “independent fishermen”);
- 19 ● *L.A. Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 96–98 (1962) (“grease
20 peddlers” were “independent contractors,” “distinct from the ... employee members” of a
21 union); *see also id.* at 108–09 (Douglas, J., dissenting) (acknowledging that the majority
22 had relied on the common law meaning of independent contractors, and arguing for the
23 “approach” the Court took in *Hearst*, which rejected “common-law standards”);
- 24 ● *Conley*, 500 F.2d at 125–27 (exemption did not apply to truck drivers because the NLRB
25 had previously applied the common law test to conclude that the truck drivers at issue
26 “were independent contractors and not employees”);
- *Spence v. Southeastern Alaska Pilots’ Ass’n*, 789 F. Supp. 1007, 1009, 1013 (D. Alaska
1990) (exemption did not apply to pilots because they were “independent contractors”).

1 In short, Seattle lacks any basis for its unprecedented “selling their labor” standard. No
2 court has ever adopted it; this court should not be the first to do so in a case on remand from the
3 Ninth Circuit. Thus, as a matter of law, the labor exemption does not apply because Seattle’s
4 ordinance covers only drivers who are independent contractors.

5 **II. AS A MATTER OF LAW, *PER SE* RULES APPLY TO THE CONDUCT**
6 **AUTHORIZED BY SEATTLE’S ORDINANCE**

7 Seattle next argues that the *per se* rule against boycotts and price fixing would not apply to
8 the ordinance if discovery shows that “for-hire transportation services provided through the Uber
9 or Lyft applications” are products in which “restraints on competition are essential if the product
10 is to be available at all.” Disc. Mot. at 10 (quoting *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 203
11 (2010)). Seattle alleges that the Uber and Lyft “applications enable drivers to engage in parallel
12 and coordinated conduct with respect to the prices charged for each ride or the driver who will be
13 dispatched for a particular ride request.” Disc. Mot. at 11. Therefore, Seattle says, horizontal
14 coordination among drivers is “essential” for making the Uber and Lyft apps available to the public.
15 *Id.*

16 Seattle’s argument is wrong as a matter of law for at least two reasons. *First*, like its state-
17 action immunity defense rejected by the Ninth Circuit, Seattle’s theory erroneously focuses on a
18 different market (the provision of transportation to passengers) than the one regulated by the
19 ordinance (the contractual relationships between drivers and driver coordinators). *Second*, even
20 accepting Seattle’s focus on the provision of transportation to passengers, the cases on which
21 Seattle relies are facially inapplicable.

22 To begin with, the Supreme Court has held in “unequivocal terms” that “the Sherman Act,
23 so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all
24 industries alike.” *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 349 (1982). The same is
25 true of “group boycotts,” which like price fixing are *per se* illegal. *Arizona*, 457 U.S. at 344 n.15.
26 Any “argument that the *per se* rule must be rejustified for every industry that has not been subject

1 to significant antitrust litigation ignores the rationale for *per se* rules,” which is in part to avoid
2 “an incredibly complicated and prolonged economic investigation” into the relevant industry.
3 *Id.* at 351; *see also United States v. Joyce*, 895 F.3d 673, 678 (9th Cir. 2018) (“the *per se* rule is
4 applicable to price-fixing agreements ... regardless of the industry in which the conduct occurred”).

5 Seattle relies on two inapposite cases in which the Supreme Court applied the rule of reason
6 rather than the *per se* rule. In *BMI v. CBS*, 441 U.S. 1 (1979), thousands of artists and publishers
7 joined BMI, an association that sold broadcasters a “blanket license” covering the collective works
8 of all its members at a single price—a product that no individual member could offer. CBS (not
9 individual artists) challenged BMI’s pricing, and the Court held that the *per se* rule against price
10 fixing did not apply to BMI’s blanket license, primarily because “[a] middleman with a blanket
11 license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility,
12 were to be avoided.” *Id.* at 20. *BMI* thus applies only where there are insurmountable
13 inefficiencies to marketing a product on an individual basis because of the small size and large
14 number of individual producers.

15 In *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984), the
16 Court held that league rules restricting football broadcasting were subject to the rule of reason,
17 rather than the *per se* rule. The Court recognized that the *per se* rule was inappropriate because
18 the product—“competition itself”—could not exist unless competing teams come together to
19 present games. *Id.* at 101. In other words, “horizontal restraints on competition are essential if
20 the product is to be available at all.” *Id.*; *see also Am. Needle*, 560 U.S. at 203 (applying *NCAA* to
21 the NFL). The Ninth Circuit has repeatedly rejected requests to extend *BMI* and *NCAA* beyond
22 circumstances where horizontal coordination was essential to create a new product that could not
23 otherwise exist. *See, e.g., Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1150–51 (9th
24 Cir. 2003) (refusing to extend to online real-estate listing service); *United States v. A. Lanoy Alston,*
25 *D.M.D., P.C.*, 974 F.2d 1206, 1209 (9th Cir. 1992) (refusing to extend to “health-care market”
26 where group of dentists had fixed prices by collectively negotiating with prepaid dental plans).

1 In attempting to rely on these cases, Seattle’s theory incorrectly focuses on prices charged
2 to *passengers*. According to Seattle, *per se* rules do not apply here because the “usefulness of the
3 [Uber and Lyft] applications to consumers ... depend[s] upon the immediate availability of
4 numerous drivers” who have agreed to “uniform pricing formulas” for rates charged to passengers.
5 Disc. Mot. 11 (emphasis added). Seattle’s desired discovery therefore relates to the provision of
6 rides to passengers. See Leyton Decl. ¶ 9, Doc. 103-1 (requesting discovery on “the cost”
7 passengers must pay for “each ride,” “the manner in which drivers are dispatched to provide rides
8 to particular riders,” and the “features” that make ride-referral services “appealing and valuable to
9 consumers”).

10 But the operation of the Uber and Lyft apps with respect to rates for passengers has nothing
11 to do with whether *per se* rules apply to the restraints that Plaintiffs challenge: the unions’ setting
12 of prices and other terms in contracts between drivers and ride-referral services. *BMI* and *NCAA*
13 provide no support for relying on the alleged necessity of coordination in one market (e.g., the
14 provision of transportation services to passengers) to determine whether coordination in a different,
15 upstream market (e.g., transactions between drivers and driver coordinators) is exempt from *per*
16 *se* rules. Under Seattle’s theory, *BMI* would shield from *per se* scrutiny musicians who fix prices
17 for their business purchases, such as buying pianos or studio time. But *BMI* said nothing about
18 those different transactions, and instead discussed only the price set by BMI for the sale of the
19 blanket license, a license that no individual musician had the ability to offer.

20 Seattle does not even attempt to explain how collective action *by drivers in their*
21 *transactions with driver coordinators* is analogous to the blanket license in *BMI*, let alone to the
22 sports leagues in *NCAA* or *American Needle*. Nor could it. Those cases applied the rule of reason
23 to concerted activity among competitors where efficiencies of scale made unilateral activity a
24 “virtual impossibility,” *BMI*, 441 U.S. at 20, and where concerted activity was “essential if the
25 product is to be available at all,” *NCAA*, 468 U.S. at 101. For-hire drivers are currently contracting
26 with ride-referral companies in Seattle and throughout the country without ever having joined a

1 union or collectively bargained with anyone. What was a “virtual impossibility” for the artists in
2 *BMI* is right now being done by for-hire drivers everywhere; driver unions are hardly “essential”
3 for these transactions to occur.

4 Seattle has tried this ploy before. Seattle argued that this Court should apply state-action
5 immunity to the ordinance by wrongly focusing on state-law authorization of anticompetitive
6 regulation of “for hire transportation services” to passengers. Defs.’ Reply Supp. Mot. Dismiss at
7 3, Doc. 56; *see also* Order Granting MTD at 9, Doc. 66 (holding that state law authorizes
8 anticompetitive regulation “in the for-hire transportation sphere”). On appeal, however, the Ninth
9 Circuit definitively rejected Seattle’s effort to leverage an immunity bestowed in one market into
10 a separate, upstream market, explaining that the state statute “centers on the provision of privately
11 operated for hire transportation services” to the public, whereas the ordinance regulates different
12 transactions, namely “the contractual payment arrangements between for-hire drivers and driver
13 coordinators for use of the latter’s smartphone apps or ride-referral services.” *Chamber of*
14 *Commerce v. Seattle of Seattle*, 890 F.3d 769, 784 (9th Cir. 2018) (citation and quotation marks
15 omitted). Just as Seattle was wrong to blur the line between these two discrete markets in seeking
16 state-action immunity, Seattle is wrong to blur that line here in seeking exemption from *per se*
17 scrutiny. The Ninth Circuit’s holding cannot be so easily evaded.

18 Seattle’s reliance on *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016), further
19 underscores that Seattle is erroneously focused on the wrong restraint. Disc. Mot. 11. *Meyer*
20 concerned an alleged conspiracy among Uber and its drivers to fix the rates for transportation
21 services sold to passengers. 174 F. Supp. 3d at 824. Here, by contrast, Plaintiffs’ claims concern
22 the prices and other terms in upstream contracts between drivers and driver coordinators.
23 Accordingly, whether *BMI* or *NCAA* applies to the claim in *Meyer*—a question that was not even
24 presented in that case—is a fundamentally different question than whether *BMI* or *NCAA* applies
25 to Seattle’s ordinance. And as explained above, *BMI* and *NCAA* cannot conceivably extend to the
26 transactions between drivers and driver coordinators at issue under Seattle’s ordinance.

1 Even accepting Seattle's red-herring focus on the provision of rides to *passengers*, *BMI*
2 and *NCAA* are facially inapplicable. As discussed above, in those cases, horizontal coordination
3 was needed to offer a product (blanket licenses and sports competition) that would not otherwise
4 be available. Here, by contrast, the Uber and Lyft applications do not exist as the result of
5 independent drivers coming together and coordinating with each other to create a new product that
6 would otherwise not be available. To the contrary, it is undisputed that Uber and Lyft respectively
7 created the Uber and Lyft apps, and that these companies enter into vertical contracts with
8 individual drivers who use those products.

9 Similarly, Seattle makes no allegation that driver coordination on prices charged to
10 passengers is an "obvious necessity if the thousands of individual negotiations, a virtual
11 impossibility, were to be avoided." *BMI*, 441 U.S. at 20. And horizontal coordination through the
12 Uber and Lyft apps is obviously not a necessity, as transportation services were being provided to
13 passengers for decades before Uber and Lyft came around. Seattle does not allege that every
14 taxicab operation or car service necessarily relies on horizontal restraints between independent
15 contractors. So the transportation industry cannot be the type of industry in which horizontal
16 restraints between independent contractors are "essential if the product is to be available at all."
17 *NCAA*, 468 U.S. at 10.

18 CONCLUSION

19 For the foregoing reasons, Seattle's legal arguments are wrong, and thus the facts it hopes
20 to establish, even if true, would not shield the ordinance from either the antitrust laws generally or
21 from *per se* scrutiny. Accordingly, those facts are immaterial to the pending motion for summary
22 judgment, and discovery is unnecessary. The Court should therefore deny Seattle's motion for
23 discovery and proceed with adjudication of Plaintiffs' motion for summary judgment.

1 Dated: April 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties who have appeared in this case.

DATED: April 12, 2019 at Seattle, Washington.

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